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Killing One's Abuser: Premeditation, Pathology, or Provocation?

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KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?

INTRODUCTION

Mr. Grove frequently abused his wife, Jessie, throughout their twenty-two year marriage.[1] One night in 1981, he arrived home drunk, threatening to kill Jessie and the children.[2] After Grove finally went to sleep, Jessie shot him.[3] Because Jessie admitted that Grove was asleep when she shot him, a Pennsylvania court found as a matter of law that he could not have posed an "imminent" threat to her or her children and therefore denied her a self-defense jury instruction.[4] The jury ultimately found her guilty of first-degree murder.[5]

Mr. Diaz physically and sexually abused his wife, Madelyn, for five years, often threatening to kill her.[6] One night, Madelyn shot him as he slept, fearing that he would carry out his threats when he awoke.[7] Like Jessie, she was charged with murder, but a New York court allowed Madelyn to receive a self-defense jury instruction, and she was acquitted.[8]

The stories of these two women provide just a glimpse into the inconsistent results reached in cases involving battered women who kill their abusers in nonconfrontational situations. Most homicides committed by women against abusive partners occur during an actual physical confrontation,[9] and these

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1 *See* Commonwealth v. Grove, 526 A.2d 369, 371 (Pa. Super. Ct. 1987).

2 *Id.* at 371, 375.

3 *Id.* at 371.

4 *Id.* at 375.

5 *Id.* at 371.

6 *See* Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 236 (1986) (discussing People v. Diaz, No. 2714 (N.Y. Sup. Ct. 1983)).

7 *See* JULIE BLACKMAN, INTIMATE VIOLENCE 185 (1989) (discussing *Diaz*).

8 *Id.* at 185–86.

9 Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 397 (1991) (finding that approximately 75% of battered women who kill their abusers do so under confrontational circumstances). Even in cases involving an actual confrontation, however, seemingly justifiable self-defense claims have been rejected. *See, e.g.*, Commonwealth v. Watson, 431 A.2d 949 (Pa. 1981) (discussing the trial court's rejection of a self-defense claim on imminence grounds where the battered woman defendant killed her common law husband while "he [had] her around the neck").

cases can proceed under normal self-defense rules.[10] However, in a minority of situations, battered women kill their sleeping abusers[11] and sometimes declare that their actions were necessary to prevent future serious bodily harm or even death.[12] While some American jurisdictions allow a jury to consider self-defense when a battered woman has committed a nonconfrontational homicide, many do not because any threat from a sleeping abuser is regarded as non-imminent.[13] This disparity in self-defense law results in varying outcomes for battered women defendants in homicide trials.[14]

For self-defense to justify a killing, the defendant must have genuinely and reasonably believed that the use of deadly force was necessary to protect herself from an unavoidable, imminent threat of death or serious bodily harm.[15] Evidence on Battered Woman Syndrome (BWS), a theory describing the effects of recurring abuse in domestic relationships, attempts to explain why conventional assumptions about reasonableness and imminence fail to account for the real-life circumstances of the battered woman defendant.[16] Some courts have used BWS to replace an objective standard of reasonableness with a primarily subjective standard, allowing battered women to more easily and, oftentimes, successfully argue self-defense even though no immediate threat would have been found under traditional legal theories.[17]

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[10] *See* Maguigan, *supra* note 9, at 392; *see also* ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 120 (2002).

[11] The term "sleeping abusers" will be used throughout this Comment to describe all abusers who are passive at the time of a nonconfrontational killing.

[12] *See* CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL 46 (1987) (noting that a majority of women who kill their abusers claim to have acted in self-defense); OGLE & JACOBS, *supra* note 10, at 121–22 (discussing how a battered woman's heightened sensitivity to danger from her abuser may lead her to reasonably apprehend future danger).

[13] *See* Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 461 (2006) (noting that a strong majority of jurisdictions do not allow a self-defense instruction where women kill in nonconfrontational circumstances).

[14] *Compare* State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989) (finding a battered woman who killed her sleeping husband guilty of manslaughter, though her sentence was later commuted), *and* Commonwealth v. Grove, 526 A.2d 369, 371 (Pa. Super. Ct. 1987) (finding a battered woman who killed her sleeping husband guilty of first-degree murder), *with* Julie Johnson, *Queens Woman Acquitted in Killing of Husband*, N.Y. TIMES, Oct. 1, 1987, at A1 (discussing the acquittal of a battered woman who killed her husband).

[15] *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).

[16] V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1283 (2001). Of course, women do not exclusively make up the class of battered defendants. However, this Comment only focuses on battered women who kill in nonconfrontational circumstances.

[17] *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 817–18 (N.D. 1983) (approving a highly subjective self-defense standard).

However, the traditional reasonableness and imminence requirements are crucial components of self-defense law precisely because they help ensure that only unavoidable killings are justified.[18] One can hardly argue that a sleeping abuser presents a truly unavoidable threat. Hence, courts that stretch the traditional self-defense requirements to accommodate battered women distort the traditional elements of the law and may encourage violent self-help.[19] On the other hand, jurisdictions that refuse to allow battered women who preemptively kill to claim self-defense, thus resulting in murder or manslaughter convictions, may be out of step with notions of substantive justice.[20] The record number of pardons and commutations in recent years for battered women convicted of murder reveals that this is most likely the case.[21] Therefore neither approach is satisfying.

This Comment illustrates how the current American approach of limiting battered women who preemptively kill to claims of self-defense has resulted in distortions in the law. It explores some of the practical results of using self-defense for battered defendants in nonconfrontational cases and demonstrates that this approach leads to outcomes that are in tension with social sentiments and the goals of the criminal law. Therefore, a new strategy is needed to better accommodate such cases. In proposing a new solution, this Comment draws from the experiences and strategies of approaches used in Australia and England to address the issues posed by battered defendants.

Advocating the English approach, this Comment argues that using the law of provocation,[22] rather than self-defense, will lead to the most just outcomes

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[18] *See* Dressler, *supra* note 13, at 463, 467 (arguing that justification depends on the reasonableness of the act while necessity depends on the imminence of the threat).

[19] For examples of cases in which courts allowed battered women who killed in nonconfrontational cases to rely on self-defense, see *Leidholm*, 334 N.W.2d at 819–20; *State v. Thomas*, 673 N.E.2d 1339, 1345–46 (Ohio 1997); and *Bechtel v. State*, 840 P.2d 1, 6 (Okla. Crim. App. 1992).

[20] For examples of cases in which courts barred a battered woman from successfully claiming self-defense, see *State v. Stewart*, 763 P.2d 572, 578–79 (Kan. 1988); *State v. Norman*, 378 S.E.2d 8, 9 (N.C. 1989).

[21] *See* Linda L. Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women, A Decade's Review*, 11 AM. U. J. GENDER SOC. POL'Y & L. 533, 544, 552 (2003) (discussing the clemency granted to twenty-eight battered women in Ohio incarcerated for killing their abusive partners and commuted sentences granted to eight Maryland battered women defendants); Elizabeth Leland, *Abused Wife's Sentence Commuted; Woman Killed Husband in 1985*, CHARLOTTE OBSERVER, July 8, 1989, at 1B (discussing the sentence commutation of Judy Norman, a battered woman who killed her abusive husband and was convicted of manslaughter after her self-defense claim was not allowed to go to the jury).

[22] A provocation defense can reduce a murder charge to manslaughter if the actor killed in a sudden "state of passion" in response to some provoking act that would incite a reasonable actor in the defendant's circumstances to react similarly. WAYNE R. LAFAVE, CRIMINAL LAW 775 (4th ed. 2003).

for battered women who preemptively kill their abusers. However, current provocation laws do not accurately reflect the situational realities in which battered women kill their abusers. Hence, provocation laws will need to be reformed to allow for situations in which women kill out of fear of serious violence.

Part I of this Comment briefly discusses BWS, its development in the United States, and its relationship to the law of self-defense. Part II more closely examines the current problems with the treatment of BWS in American courts and the extreme results reached for battered women who kill in nonconfrontational circumstances. Part III explores the legal treatment of BWS by courts in Australia and England in order to consider other strategies used to accommodate battered women within the law. This Part recognizes that comparing the solutions reached by other common law countries offers an opportunity to find a better solution for the United States. Finally, Part IV proposes applying provocation law to battered women who preemptively kill their abusers as the best way to achieve substantive justice for battered women while still fulfilling the goals of the criminal law. However, Part IV also recommends changing current provocation law to more accurately reflect the realities and perceptions of battered women who kill their sleeping abusers. It proposes a reformed provocation defense that would mitigate murder to manslaughter in cases where battered women preemptively kill an abuser out of a fear of serious violence.

I. BATTERED WOMAN SYNDROME AND SELF-DEFENSE

Battered women defendants who kill their abusers often claim they acted in self-defense.[23] Generally, however, battered women who preemptively kill their abusers cannot prove the traditional elements of self-defense, which include reasonableness and imminence.[24] As a result, the theory of BWS was developed to support a battered woman's self-defense claim by showing how the woman might have reasonably thought her actions were defensive and necessary.[25] This Part first describes the traditional elements of self-defense

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[23] EWING, *supra* note 12, at 46 (discussing battered women's self-defense claims).

[24] *See id.* at 46–48 (exploring the difficulties faced by battered women defendants in raising a successful self-defense claim).

[25] *See* Rebecca Bradfield, *Understanding the Battered Woman Who Kills Her Violent Partner—The Admissibility of Expert Evidence of Domestic Violence in Australia*, 9 PSYCHIATRY PSYCHOL. & L. 177, 180 (2002) ("At its inception, BWS evidence was a device directed towards counteracting the limitations of the substantive law of self-defence as it applied to battered women.").

law and examines the primary difficulties battered women defendants face in claiming self-defense. Next, this Part explains the theory behind BWS and how evidence of past abuse may be used to inform a self-defense claim. Finally, this Part briefly discusses the introduction of BWS into American courts.

A. The Self-Defense Defense

Self-defense is generally defined as the justifiable use of force upon another when one reasonably believes that such force is necessary to protect oneself from imminent danger of unlawful bodily harm.[26] The force used must not be excessive in relation to the harm threatened.[27] Thus, a person is justified in using *deadly* force only if there is a reasonable belief that such force is necessary to protect herself from imminent, unlawful deadly force by another.[28]

In homicide cases, the traditional requirements of self-defense are interpreted narrowly because the defense is being used to justify the taking of a human life.[29] A person who defends herself against a threat of harm can only use violent self-help as a last resort.[30] By requiring that the defender's actions be in response to an immediately threatened harm, self-defense law aims to ensure that only those defendants who have no other choice but to kill are acquitted.[31]

1. The Elements of Self-Defense

To make a successful self-defense claim, a defendant must show that she had a reasonable belief that she was in imminent danger of great bodily harm or death at the time she acted.[32] Most courts have found that a self-defense claim has both subjective and objective elements.[33] First, the defendant must have *subjectively* believed she was in danger of death or serious harm at the time she acted and thus needed to use deadly force to repel an imminent,

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[26] LAFAVE, *supra* note 22, at 539.

[27] This is known as the proportionality rule. Rosen, *supra* note 15, at 30.

[28] LAFAVE, *supra* note 22, at 456.

[29] Rosen, *supra* note 15, at 27.

[30] *Id.* at 31.

[31] *Id.* at 53.

[32] SANA LOUE, INTIMATE PARTNER VIOLENCE: SOCIETAL, MEDICAL, LEGAL, AND INDIVIDUAL RESPONSES 108 (2001).

[33] *See, e.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (discussing the application of a two-pronged self-defense standard).

unlawful attack.[34] Second, her subjective belief must have been one that a "reasonable person" in the same situation would have possessed.[35] Therefore, self-defense justifies a defendant in killing a perceived aggressor only if the belief was also *objectively* reasonable.[36]

Reasonableness and imminence are closely related. In the absence of an imminent threat, the objective reasonableness element of self-defense usually cannot be met since there was no immediate harm requiring a reaction.[37] Though there is no single definition of "imminence" applied by courts, at common law it is generally understood to mean a threat of harm that is pressing and urgent and will occur immediately.[38] The danger is not imminent if the harm is threatened to occur at a later time.[39] The imminence requirement ensures that a person will use deadly force to preserve herself from death or serious harm only as a last resort.[40]

2. Problems for Battered Women Who Claim Self-Defense

Battered women who kill sleeping abusers face many obstacles in raising a traditional self-defense claim.[41] The objective reasonableness element of self-defense is the most problematic.[42] This requirement was originally developed to address situations where a man kills another man in a one-time, face-to-face

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[34] OGLE & JACOBS, *supra* note 10, at 98–99.

[35] *Id.* Self-defense is available if the defendant acted reasonably, even if the defendant was mistaken in her belief of an actual imminent threat. *See* Rosen, *supra* note 15, at 31. Self-defense is not available, however, to someone whose belief was unreasonable but sincere. OGLE & JACOBS, *supra* note 10 at 98–99. In such cases, the traditional rule is that the actor is guilty of murder, although a minority of jurisdictions allows an unreasonably mistaken defendant to assert an "imperfect self-defense" claim, which mitigates a murder offense to manslaughter. *See id.* at 117–20.

[36] OGLE & JACOBS, *supra* note 10 at 98–99. Today, even in the majority of jurisdictions, the "objective" standard of reasonableness in self-defense is not purely objective, but rather incorporates some subjective elements. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 165 (2004). Commentators have argued that a true objective standard would be unduly harsh and would hold the defendant to a standard she could not meet. *See, e.g.*, *id.*

[37] OGLE & JACOBS, *supra* note 10, at 128.

[38] *See* Nourse, *supra* note 16, at 1242 (discussing some meanings of imminence); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 232 (5th ed. 2009) (comparing imminence with immediacy).

[39] Rosen, *supra* note 15, at 30–31; *see also* State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (defining "imminence" as "'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))).

[40] *Norman*, 378 S.E.2d at 13.

[41] EWING, *supra* note 12, at 47.

[42] *Id.*

confrontation.[43] Of course, this stereotypical scenario does not accurately reflect the realities of a battered woman's situation.[44] Generally, a battered woman must protect herself against a male abuser who is physically larger and stronger and with whom she has an ongoing or past relationship.[45] Nevertheless, under traditional self-defense law, a battered woman defendant who kills in a nonconfrontational situation could not have acted as a "reasonable person" since there was no obvious, immediate threat.[46] Accordingly, a majority of courts have found, as a matter of law, that a battered woman's use of deadly force against her sleeping abuser can never be objectively reasonable.[47]

Self-defense law also requires that a defendant kill only in response to a threatened harm that is immediately going to occur. Otherwise, the self-defense claim is negated, and a jury is not given a self-defense instruction.[48] Battered women defendants who kill their abusers preemptively, rather than in response to an ongoing, physical attack, do not appear to meet this requirement because of the lack of imminent danger posed by a sleeping abuser.[49] Thus, when self-defense law is strictly applied, a jury will not be allowed to consider a self-defense claim in nonconfrontational cases.[50]

B. The Battered Woman Syndrome

Battered Woman Syndrome[51] describes the psychological effects and behavioral reactions exhibited by victims of ongoing domestic abuse.[52] Since Lenore Walker introduced the theory in 1979,[53] battered defendants have relied

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[43] Rosen, *supra* note 15, at 34.

[44] *See id.*

[45] *Id.*

[46] *See* EWING, *supra* note 12, at 47–48 (noting that the abuser does not seem to pose any harm to the battered woman while he is asleep).

[47] *See, e.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (stating that self-defense can never be found when a battered woman kills her sleeping abuser); State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989) (holding that a sleeping abuser cannot reasonably pose an imminent threat).

[48] Dressler, *supra* note 13, at 461.

[49] *See* EWING, *supra* note 12, at 46–50 (discussing the doctrinal issues posed by "sleeping spouse" cases).

[50] Dressler, *supra* note 13, at 461.

[51] The terms "Battered Wife Syndrome," "Battered Spouse Syndrome," or "Battered Person Syndrome" also are commonly used.

[52] *See generally* LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (3d ed. 2009) (investigating the sociological and psychological factors involved in BWS).

[53] *See generally* LENORE E. WALKER, THE BATTERED WOMAN (1st ed. 1979) (advancing the concepts of "learned helplessness" and the "cycle theory of violence").

on BWS evidence to explain why their beliefs and actions could be considered reasonable in the context of a self-defense claim.[54]

The syndrome draws on the theory of the cycle of violence in battering relationships, explaining that the battering is neither random nor constant, but rather it occurs in repetitive cyclical phases.[55] This cycle leads the battered woman to develop a sense of helplessness in which she feels powerless to change the situation because she can neither control nor predict the next outbreak of violence.[56] Walker hypothesized that such "learned helplessness"[57] would prevent a battered woman from perceiving or acting on opportunities to escape the violent relationship.[58]

Psychologically, BWS may apply when a woman has been abused at least twice and exhibits a cluster of symptoms such as low self-esteem, self-blame, anxiety, depression, and despair.[59] The syndrome explains that a battered woman stays in an abusive relationship as a result of these feelings of helplessness and fear.[60] Since a woman suffering from BWS feels she cannot leave the relationship, she may come to believe that using deadly force is her only option for escape.[61]

C. BWS in American Courts

Evidence of BWS serves two functions in the context of a claim of self-defense. First, BWS evidence helps a jury credit the testimony of the battered woman defendant[62] and understand why the woman did not simply leave the

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[54] *See, e.g.*, Ibn-Tamas v. United States, 407 A.2d 626, 631–35 (D.C. 1979) (allowing the defendant to introduce evidence of BWS in support of a self-defense claim).

[55] There is a tension-building phase, an acute battering phase, and a "honeymoon" phase. WALKER, *supra* note 52, at 91–94. This third phase provides positive reinforcement for the battered woman to stay in the relationship and reaffirms the woman's hopes that her abuser's behavior will change. *Id.* at 94.

[56] Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, *in* CRIMINAL LAW THEORY 259, 263 (Stephen Shute & A.P. Simester eds., 2002).

[57] WALKER, *supra* note 52, at 71.

[58] *Id.* at 71–72.

[59] *See generally* WALKER, *supra* note 52.

[60] Kinports, *supra* note 36, at 168.

[61] *See* SOLOMON M. FULERO & LAWRENCE S. WRIGHTSMAN, FORENSIC PSYCHOLOGY 158–59 (3d ed. 2009) (discussing why a battered woman stays in an abusive relationship and why she might attack her batterer while he is asleep).

[62] At least two-thirds of states consider expert testimony on BWS as relevant to the question of why a battered woman did not leave the relationship, and one-fourth of states have specifically found such evidence "admissible to bolster the defendant's credibility." Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 122–25 (1996).

relationship.[63] Second, BWS testimony may support the objective reasonableness requirement by showing that a reasonable person in her circumstances would have acted in the same way.[64] Without expert testimony on BWS to explain a battered woman's perceptions, a jury likely will not understand how the defendant's reaction could be considered reasonable.[65]

For many years, expert testimony on battering and its effects on women was generally inadmissible.[66] This presented a major obstacle for battered women who preemptively killed an abusive partner and claimed self-defense.[67] In 1977, however, the Supreme Court of Washington decided *State v. Wanrow*, a case involving a disabled—not battered—woman who used a weapon to defend herself against a threat made by her male neighbor.[68] In *Wanrow*, the court held that a woman defendant in a self-defense case "was entitled to have the jury consider her actions in the light of her own perceptions of the situation . . . ."[69] This opinion was the first step toward redefining the "reasonable person" in the objective reasonableness test.

Ibn-Tamas v. United States was the first decision to permit expert testimony on BWS.[70] The court in *Ibn-Tamas* reasoned that the admission of the evidence was relevant to establish the defendant's credibility and to help the jury understand the defendant's rationalization of her actions.[71] Since *Ibn-Tamas*, many courts have found that evidence and expert testimony on BWS are necessary to help a jury credit the battered woman defendant's testimony regarding what happened prior to the killing. In *State v. Kelly*, for example, the New Jersey Supreme Court found that expert testimony on BWS was

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[63] Dressler, *supra* note 56, at 263–64. More than half the states have found that expert testimony is relevant to assessing the reasonableness of the battered woman's conduct and her belief that she was in danger of imminent harm. Parrish, *supra* note 62, at 120–21.

[64] Dressler, *supra* note 56, at 264.

[65] *See* FULERO & WRIGHTSMAN, *supra* note 61, at 158 (illustrating the various purposes served by expert testimony on BWS).

[66] *See id.* at 157 (noting that expert testimony on battering was admitted for the first time in *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979)).

[67] *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1577–78 (1993) ("Before the introduction of expert testimony on the battered woman syndrome in the mid-1970s, women who killed their abusers in situations in which a narrow interpretation of the law prevented them from claiming self-defense often pled guilty . . . .").

[68] 559 P.2d 548, 551 (Wash. 1977), *superseded by statute on other grounds*, WASH. REV. CODE § 9.73.090 (2009), *as recognized in* Lewis v. Dep't of Licensing, 139 P.3d 1078 (Wash. 2006).

[69] *Wanrow*, 559 P.2d at 559.

[70] *Ibn-Tamas*, 407 A.2d at 639; *see* FULERO & WRIGHTSMAN, *supra* note 61, at 157.

[71] *Ibn-Tamas*, 407 A.2d at 632–35.

essential to rebut general misconceptions regarding battered women.[72] The court in *Kelly* further acknowledged the importance of such testimony in explaining the defendant's subjective honesty as well as the objective reasonableness of her response.[73]

Notwithstanding the increasing use of BWS evidence by battered women defendants since the theory was first introduced into American courts, it has been subject to much censure. Critics have disparaged the theory for several key reasons: the theory (1) implies that battered women act as a result of a mental disorder rather than reasonableness; (2) suggests a stereotypical model for all women in battering relationships that does not, in fact, fit many women; and (3) uses a learned helplessness model that is inconsistent with the battered woman's use of self-defense.[74] Though BWS was designed to help jurors understand how a battered woman who killed her abuser might have acted reasonably, some commentators claim that BWS evidence has the overall effect of emphasizing the stereotype of the unreasonable, "pathological" woman.[75] As a result, it is questionable whether BWS is still helpful or appropriate.[76]

II. CURRENT AMERICAN TREATMENT OF BATTERED WOMEN WHO KILL SLEEPING ABUSERS

Despite the concerns regarding BWS, every state currently admits evidence and expert testimony on BWS, although to varying degrees.[77] In traditional, confrontational self-defense cases, nearly all courts accept BWS evidence and give an instruction on self-defense to the jury.[78] However, in cases involving

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[72] State v. Kelly, 478 A.2d 364, 372 (N.J. 1984); *see also* FULERO & WRIGHTSMAN, *supra* note 61, at 149, box 7.1 (describing some common myths about the battered woman).

[73] *See Kelly*, 478 A.2d at 378; *see also* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 130 (2000) (discussing the implications of *Kelly*).

[74] Kinports, *supra* note 36, at 169; *see, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 52, 81 (1994) (describing BWS as a "mental disorder" and noting that "the learned helplessness diagnosis . . . is inconsistent with the homicidal act" of killing a batterer); Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 48 (1998) (finding that BWS "homogenize[s] women's experiences").

[75] For more discussion on how BWS pathologizes women, see *infra* Part II.C.

[76] *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *Overview and Highlights of the Report*, *in* THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT, at v, vii (1996), *available at* http://www.ncjrs.gov/pdffiles/batter.pdf (finding that the term "BWS" is "no longer useful or appropriate").

[77] Parrish, *supra* note 62, at 91.

[78] *Id.* at 104–05.

nonconfrontational self-defense situations, courts are divided. This Part examines and compares how courts in majority and minority jurisdictions currently treat battered women defendants. Next, this Part discusses the practical effects of accommodating battered women within self-defense law and argues that the results of current practices reveal inherent flaws with the present approaches.

A. The Self-Defense Problem in Majority Jurisdictions

In a majority of jurisdictions, a battered woman who kills her sleeping abuser is not entitled to a jury instruction on self-defense.[79] The rationale used by these jurisdictions is that because the woman did not kill to repel an ongoing unlawful attack or an imminent assault, she cannot fulfill the objective reasonableness requirement of self-defense.[80] Courts employing traditional, objective notions of self-defense generally decide as a matter of law that the "fatal blow" could not have been struck in self-defense.[81] Therefore, in most jurisdictions, as a matter of law the battered woman's actions are not classified as self-defense but as a culpable homicide like premeditated murder.[82]

The Kansas Supreme Court decision of *State v. Stewart* illustrates how courts in majority jurisdictions treat battered women who kill in nonconfrontational cases.[83] In this case, a battered woman shot her abusive husband as he slept.[84] The trial court allowed testimony of the history of abuse in the marriage to help the jury determine whether the defendant reasonably perceived danger from her husband.[85] However, the Kansas Supreme Court made clear that an objective standard of reasonableness must be used when measuring a defendant's actions.[86]

The court established a two-part standard for self-defense[87] that requires use of a subjective standard "to determine whether the defendant sincerely and

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[79] Dressler, *supra* note 13, at 461–62 ("[A]ppellate courts have only rarely authorized a jury instruction on self-defense in nonconfrontational circumstances.").

[80] *Id.* at 461.

[81] OGLE & JACOBS, *supra* note 10, at 147–48.

[82] Anannya Bhattacharjee, *Private Fists and Public Force: Race, Gender, and Surveillance*, *in* POLICING THE NATIONAL BODY: SEX, RACE AND CRIMINALIZATION 1, 15 (Jael Silliman & Anannya Bhattacharjee eds., 2002).

[83] 763 P.2d 572, 579 (Kan. 1988).

[84] *Id.* at 575.

[85] *Id.* at 579.

[86] *See id.* (disapproving a subjective standard of reasonableness).

[87] *Id.*

honestly believed it necessary to kill in order to defend" herself.[88] Then, an objective standard must be used to determine whether a reasonable person in the defendant's circumstances would have perceived self-defense as necessary.[89] With this hybrid test, the court recognized that some subjectivity is appropriate in the reasonable person standard.[90] However, such "subjectivization" should be limited to certain characteristics of the battered defendant—for example, the defendant's physical size, ability to defend herself, and relevant experiences with the abuser.[91]

The court went on to hold that in a nonconfrontational case such as this, the requirements of self-defense could never be met because a sleeping spouse could never pose an imminent danger to a battered woman, and thus she could never reasonably fear imminent harm.[92] Therefore, a self-defense instruction cannot be given to the jury under such circumstances.[93] Furthermore, the court believed that "[t]o hold otherwise . . . would in effect allow the execution of the abuser for past or future acts and conduct."[94] In a later Kansas case, *State v. Cramer*, the state court of appeals rejected the argument that the objective test requires the jury to consider "whether a reasonably prudent battered woman would have perceived self-defense as necessary." The court also reiterated that the jurisdiction did not recognize such a standard.[95]

After reviewing Kansas Supreme Court jurisprudence, the appeals court concluded that any previous discussion by the high court about using "an objective test of how a reasonably prudent battered woman would react" was merely dicta, and juries were not required to receive instructions along these lines.[96] According to the court of appeals, creating a more subjective standard of reasonableness for battered women would be tantamount to giving such women an unfair advantage over other defendants relying on self-defense.[97]

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88 *Id.*

89 *Id.*

90 *Id.*

91 Dressler, *supra* note 56, at 269; *see also* State v. Wanrow, 559 P.2d 548, 558–59 (Wash. 1977) (noting that self-defense requires consideration of all circumstances surrounding the event, such as the defendant's sex, height, or disability).

92 *Stewart*, 763 P.2d at 578.

93 *Id.* at 579.

94 *Id.*

95 State v. Cramer, 841 P.2d 1111, 1117 (Kan. Ct. App. 1992) (internal quotation marks omitted).

96 *Id.* at 1118.

97 *See id.* (noting that adoption of a "reasonably prudent battered woman" standard would represent a modification of the law of self-defense that is "more generous to one suffering from the battered woman's syndrome than to any other defendant relying on self-defense").

Courts in majority jurisdictions, like the *Stewart* court, are thus reluctant to find that a battered woman who preemptively kills her batterer acts in self-defense because doing so would require an expansion of the traditional self-defense requirements.[98] These courts decline to recognize any such expansion, however slight, because they believe it signals approval of the woman's actions, encourages violent self-help, and undermines the rule of law.[99] Thus, in a majority of jurisdictions the BWS theory does little to help battered women who kill in nonconfrontational cases.[100] If a jury is not allowed to consider self-defense in a nonconfrontational case, there is little choice but to convict because there is often no question that the battered woman had the culpable state of mind required for homicide—it was her intent to kill her batterer.[101]

B. Accommodation of BWS in Minority Jurisdictions

Because the battered woman who kills in a nonconfrontational situation is not an objectively reasonable actor—according to a conventional understanding of the term—her actions appear disproportionate to the harm posed at the time of the killing.[102] Despite this, the current moral climate of sympathy for battered women[103] has inspired some judges and juries to completely excuse deliberate, intentional killings, even though they may be styled as unconventionally defensive. Recognizing the flaws in the majority approach, a minority of jurisdictions have expanded traditional self-defense law in an attempt to better accommodate battered women who preemptively kill their abusers.[104] This expansion of self-defense law has most often come through a stretching of the reasonable person standard.[105] Since BWS was introduced into the courts, a growing legal trend favors "subjectivizing" this objective standard.[106]

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[98] *See* Dressler, *supra* note 56, at 269 ("Put simply, without distorting the meaning of reasonableness beyond sensible recognition, a 'reasonable person' does not fear instantaneous death from a sleeping person.").

[99] *See, e.g.*, State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) (finding that a self-defense instruction would be tantamount to allowing "the execution of the abuser for past and future acts and conduct" and "'would amount to a leap into the abyss of anarchy'" (quoting Jahnke v. State, 682 P.2d 991, 997 (Wyo. 1984))).

[100] *See Stewart*, 763 P.2d at 576–79.

[101] PAUL H. ROBINSON, WOULD YOU CONVICT? 146–47 (1999).

[102] *See* EVAN STARK, COERCIVE CONTROL 140 (2007).

[103] *Id.*

[104] Dressler, *supra* note 13, at 458 (noting a growing trend in a minority of jurisdictions to allow battered women who kill in nonconfrontational situations to assert self-defense).

[105] *See, e.g.*, Bechtel v. State, 840 P.2d 1, 11 (Okla. Crim. App. 1992) ("[W]e deem it necessary to modify [the self-defense instruction] by striking the words 'reasonably' and 'reasonable' from such instruction.").

[106] Dressler, *supra* note 13, at 458.

The North Dakota Supreme Court decision in *State v. Leidholm* illustrates one version of this more subjective standard.[107] In *Leidholm*, a battered woman stabbed her abusive husband as he slept.[108] Though the trial judge instructed the jury on self-defense, the North Dakota Supreme Court found that the instruction did not adequately emphasize a subjective standard.[109]

The *Leidholm* court approved a highly subjective standard of reasonableness, finding that a self-defense instruction should require the jury to measure "the reasonableness of an accused's belief . . . against the accused's subjective impressions and not against the impressions which a jury might determine to be objectively reasonable."[110] The court further held that the defendant's actions should be evaluated from "the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."[111]

The court specifically found that the defendant's conduct should not be judged by what a "reasonably cautious person" would do under similar circumstances, but rather what the defendant herself "honestly believed and had reasonable ground to believe was necessary for [her] to do to protect [herself] from apprehended death or great bodily injury."[112] This standard requires a jury to consider the defendant's history of battering and to take into account the abusive relationship when deciding whether she acted reasonably.[113] Thus, evidence of BWS could show that a battered woman might honestly and reasonably believe that her abuser would kill her when he awakened, given his threats and prior abusive actions.[114]

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107 State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983).

108 *Id.* at 814.

109 *Id.* at 818–19.

110 *Id.* at 821.

111 *Id.* at 818.

112 *Id.*

113 *Id.* at 819–20.

114 Similar to minority American jurisdictions, the Canadian Supreme Court has held that BWS evidence should be used to inform the objective reasonableness of a battered woman defendant's perceptions and actions, even in nonconfrontational cases. In *R. v. Lavallee*, [1990] 1 S.C.R. 852 (Can.), the Court rejected the notion that a battered woman must wait until the physical assault is underway before she can validly use force and assert self-defense. The Court further held that expert evidence of BWS is relevant to an assessment of whether the defendant acted "on reasonable grounds." *Id.* at 882. In *Malott v. The Queen*, [1998] 1 S.C.R. 123, 132–34 (Can.), the Canadian Supreme Court affirmed the *Lavallee* decision. A concurring opinion in *Malott* noted that *Lavallee* implicitly accepted that the experiences and perspectives of men and women in relation to self-defense may differ and thus must be reflected in self-defense law. *Malott*, 1 S.C.R. at 141 (L'Heureux-Dubé, J., concurring).

Such a standard potentially allows a battered woman to successfully claim self-defense largely on her word.[115] If the jury believes her, and finds that other battered women in the same situation would have acted similarly, the defendant's actions could be seen as justified, and she could be acquitted on self-defense grounds, no matter how inaccurate or objectively unreasonable her belief that she was in imminent danger.[116] Minimizing the objective element of self-defense law in this way can result in unjust outcomes because it emphasizes the defendant's state of mind while deemphasizing the severity of her actions.[117] This has never been the intent of self-defense law; rather, this bears a strong resemblance to an excuse defense.[118]

C. Practical Effects of the Current American Approach

As this Comment has discussed, neither the majority nor minority approach is satisfactory. A battered woman who kills her sleeping abuser in a majority jurisdiction has technically broken the law because she faced no objectively reasonable, imminent threat at the time she killed.[119] Thus, in keeping with traditional self-defense law, the majority approach would find that she could not have killed in self-defense and therefore should be punished.[120]

Nevertheless, if a battered woman honestly believed it was necessary to kill her abuser, even if her belief was not entirely reasonable, she does not seem as blameworthy as someone who killed without such a belief.[121] Therefore, her actions do not appear to warrant a murder conviction and the social stigma that

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115 *See* OGLE & JACOBS, *supra* note 10, at 113 ("The subjective test is a weak one, giving great latitude to the defendant's perceptions if the jury simply believes that the defendant perceived things as she testified she did.").

116 *Id.* at 107.

117 Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 149 (1985).

118 *See* Dressler, *supra* note 13, at 463 (noting that "justifications focus on the act; excuses focus on the actor"). In criminal law terms, self-defense is a justification. *Id.* at 461. Battered women's syndrome does not fit well within the self-defense theory because it fundamentally emphasizes an excuse defense rather than a justification defense. SCHNEIDER, *supra* note 73, at 135–36. Thus, using BWS to justify the actions of women who preemptively kill their batterers by invoking self-defense necessarily distorts self-defense law. Dressler, *supra* note 13, at 461–63. *See also* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986), *reprinted in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 311, 318 (D. Kelly Weisberg ed., 1996).

119 *See* Dressler, *supra* note 13, at 461.

120 *See* State v. Stewart, 763 P.2d 572, 576–79 (Kan. 1988).

121 ROBINSON, *supra* note 101, at 151.

attaches to such punishment.[122] In contrast, the minority approach allows a self-defense claim and evidence of BWS in "sleeping abuser" cases.[123] While such an approach may give a battered woman the opportunity for acquittal, the use of BWS to stretch traditional legal concepts of self-defense is problematic. This section further explores the practical implications resulting from both barring a battered woman's self-defense claim and expanding self-defense law to advance substantive justice for battered women.

1. Problems with the Majority Approach

a. Clemency for Battered Women Who Kill

Since most jurisdictions do not allow battered women who kill in nonconfrontational situations to successfully plead self-defense, it is not surprising that a large number of clemencies have been granted to battered women who were denied the opportunity to present evidence of BWS at trial or were unable to get a jury instruction on self-defense.[124] The "clemency movement"[125] for battered women prisoners first gained recognition in December 1990, when Ohio Governor Richard Celeste issued pardons to twenty-five battered women convicted of killing or assaulting their batterers.[126] Shortly thereafter, Governor William Schaefer of Maryland granted clemency to eight battered women incarcerated for killing their abusers.[127] The governors of several other states, including Colorado, California, Illinois, and Florida, followed suit by granting clemency to battered women convicted of

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[122] *See* Suzanne Uniacke, *What Are Partial Excuses to Murder?*, *in* PARTIAL EXCUSES TO MURDER 1, 15 (Stanley Meng Heong Yeo ed., 1991) ("[T]he label 'murderer' carries a very great social stigma . . . .").

[123] *See* State v. Leidholm, 334 N.W.2d 811, 819–20 (N.D. 1983) (holding that evidence of the abuse should be admitted to allow the jury to decide if the woman acted reasonably).

[124] Christine Noelle Becker, Comment, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297, 327–37 (1995). Clemency is the "official use of the executive power to reduce the severity of a punishment at the discretion of the executive." KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 5 (1989). Executive clemency acts as a "fail safe" mechanism in the death penalty system. Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, *in* WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 229, 231 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

[125] *See* SCHNEIDER, *supra* note 73, at 145–46 (discussing the "clemency movement[s]" in several states benefiting battered women who have killed).

[126] *See* Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, §1, at 1 (discussing the mass pardons granted by then-Ohio Governor Richard Celeste).

[127] *See* Howard Schneider, *Maryland to Free Abused Women; Schaefer Commutes 8 Terms, Citing Violence*, WASH. POST, Feb. 20, 1991, at A1 (discussing the pardons issued by then-Maryland Governor William Donald Schaefer).

killing their abusers.[128] These events not only suggest a widespread recognition of the problems faced by battered women charged with homicide, but also reveal deep dissatisfaction with the current majority approach.[129]

b. Jury Nullification

In a homicide case with a battered woman defendant, jurors may be presented with a choice between two extreme outcomes: convict the woman of murder or completely acquit her on self-defense grounds.[130] Self-defense is a complete defense,[131] but if a battered woman has not technically met the requirements of the defense, she risks being convicted as an intentional killer.[132] Nevertheless, jurors and society may feel that even if the battered woman's actions were objectively unreasonable, they were understandable, and thus the jurors may be unwilling to convict her of a culpable intentional homicide.[133]

Through jury nullification, juries have the ability to acquit battered women defendants or convict them of lesser charges—even if the law technically requires a murder conviction.[134] Jury nullification occurs when jurors refuse to follow the law and instead reach a result that is in accord with their own feelings of justice.[135] When a jury nullifies evidentiary standards, it sends a message that it is unwilling to impose the outcome dictated by current law.[136]

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128 SCHNEIDER, *supra* note 73, at 146.

129 *Id.* at 145.

130 *See* State v. Leidholm, 334 N.W.2d 811, 816 (N.D. 1983) (finding that a jury could determine that a battered wife's use of deadly force could be "justified or excused").

131 LAFAVE, *supra* note 22, at 539.

132 *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE 54 (1988) (noting the "all-or-nothing" approach of self-defense).

133 *See* STARK, *supra* note 102, at 140–41 (noting that some juries look for ways to excuse a battered woman defendant's behavior and that some courts have "reconstitut[ed] the [heat of passion] defense" in order to "meet changing community beliefs halfway").

134 *See* ALAN M. DERSHOWITZ, REASONABLE DOUBTS 93 (1996) (discussing the history of jury nullification); ALBERT R. ROBERTS, CRITICAL ISSUES IN CRIME AND JUSTICE 295 (2d ed. 2003) (discussing the jury's "power to acquit the defendant of all charges or convict the defendant of lesser included charges"); *see also* JEFFREY ABRAMSON, WE, THE JURY 61–64 (1994) (discussing the jury nullification doctrine and noting a jury's "raw power to pardon lawbreaking because there is no device for reversing a jury that insists on acquitting a defendant against the law").

135 Jury nullification "occurs when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt." DERSHOWITZ, *supra* note 134, at 93 (quoting federal district judge Jack B. Weinstein).

136 PHILIP P. PURPURA, CRIMINAL JUSTICE 100 (1997) (noting that jury nullification "sends a message" that a jury disagrees with the law or how it is applied); *see* 3 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 960 (David Levinson ed., 2002) (discussing reasons why a jury might engage in jury nullification).

In battered women cases, juries sometimes do acquit defendants who have not established the legal requirements of self-defense.[137] Nullification in those instances indicates that the current law is in tension with societal views and sentiments.[138] As a result, jury nullification lends even more support to the claim that the current majority approach of using, but then denying, self-defense for battered women is problematic.

2. Problems with the Minority Approach: The "Pathology" of BWS

Courts that accept BWS and expand traditional self-defense requirements believe that they are appropriately accommodating the battered woman's situation.[139] However, BWS concedes that a normal, reasonable person in the defendant's situation would not have remained in the relationship until the point where deadly force was necessary[140]—thus it admits that the battered woman did not act reasonably according to conventional frameworks.

Professor Anne Coughlin, a critic of BWS, has observed that the syndrome "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates."[141] Despite its best intentions, BWS reinforces the stereotypical idea that the battered woman is passive, helpless, and psychologically unable to escape a battering relationship.[142] Under BWS, a battered woman who kills her abuser is someone out of touch with objective reality who acts as she does because she suffers from a cognitive disorder.[143] Even the use of the term "syndrome" emphasizes the woman's abnormality.[144]

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137 DERSHOWITZ, *supra* note 134, at 94 ("One contemporary manifestation of jury nullification . . . occurs in the context of the 'battered woman syndrome.' Although the law of self-defense is clear—a battered woman may kill or maim her batterer only if her life is in imminent danger and she has no other option, such as leaving or calling 911—several juries have acquitted battered women who did not meet these stringent criteria.").

138 *See* MARIANNE CONSTABLE, THE LAW OF THE OTHER 55 (1994) (noting that jury nullification points to a "tension between 'the law' and jurors' 'feelings of what is right and wrong'" (quoting SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 158 (1988))).

139 *See, e.g.*, Bechtel v. State, 840 P.2d 1, 12 (Okla. Crim. App. 1992) (analogizing the battered woman to a hostage and finding that a battered woman should be allowed to claim self-defense successfully if she kills her batterer, even in a nonconfrontational case).

140 *See* Coughlin, *supra* note 74, at 54–55.

141 *Id.* at 7.

142 Dressler, *supra* note 56, at 268.

143 Coughlin, *supra* note 74, at 7, 52.

144 *See* U.S. DEP'T OF JUSTICE, *supra* note 76, at vii ("[T]he word 'syndrome' may be misleading, by carrying connotations of pathology or disease, or . . . it may create a false perception that the battered woman

This undermines the very purpose of BWS, which is to show how a battered woman's use of deadly self-help against her abuser is reasonable given the extraordinary circumstances.[145] As a result, even the Department of Justice has concluded that the term "BWS" fails "to reflect the breadth of empirical knowledge now available concerning battering and its effects" and is therefore "no longer useful or appropriate."[146]

Allowing an expansion of traditional self-defense law by using BWS to help battered women, as minority jurisdictions have done, is unsatisfying because it emphasizes the stereotype of the "pathological woman." Furthermore, stretching traditional self-defense requirements may encourage violent self-help and diminish the sanctity of human life by sending a message to society that the law sanctions killings that may have been avoidable.[147] Yet, as demonstrated by mass clemencies and jury nullification in battered women cases, society is dissatisfied with the outcome of such cases in majority jurisdictions. Because both approaches are clearly problematic, this Comment examines alternative solutions used in other common law countries to inform how the United States might more appropriately achieve justice for battered women.

III. TREATMENT OF BWS IN AUSTRALIA AND ENGLAND

Soon after the use of expert evidence on BWS became widespread in America, foreign courts began to recognize BWS and develop varying approaches to accommodate such evidence under existing laws.[148] This Part focuses on how Australia and England have adapted BWS within their respective laws governing self-defense or provocation. Because of their similarity to our legal system, practices in common law systems such as

'suffers from' a mental defect."); Regina A. Schuller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167, 169 (1996) (finding that introducing BWS evidence at trial has the effect of "pathologizing" the abused woman in the minds of jurors); *see also* Osland v. The Queen (1998) 197 C.L.R. 316, 372–74 (Austl.) (Kirby, J., concurring) (discussing how the term "syndrome" is "designed to 'medicalise'" a battered woman's actions and concluding that "BWS denies the rationality of the victim's response to prolonged abuse and instead presents the victim's conduct as irrational and emotional").

145 *Osland*, 197 C.L.R. at 374–75 (Kirby, J. concurring).

146 U.S. DEP'T OF JUSTICE, *supra* note 76, at vii.

147 *See* Dressler, *supra* note 13, at 468, 471 (discussing the moral messages that are sent to society when the traditional elements of self-defense are expanded).

148 For example, the Canadian Supreme Court relied heavily on the case of *State v. Wanrow* in its acceptance of BWS evidence to help inform the reasonableness element of self-defense. *See* R. v. Lavallee, [1990] 1 S.C.R. 852, 874–75 (Can.).

Australia and England readily lend themselves to comparison with American law.[149] As a result, American courts may learn how to better accommodate battered women defendants within the law by looking to the different strategies employed by these countries.[150]

After assessing the two approaches, this Part rejects Australia's approach of eliminating the imminence requirement in favor of England's strategy of applying provocation law. This Part also discusses the reforms to provocation law proposed by the English Government and examines how such reforms can more effectively assist battered women.

A. Reasonableness and Imminence in Self-Defense: Australia

Australia considers evidence of BWS under the law of self-defense to inform the subjective element of reasonableness.[151] Due to Australia's elimination of the technical imminence requirement in self-defense and recent reforms in at least one Australian state,[152] at least four battered women defendants who killed in nonconfrontational situations have successfully claimed self-defense.[153]

1. Case Law Developments

Since the introduction of BWS evidence in the 1991 case of *Runjanjic & Kontinnen,* all Australian states and territories have accepted expert evidence of BWS.[154] In cases involving battered women who kill, Australian courts recognize BWS as part of a self-defense strategy.[155]

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[149] JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 3–4 (3d ed. 2007) (discussing the origins of the common law system in England and how it remains the prevailing legal system in Australia and the United States).

[150] *See, e.g.*, Sadiq Reza, *Transnational Criminal Law and Procedure: An Introduction*, 56 J. LEGAL EDUC. 430, 442 (2006) (concluding that there is a need to consider a "range of approaches to common problems" by looking to the practices of other countries).

[151] *See* Osland v. The Queen (1998) 197 C.L.R. 316, 337 (Austl.) (discussing the relationship between BWS evidence and the subjective element of reasonableness in self-defense).

[152] The Australian state of Victoria passed new legislation updating their criminal laws in 2005. Crimes (Homicide) Act 2005 § 9AH (Vict.), *available at* http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/F0B7C8D5D930EE26CA2570C1001F677F/$FILE/05-077a.pdf.

[153] Julie Stubbs & Julia Tolmie, *Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome*, 23 MELB. U. L. REV. 709, 733 (1999).

[154] *See* R v. Runjanjic, (1991) 56 S.A. St. R. 114, 122 (Austl.) (permitting for the first time the use of expert evidence on BWS under the context of duress).

[155] SUSAN S. M. EDWARDS, SEX AND GENDER IN THE LEGAL PROCESS 236 (1996).

The only High Court[156] decision discussing treatment of BWS evidence in relation to self-defense is *Osland v. The Queen*.[157] In *Osland*, the defendant and her son killed the defendant's abusive husband while he slept.[158] The Court noted that BWS evidence may be relevant to the issue of self-defense, particularly whether the battered woman believed her actions were necessary to avoid the risk of death or serious bodily injury.[159] However, the Court focused solely on how BWS is relevant to the subjective component of self-defense.[160] The majority opinion noted that BWS could be relevant to determining the sincerity of the battered woman's belief that she was at risk of death or serious bodily harm and that deadly force was necessary to avoid the threat.[161] However, the majority opinion did not discuss how evidence of BWS might inform the objective reasonableness of the defendant's actions.[162] A concurring opinion urged caution,[163] stating that such evidence should only be viewed as forming part of all the evidence that must be considered by a judge or jury in determining whether the elements of provocation or self-defense were met.[164]

Australian jurisdictions have allowed evidence of BWS in several self-defense cases.[165] In some instances, the defendants were battered women who killed their abusers in the midst of an ongoing attack and were ultimately

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156 The High Court is the Australian equivalent to the U.S. Supreme Court. Elaine Thompson, *Political Culture*, *in* AMERICANIZATION AND AUSTRALIA 107, 110–11 (Philip Bell & Roger Bell eds., 1998).

157 (1998) 197 C.L.R. 316, 337–38.

158 *Id.* at 316.

159 *Id.* at 337 ("[E]xpert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence . . . .").

160 Stubbs & Tolmie, *supra* note 153, at 725.

161 *Osland*, 197 C.L.R. at 337. The Court also briefly discussed how BWS evidence could be used to explain why an act of "apparently slight significance" might properly be as seen as evidence of provocation. *Id*.

162 Stubbs & Tolmie, *supra* note 153, at 725. A concurring judgment in *Osland* did recognize that BWS evidence could show how a battered woman's actions toward her abuser were objectively reasonable. *See Osland*, 197 C.L.R. at 382 (Kirby, J., concurring) ("[BWS] evidence may assist a jury to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike.").

163 *See id.* at 375 (Kirby, J., concurring) (warning "of the need for caution in the reception of testimony concerning BWS" given the controversy surrounding it and its lack of universal acceptance). *See generally* Barbara Ann Hocking, *A Tale of Two Experts: The Australian High Court Takes a Cautious Stand*, 64 J. CRIM. L. 245 (2000) (discussing the High Court's decision in *Osland*).

164 *Osland*, 197 C.L.R. at 337–38.

165 *See, e.g.*, Stubbs & Tolmie, *supra* note 153, at 733–35 (discussing several unreported Australian cases involving self-defense and BWS evidence); R v. Secretary (1996) 131 F.L.R. 124, 126 (Austl.).

acquitted.[166] In addition, battered women defendants in at least four Australian cases have been acquitted on self-defense grounds, despite preemptively killing an abuser.[167]

The most significant change to Australian law, and the most beneficial to battered defendants, has been the elimination of imminence as a technical requirement in self-defense law.[168] Unlike the American approach to self-defense, in which imminence remains a key element of a defense to homicide, Australia has abandoned imminence as a requirement altogether. As a result, some battered women defendants who kill in nonconfrontational circumstances have successfully claimed self-defense.[169] For example, in *R v. Secretary*, a battered woman killed her husband as he slept.[170] Prior to the killing, the deceased assaulted the defendant, threatened her with further violence in the future, and then fell asleep.[171] The trial judge held that the defendant could not raise self-defense because self-defense law requires that the danger be imminent, and the aggressor have an "actual or apparent present ability to effect his purpose."[172] However, the Court of Criminal Appeal of the Northern Territory held that the law did not require imminence.[173] Instead, a continuing or incomplete threat of future harm might be sufficient to justify a defendant taking action to protect herself against the threat.[174] In holding that a battered woman could successfully raise a self-defense claim even when she kills a sleeping abuser, the court noted that the "common law has moved away from the requirement of immediacy, favoring a more flexible approach in the law relating to . . . self defence."[175] Of course, the question of whether the threat justified the defendant's use of deadly force remained.[176] Thus, the history of

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166 *See* Katrina Budrikis, *Note on* Hickey*: The Problems with a Psychological Approach to Domestic Violence*, 15 SYDNEY L. REV. 365, 366–72 (1993) (discussing *R v. Hickey*, an unreported Australian self-defense case in which a battered woman defendant who killed her abuser in a confrontational situation was acquitted).

167 Stubbs & Tolmie, *supra* note 153, at 733–35.

168 *See* Zecevic v. Dir. of Pub. Prosecutions (1987) 162 C.L.R. 645, 646, 663 (Austl.) (modifying existing self-defense law by eliminating a technical imminence requirement).

169 Stubbs & Tolmie, *supra* note 153, at 733.

170 131 F.L.R. at 124.

171 *Id.* at 128.

172 *Id.* at 124, 128.

173 *Id.* at 132.

174 *Id.* (finding no reason why the assault would be complete "merely because the deceased was temporarily physically unable to carry out his threat").

175 *Id.* (citation omitted).

176 *Id.* at 126.

the relationship and the effect of BWS were relevant factors for a jury to consider in determining whether the defendant sincerely apprehended harm.[177]

2. Recent Reforms

More recently, at least one Australian state has enacted reforms in response to increased awareness and understanding of the incidence and nature of domestic violence and the realities battered women face. In 2005, the State of Victoria passed the Crimes (Homicide) Act.[178] The Act states that:

> [F]or the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her conduct is necessary—(a) to defend himself or herself or another person . . . even if—(c) he or she is responding to a harm that is not immediate; or (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.[179]

The Act further notes that evidence of abuse is relevant in determining whether the person acted under the belief that the conduct was necessary and had reasonable grounds for that belief.[180]

Under the Act, a battered woman may successfully claim self-defense if she shows that she killed to defend herself against further abuse and reasonably believed her actions were necessary, even if the harm was not imminent.[181] Thus, the reforms are consistent with the Australian High Court's elimination of the imminence requirement.[182] The reforms also give a battered woman defendant the opportunity to introduce evidence of BWS to show that her actions were objectively reasonable.[183] Furthermore, if the Act is interpreted broadly enough, a woman in a continuously abusive relationship will have little problem establishing self-defense, even if she kills a sleeping abuser, because she can show the pattern of abuse and argue that she was responding to an ongoing threat.

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177 The defendant was ultimately acquitted. *See* Stubbs & Tolmie, *supra* note 153, at 735 (discussing the *Secretary* case).

178 Crimes (Homicide) Act 2005 § 9AH (Vict.).

179 *Id.*

180 *Id.* §§ 9AC, 9AH(3).

181 *Id.* § 9AC.

182 *See* Zecevic v. Dir. of Pub. Prosecutions (1987) 162 C.L.R. 645, 663.

183 Crimes (Homicide) Act 2005 §§ 9AC, 9AH(3) (Vict.).

3. Problems with the Australian Approach

Despite making it easier to acquit battered women defendants who kill in nonconfrontational situations, Australia's relaxation of the traditional self-defense requirements still poses problems. First, by distinguishing and separating them from other persons who kill, laws like the one in Victoria encourage the perception that battered defendants need their own separate defense.[184] Such a legal defense gives battered women an unfair advantage simply because they are battered women, but this is not and should not be a justification for homicide.[185] A "battered woman defense" is based entirely on a battered woman's perceptions and completely removes the objective standard of reasonableness, thus creating a risk of encouraging conduct that might be completely unnecessary or erroneous.[186] It is dangerous to adopt a model that encourages the law to stretch the traditional concepts of self-defense to accommodate only battered women.

Second, Australia's elimination of the imminence requirement removes an important restraint on self-defense homicides.[187] By relaxing the imminence requirement, Australia's approach increases the possibility that battered women who kill out of revenge or anger, rather than fear of serious bodily harm or death, will successfully claim self-defense.[188] While in some cases the imminence requirement may seem unjust, it remains a "crucial limitation on the right to violent self-help."[189] If the use of deadly force is authorized other than as a last resort, there is a greater risk that the threat is actually non-existent, and thus deadly force is unwarranted.[190] According to Professor Joshua Dressler, such a radical change in the law could promote a "criminal defence that categorically justifies the taking of life before it is immediately necessary."[191] No matter how morally reprehensible the conduct of the murder

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184 *See* Renée Römkens, *Ambiguous Responsibilities: Law and Conflicting Expert Testimony on the Abused Woman Who Shot Her Sleeping Husband*, 25 LAW & SOC. INQUIRY 355, 363 n.9 (2000).

185 *Id.*; EWING, *supra* note 12, at 78–79 (discussing the absence of a "battered woman syndrome defense" as a separate legal defense).

186 *See* Rosen, *supra* note 15, at 21 ("To hold, as the battered woman's defense requires, that the actor's own experiences and psychological makeup should be considered in determining whether an act is justified is entirely inconsistent with the theory that a justified act is either beneficial or not harmful to society.").

187 *See id.* at 53 (discussing the rationale behind the imminence requirement).

188 *See* Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 365 (2007) (noting that the imminence rule limits the use of self-defense when the defendant kills out of anger or revenge).

189 *Id.* at 369.

190 Dressler, *supra* note 13, at 467–68.

191 Dressler, *supra* note 56, at 275.

victim, to justify the taking of human life unnecessarily reduces the sacredness of human life.[192] Ultimately, removing the imminence requirement is not the best solution because it undermines the criminal law's goals of promoting the value of human life and discouraging self-help.

B. Broadening Provocation: England

Unlike American and Australian courts, English courts have taken a provocation-oriented approach to BWS evidence.[193] The courts have generally been reluctant to consider BWS evidence in self-defense claims;[194] instead, in cases involving battered women who kill abusive partners, provocation has been commonly used as a partial defense[195] to murder in nonconfrontational circumstances.[196] This section will discuss the English courts' recognition of the need to broaden provocation to more accurately reflect the situational realities of battered women. Such broadening has been achieved through modification of the common law as well as recent governmental reforms.

1. Case Law Developments

Under the current English law, for a provocation defense to succeed there must be conduct "which would cause in any reasonable person, and actually causes in the accused, a 'sudden' and 'temporary' loss of self-control."[197] There are both subjective and objective elements to the partial defense. Subjectively, the conduct must have actually provoked the defendant to kill. Objectively, the conduct must be of the type that would have provoked a reasonable person to lose his normal self-control.[198]

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[192] Dressler, *supra* note 13, at 468.

[193] *See* Dressler, *supra* note 56, at 261 (noting that BWS has less support in England than in the United States, Canada, or Australia but is admissible to mitigate a homicide to manslaughter on provocation grounds).

[194] *See* EDWARDS, *supra* note 155, at 245 ("[English and Welsh] courts are reluctant to entertain self-defence and decidedly averse to admitting evidence relating to battered woman syndrome.").

[195] A partial defense mitigates criminal responsibility but does not provide a complete defense. Provocation, as a partial defense, reduces a murder charge to voluntary manslaughter. *See* Finbarr McAuley, *Provocation: Partial Justification, Not Partial Excuse*, *in* PARTIAL EXCUSES TO MURDER, *supra* note 122, at 19, 19 (explaining that provocation is a "partial and limited defence").

[196] EDWARDS, *supra* note 155, at 236; JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 186–87 (1992) (noting statistics showing that in England 52.5% of women who killed their partners and were ultimately convicted of homicide were convicted only of manslaughter on the grounds of provocation).

[197] R v. Duffy, (1949) 1 All E.R. 932, 932 (Crim. App.).

[198] *See, e.g.*, R. v. Smith, (2000) 4 All E.R. 289, 297 (H.L.) (discussing the subjective and objective elements of provocation law).

Fulfilling the requirement of a sudden and temporary loss of self-control is often difficult for battered women who kill, especially in cases where the deceased was sleeping or not actively posing a threat at the time of the killing.[199] Under the traditional common law interpretation, provoked killings must be impulsive and happen quickly, usually immediately after the provoking act.[200] However, in several cases, English courts have expanded parts of this requirement to accommodate women defendants who offer evidence of BWS.[201]

R v. Ahluwalia[202] was a landmark decision that changed how courts view the suddenness requirement of provocation.[203] In *Ahluwalia*, the defendant's relationship with the victim, her husband, was characterized by a long history of violence and abuse.[204] The night of the killing, the defendant's husband threatened to beat her the next morning.[205] After a significant delay, during which the defendant's husband went to sleep, the defendant set him on fire.[206]

On appeal, the defendant's lawyers argued that when a battered woman is provoked, a delayed response between the final provocative conduct and the killing might not signal a "cooling-off" but rather a "slow-burn" reaction[207] in which the defendant does not actually regain self-control.[208] The court of appeal agreed, holding that a provocation defense will not fail simply because there was a delayed response.[209] Thus, the court's decision in *Ahluwalia* opened the way for a battered woman to plead provocation as a partial defense to murder, even if the killing was committed after a delayed response. Most

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199 HORDER, *supra* note 196, at 187–91.

200 George Mousourakis, *Defending Victims of Domestic Abuse Who Kill: A Perspective from English Law*, 48 LE CASHIERS DE DROIT 351, 357 (2007).

201 *See, e.g.*, R v. Thornton (No. 2), (1996) 2 All E.R. 1023, 1030 (Crim. App.); R v. Humphreys, (1995) 4 All E.R. 1008, 1023–24 (Crim. App.).

202 (1992) 4 All E.R. 889 (Crim. App.).

203 The case of *R v. Thornton (No. 1)*, (1992) 1 All E.R. 306 (Crim. App.), decided the year before *Ahluwalia*, raised for the first time whether courts could consider cumulative provocation, rather than focusing exclusively on a "sudden and temporary" loss of control, in the case of battered defendants. WENDY CHAN, WOMEN, MURDER AND JUSTICE 118 (2001).

204 *Ahluwalia*, 4 All E.R. at 891–92.

205 *Id.* at 892–93.

206 *Id.*

207 *Id.* at 895–96; *cf.* MODEL PENAL CODE § 210.3 (Official Draft and Revised Comments 1980). The Model Penal Code approach, which is recognized in a few U.S. jurisdictions, allows a defendant to be found guilty of manslaughter if she acted as a result of an "extreme . . . emotional disturbance," a concept which does not require a defendant to have committed the killing before cooling off. *Id.*

208 *Ahluwalia*, 4 All E.R. at 895–96.

209 *Id.* The court did note, however, that a provocation defense would be less likely to succeed the longer the delay. *Id.*

importantly, the court also found that expert testimony on BWS is admissible and relevant to a jury's understanding of the long-term effects of battering, though its allowance of BWS evidence focused on the defendant's mental state rather than on her partner's violence.[210]

The court of appeal further discussed the relevance of long-term abuse to provocation in *R v. Humphreys*[211] and *R v. Thornton (No. 2)*.[212] Emma Humphreys was convicted of murdering her boyfriend after he taunted her for failing to commit suicide.[213] Though the defense presented evidence that the deceased had frequently abused the defendant, the judge directed the jury to focus on events immediately surrounding the killing in determining whether her loss of self-control was reasonable.[214] However, the court of appeal substituted manslaughter for murder, holding that the whole history of the abusive relationship was relevant to the defendant's guilt or innocence, and the deceased's prior violence and threats should have been presented to the jury as constituting part of the provocative conduct—not merely as background to the taunting.[215] *Humphreys* resolved prior inconsistencies by concluding that a period of cumulative provocation culminating in a loss of self-control is relevant and should be considered by a jury.[216]

In *Thornton (No. 2)*,[217] which followed the decision in *Humphreys*, the court of appeal found for the first time that BWS could be relevant in a jury's consideration of provocation as a partial defense to murder[218] and a jury's assessment of the objective reasonableness and sincerity of the loss of self-control on the part of the defendant.[219] The court reiterated that BWS might

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210 *Id.* at 896–99. *Ahluwalia* was groundbreaking in its allowance of BWS and was the first time that the Court of Appeals admitted evidence of BWS in an appeal against a conviction for murder. Ultimately, however, the court only considered evidence of BWS under the doctrine of diminished responsibility. EDWARDS, *supra* note 155, at 246–47.

211 (1995) 4 All E.R. 1008, 1012, 1021–22 (Crim. App.)

212 (1996) 2 All E.R. 1023, 1029–30 (Crim. App.).

213 *Humphreys*, 4 All E.R. at 1010, 1012.

214 *Id.* at 1014.

215 *Id.* at 1023–24.

216 *See generally* Donald Nicolson & Rohit Sanghvi, *More Justice for Battered Women*, 146 NEW L.J. 1122 (1995) (discussing *Humphreys*).

217 *Thornton (No. 2)*, 2 All E.R. at 1023. Thornton was a battered woman who killed her husband while he lay on the couch after she had admittedly "calm[ed] down." *Id.* at 1026.

218 EDWARDS, *supra* note 155, at 247.

219 *Thornton (No. 2)*, 2 All E.R. at 1029–30.

demonstrate how a period of habitual abuse results in a "slow-burn" effect that over time culminates in a loss of control.[220]

Following the approach developed from *Ahluwalia* to *Thornton (No. 2)*, English courts currently allow battered defendants significant opportunity to put forth evidence of circumstances and characteristics relevant to provocation.[221] In addition, though the traditional requirement of a "sudden" loss of self-control remains, some courts have accommodated cumulative provocation where there is evidence of battering and a "slow-burn" response.[222]

Nevertheless, the current approach of English courts to accommodate battered women who kill within the law of provocation is problematic because courts have attempted to stretch the notions of suddenness and reasonableness within existing traditional laws, creating a palpable tension within the law that can lead to inconsistency.[223] Because the traditional defense of provocation was primarily intended to deal with killings triggered by anger, and was premised on notions of masculine behavior, continued difficulties arise when attempting to accommodate evidence of battering and its effects on women within current provocation law.[224]

2. Proposed Government Reforms

The English government recently proposed reforms to the law of manslaughter and murder in ways that would directly impact battered women who kill their abusive partners.[225] The reforms propose replacing the existing common law partial defense of provocation with two new partial defenses to murder that would apply only in exceptional circumstances: killing in response

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[220] *Id.*; *see also* HORDER, *supra* note 196, at 188–89 (noting that, historically, the provocation defense was not available to an individual subjected to provocative acts over an extended period of time).

[221] *See* EDWARDS, *supra* note 155, at 247–48 (discussing the "expansion of the concept of the reasonable man" in England).

[222] *See, e.g.*, R v. Ahluwalia, (1992) 4 All E.R. 889 (Crim. App.). Despite the decisions in *Ahluwalia*, *Humphreys*, and *Thornton*, some commentators remain concerned about the problems resulting from the continued requirement that the defendant "must suddenly lose their self-control," especially for those women who "tend to kill in an outwardly calm manner." *See* Nicolson & Sanghvi, *supra* note 216, at 1122.

[223] CHAN, *supra* note 203, at 120.

[224] *See* HORDER, *supra* note 196, at 192–94.

[225] *See generally* U.K. MINISTRY OF JUSTICE, MURDER, MANSLAUGHTER AND INFANTICIDE: PROPOSALS FOR REFORM OF THE LAW (2008), *available at* http://www.justice.gov.uk/docs/murder-manslaughter-infanticide-consultation.pdf (proposing, among other things, the replacement of current provocation with two new partial defenses to murder).

to a fear of serious violence and killing in response to words and conduct that caused the defendant to have a justifiable sense of being seriously wronged.[226]

The reforms would affect the outcome of cases in which battered women who kill plead provocation. Under the reformed partial defense, a defendant would be guilty of manslaughter if she killed as a result of a loss of self-control triggered by a fear of serious violence by the abuser.[227] A jury would be required to determine whether a person of the defendant's same sex and age with a normal degree of tolerance and self-restraint in the same circumstances would have acted in the same or similar way as the defendant.[228] Thus, the reforms would abolish a need for a "sudden" loss of self-control and would allow the defense to be used if fear of an attack was not imminent.

The government's proposed reforms offer a more balanced approach to accommodating battered women than prior provocation law. By recognizing that a woman who is the victim of prolonged abuse may not always act immediately following a threat or episode of abuse and that her response will usually be the result of fear and not anger,[229] the reforms will likely produce more equitable results. This is because battered women who kill in nonconfrontational situations will be able to argue provocation more effectively, thus avoiding a murder conviction. Yet they will still be convicted of manslaughter and punished for their actions.

Additionally, the reforms could significantly lessen the need for expert testimony on BWS because evidence that the battering and abuse actually took place would be enough to show that the woman had a legitimate fear of serious violence.[230] Expert testimony on BWS could be limited to supporting the woman's credibility with the jury, if used at all.[231] As a result, concerns with problems that BWS creates, such as the battered woman stereotype and the "syndromization" of battered women, are also lessened.[232] Indeed, because provocation is a "rational defense" based on the standard of what an ordinary person would do, the concern that a battered woman's actions will be viewed

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226 *Id.* at 2.

227 *Id.* at 33.

228 *Id.*

229 *Id.* at 8.

230 *See* Dressler, *supra* note 56, at 266 (noting that evidence of BWS is not always needed to explain to a jury why a battered woman reacted as she did).

231 *See id.* ("BWS testimony should be limited to enhancing the battered woman's credibility . . . .").

232 *See, e.g.*, Schuller & Hastings, *supra* note 144.

as abnormal and irrational is further reduced.[233] Thus, the proposed reforms would recognize that a battered woman defendant who killed her batterer in response to threats of serious violence acted reasonably.

IV. ARGUMENT FOR THE ADOPTION OF REFORMED PROVOCATION

As explained above, the problems with the current U.S. approach of accommodating battered women defendants within traditional self-defense law are plentiful. For a woman who preemptively kills her abuser to successfully claim self-defense, courts must expand the traditional legal requirements of self-defense.[234] But expansion of self-defense law not only encourages violent self-help, it also diminishes the sanctity of human life by signifying that the law authorizes killings that may have been avoidable.[235] Thus, when a battered woman kills outside of the traditional elements of self-defense, her actions should not be legally justified.[236] However, as demonstrated by the mass clemencies granted to convicted battered women in recent years, it appears that the majority view in society is that women who kill in response to years of abuse should not be labeled "murderers."[237]

Provocation law provides a better solution than self-defense for helping battered women who kill sleeping abusers escape a murder conviction. As a defense that partially excuses or justifies a defendant's actions,[238] provocation

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[233] Rebecca Bradfield, *Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide*, 13 CURRENT ISSUES CRIM. JUST. 143, 149 (2001).

[234] *See, e.g.*, State v. Leidholm, 334 N.W.2d 811, 818–19 (N.D. 1983) (deciding that a finder of fact must apply a subjective, rather than the traditionally objective, standard of reasonableness); Bechtel v. State, 840 P.2d 1, 10–13 (Okla. Crim. App. 1992) (finding that in a battered woman case, the court should use a more subjective standard to determine whether the defendant acted in self-defense).

[235] Dressler, *supra* note 13, at 467–68.

[236] For example, the court in *State v. Stewart* recognized that to allow battered women who preemptively kill their abusers to successfully claim self-defense "would amount to a leap into the abyss of anarchy." 763 P.2d 572, 579 (Kan. 1988). Indeed, the distortion of the legal requirements has led some courts to impose inconsistent standards. *See, e.g.*, *Bechtel*, 840 P.2d at 11–12 (creating a special self-defense standard for battered women only and thus being more generous to battered women than to other defendants claiming self-defense).

[237] At least two commentators have noted that one would usually expect battered women who kill to be charged and convicted of an offense no higher than voluntary manslaughter. In reality, many women are charged and convicted of murder because they appear to have "cooled off," and thus fail to meet the requirements of the rule of provocation. In addition, only a minority of jurisdictions allows a defendant to assert an imperfect self-defense claim. *See* EWING, *supra* note 12, at 44–45; OGLE & JACOBS, *supra* note 10, at 99.

[238] *See* Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 55 n.158 (2006) (noting that provocation can be considered either a partial excuse or a partial justification).

recognizes the wrongfulness of the defendant's conduct while finding that she is not entirely to blame and therefore should receive a reduced punishment.[239] Nevertheless, current provocation laws fail to consider certain realities of a battered woman's situation and therefore must be reformed before they can adequately resolve the problems such women face in sleeping abuser cases.

This Part will discuss the problems with current provocation law in the United States and propose a reformed provocation defense, similar to the provocation reforms proposed by the English government. Next, this Part will further analyze the benefits of using provocation, rather than self-defense, in battered women's cases. Finally, this Part will discuss the implications of using a reformed provocation defense.

A. Problems with Current Provocation Law

Battered women who kill in nonconfrontational situations usually have great difficulty raising a traditional provocation defense.[240] Just like self-defense, provocation was created with male interactions and reactions in mind; as such, the partial defense was developed to deal with situations in which a man kills as a result of being provoked by some act, such as a wife's infidelity.[241] Current provocation law is based on the notion that an ordinary person may lose self-control when faced with adequate provocation.[242] The American Law Institute has observed that this partial defense is basically a "concession to human weakness,"[243] recognizing that a person acting out of passion is less able to control her actions and is less blameworthy than a person

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[239] *See* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 227 (2003) ("The reason we allow the mitigation from murder to manslaughter [in provocation] is not because we think the *act* . . . is right or correct . . . but because we feel the *actor* is not entirely to blame for what happened." (footnote omitted)).

[240] *See, e.g.*, Camille A. Nelson, *(En)Raged or (En)Gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007, 1063–64 (2002) (noting the problems battered women face with a provocation defense).

[241] *See* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80–81 (1992) (discussing provocation and noting that, at common law, adultery was seen as "the highest form of provocation").

[242] *See* McAuley, *supra* note 195, at 20 (noting that provocation recognizes "that circumstances arise in which even the prudent individual may be unable to control her or his behaviour").

[243] MODEL PENAL CODE § 210.3 cmt. 5 (Official Draft and Revised Comments 1980).

who kills in a normal state of mind.[244] Therefore, the defense reduces intentional homicide to voluntary manslaughter.[245]

At common law, a provocation defense requires the actor to act (1) in the sudden heat of passion, (2) as a result of adequate provocation, and (3) without a reasonable opportunity to cool off.[246] For a battered woman, the primary difficulty with using a provocation defense in its current form is the sudden "heat of passion" element, which does not allow for a "cooling off" period.[247] This element requires the killing to occur immediately or soon after the provoking act.[248] If a reasonable person would have cooled off in the time that elapsed between the provocation and the fatal act, the "suddenness" requirement fails.[249] The battered woman who kills a sleeping abuser is usually unable to meet such a requirement because of the very fact that she killed in a nonconfrontational situation instead of immediately after some provoking act.[250]

Current provocation laws fail to take into account the complexities of a battered woman's situation. Battered women usually kill their batterers out of an accumulation of fear and despair rather than just anger.[251] However, the primary emotion associated with "heat of passion" is anger or rage—the typical male reaction—and only some jurisdictions consistently include fear in their definition of "heat of passion."[252] Thus, while courts might recognize

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244 Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1992 (2001) ("It is sometimes said that a person who commits a crime under the influence of emotion is less culpable than a person who acts calmly and deliberately.").

245 *See* LEE, *supra* note 239, at 18.

246 ENCYCLOPEDIA OF MURDER & VIOLENT CRIME 241 (Eric Hickey ed., 2003); LAFAVE, *supra* note 22, at 654. The Model Penal Code (MPC) provides that murder will be mitigated to manslaughter if a homicide "is committed under the influence of an extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (Official Draft and Revised Comments 1980). The reasonableness of the actor's explanation or excuse for the emotional disturbance is "determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." *Id.* Notably, the MPC does not require that the defendant act before having an opportunity to "cool off." *See* LEE, *supra* note 239, at 34.

247 *See* EWING, *supra* note 12, at 45.

248 ENCYCLOPEDIA OF MURDER & VIOLENT CRIME, *supra* note 246, at 241.

249 *Id.*

250 *See* HORDER, *supra* note 196, at 188–89; Nicolson & Sanghvi, *supra* note 216, at 1122.

251 *See* Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 82 (2008) (identifying fear as the primary emotion felt by battered women who kill their abusers); Forell, *supra* note 238, at 34.

252 Coker, *supra* note 241, at 79; *see also, e.g.*, Rebecca Bradfield, *Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?*, 5 PSYCHIATRY, PSYCHOL. & L. 71, 75 (1998) (noting that anger is the primary emotion associated with provocation); Christina Pei-Lin Chen, *Provocation's*

that fear is an emotion that is capable of inducing "heat of passion," such language may disadvantage battered women who kill their batterers out of fear or desperation.[253]

Nevertheless, battered women can react out of anger or frustration as well.[254] The woman's feelings of fear and anger accumulate slowly over time until she can no longer control herself.[255] Often, there is not one triggering event that leads to the loss of control, but rather an accumulation of years of abuse and fear of the abuser.[256] Thus, the history of the relationship between the battered woman and her abuser is relevant in considering the reasonableness of the woman's reaction.

B. Reformed Provocation

Given the limitations of current provocation law, the defense must be reformed to take into account the reality of a battered woman's situation. The English government's current proposal to reform provocation laws and make them more accessible to battered women is instructive to the United States for three reasons. First, using a reformed provocation defense benefits battered women who kill in nonconfrontational situations by providing a partial defense to murder. Second, taking BWS out of traditional self-defense law allows the laws of self-defense to remain intact. Third, creating such a partial defense of reformed provocation will help balance certain principles of criminal punishment. Thus, states should replace current provocation laws with a

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Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense, 10 CORNELL J.L. & PUB. POL'Y 195, 221 (2000) ("[R]age, not fear or terror, is the only legally recognized and criminally excusable definition of passionate emotion.").

253 *See* Nelson, *supra* note 240, at 1063 ("Women in battering situations typically do not kill their abusers in the 'heat of passion' as traditionally contemplated by the defence.").

254 *See, e.g.*, Brenda Baker, *Provocation as a Defence for Abused Women Who Kill*, 11 CAN. J.L. & JURISPRUDENCE 193, 198 (1998) (discussing the slow-burn effect of anger and frustration experienced by battered women who kill); Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 300 n.222 (2007) ("Battered women kill out of fear rather than anger, although most battered women eventually feel anger toward their abusers.").

255 This is known as "cumulative provocation," which can be defined as:

> [A] series of acts or words over a period of time which culminate in the sudden and temporary loss of self-control by the accused. Thus, provocation is not confined to the last act before the killing occurred; there may have been previous acts or words which, when added together, cause the accused to lose his self-control, although the last act on its own may not be sufficient to constitute provocation.

MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 282 (8th ed. 2005) (internal quotation marks omitted).

256 *See* Baker, *supra* note 254, at 198 (discussing cumulative provocation and the battered woman).

reformed provocation defense that mitigates murder to voluntary manslaughter if the defendant acted in response to a fear of serious violence, gross provocation, or a combination of both.

1. The Proposal

The English government's provocation reform proposals provide a good example of a defense that could adequately accommodate battered women who kill. Using these proposals as a guide, this Comment argues that state legislatures should replace current provocation laws with a reformed provocation defense that could take the following form:

> Where a defendant has committed homicide, that defendant is not to be convicted of murder, but rather voluntary manslaughter, if (a) the defendant's actions resulted from her loss of self-control, (b) the loss of self-control was in response to adequate provocation, and (c) an ordinary person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, would have reacted in the same or in a similar way as the defendant did. Adequate provocation means (1) a fear of serious violence from the victim against the defendant; or (2) a thing or things said or done which amounted to an exceptional happening, and caused the defendant to have a justifiable sense of being seriously wronged; or (3) a combination of both (1) and (2).[257]

Creating a reformed partial defense of provocation that applies when a person kills in response to fear of serious violence would provide a tailored partial defense to murder for battered women who kill in nonconfrontational circumstances. In instances where battered women cannot or should not receive a jury instruction on self-defense, the partial defense would make sure that women who reasonably lost their self-control in response to fear of serious violence would not be labeled "murderers" and would receive a lesser punishment.[258] Such a defense would reflect compassion for the battered woman's situation while at the same time providing for at least some punishment. It also has the added benefit of applying to a wider class of defendants.

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[257] This language is quite similar to what the English government has proposed. For the actual text of the British proposal, see U.K. MINISTRY OF JUSTICE, *supra* note 225, at 33 (proposing language for new partial defenses to murder).

[258] *See, e.g.*, MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 206 (3d ed. 2007) (noting that in 1999, for example, "the mean sentence length for manslaughter . . . was approximately half that of murder, and the mean time served for manslaughter was less than five years").

The most beneficial result of such a defense would be the elimination of the "suddenness" requirement following the provoking act.[259] A victim of sustained abuse who killed to thwart an anticipated but not imminent attack could claim that she killed out of fear of serious violence. Therefore, even if an abuser was asleep at the time of the fatal act, a battered woman could be convicted of voluntary manslaughter, rather than murder, if she shows that she honestly anticipated a future attack because of past abusive episodes and threats. In the case of an abuser who, before going to sleep, threatens to harm the battered woman when he wakes up (but makes no aggressive move at the time of the threat), the woman who kills him as he sleeps could potentially claim the defense on account of the gross provocation and fear of serious violence.[260] Evidence of past threats and abusive episodes could support the battered woman's fear and show how it was reasonable.

2. Benefits of Using Provocation vs. Self-Defense

Accommodating battered women who kill within the law of provocation, rather than self-defense, is preferable for several reasons. First, in contrast to self-defense, which either wholly endorses or totally denies a justification of a battered woman's actions, provocation recognizes that the battered woman's actions were wrongful to some degree.[261] Yet it acknowledges that she should not be fully blamed for killing her abuser.[262] While provocation law recognizes human weakness, it does not encourage it.[263] Thus, for a battered defendant, the partial defense appropriately distinguishes the circumstances surrounding a provoked homicide from the circumstances of a homicide that was either unavoidable or completely avoidable.

Second, considering the actions of a battered woman who kills her abuser within a provocation defense can emphasize the reasonableness of the woman's actions. Like self-defense, provocation compares the defendant's reaction to the way a reasonable, ordinary person would have reacted in the

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259 *See* HORDER, *supra* note 196, at 190 (discussing the existence of the "suddenness" requirement in provocation as detrimental to battered women defendants).

260 Under current provocation law in most jurisdictions, words alone do not constitute adequate provocation. *See, e.g.*, Girouard v. State, 583 A.2d 718, 722 (Md. 1991) (noting that it is the "overwhelming[]" rule that words alone do not constitute adequate provocation).

261 *See* Rosen, *supra* note 15, at 22–24.

262 *See id.* at 23.

263 *See* McAuley, *supra* note 195, at 20 (stressing that while the law must "take cognisance of ordinary human weaknesses, it must be careful not to promote them").

same circumstances.[264] By using a provocation defense, the battered woman can argue that she acted as any ordinary person would, given the years of abuse and terror endured at the hands of her abuser.

Though a battered defendant might still choose to use expert evidence of BWS, such testimony may not always be necessary to a provocation defense.[265] Since BWS emphasizes the objective *unreasonableness* of a battered woman's reactions, it could actually undermine any effort to establish that an ordinary person would react as the defendant did.[266] Instead, the defendant herself could testify about the battering episodes and the circumstances she found herself in to help support the reasonableness of her actions. If the woman's reactions were deemed objectively reasonable, the provocation defense would succeed.[267] Thus, using a provocation defense can rationalize, rather than pathologize, the woman's behavior.

Third, using the partial defense of provocation allows the battered woman to escape a murder conviction while still imposing some punishment for her actions. This is necessary because by killing her abuser outside of the traditional rules of self-defense, the battered woman has broken the law; thus, the principle of retributivism requires that she be punished for her crime.[268] Other principles of criminal law find that a person should be punished only to deter crime.[269] Though it is unlikely that a battered woman who kills her abuser will ever commit such a crime again,[270] the defendant must nevertheless

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264 *See* LEE, *supra* note 239, at 25–26 (discussing the comparison of the defendant to the "reasonable person" in provocation).

265 Though BWS was originally developed to support a self-defense claim, it might still be useful in a provocation defense. For example, BWS evidence could still bolster a defendant's credibility with the jury. *See* Carrie L. Hempel, *Battered Women Who Strike Back: Using Expert Testimony on Battering and Its Effects in Homicide Trials*, *in* SEXUALIZED VIOLENCE AGAINST WOMEN AND CHILDREN: A PSYCHOLOGY AND LAW PERSPECTIVE 71, 84 (B.J. Cling ed., 2004) (discussing how BWS can enhance a defendant's credibility).

266 *See* SCHNEIDER, *supra* note 73, at 136.

267 *See, e.g.*, Lawrence S. Lustberg & John V. Jacobi, *The Battered Woman as Reasonable Person: A Critique of the Appellate Division Decision in* State v. McClain, 22 SETON HALL L. REV. 365, 380 n.77 (1992) (explaining that a successful provocation defense acknowledges that the defendant acted as any reasonable person would under the same circumstances).

268 Retributivist principles dictate that punishment is justified when a person "deserve[s] it." Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983); *see also* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4 (1955) (explaining that retributivism finds that "punishment is justified on the grounds that wrongdoing merits punishment").

269 Utilitarian principles hold that punishment should only be imposed if it will provide an "overall benefit to society." WILLIAM WILSON, CENTRAL ISSUES IN CRIMINAL THEORY 51 (2002).

270 Since a battered woman who kills her abuser is unlikely to repeat the crime, specific deterrence through punishment is unnecessary to prevent her from committing the same crime in the future. *See* K. J.

be punished to send a message to society that the law will not condone such behavior.[271] No matter how egregious a person's conduct may be, human life—even a batterer's life—is not simply expendable.[272] By sending this message, the criminal law seeks to ensure that the sanctity of human life is respected.[273] Imposing some punishment also makes it clear that violent self-help is not encouraged. Therefore, by mitigating a murder offense to manslaughter, which carries a lesser social stigma[274] and a lesser sentence,[275] the goals of the criminal law are more effectively achieved.

3. Implications of Reformed Provocation

Reformed provocation doctrine would only provide a partial defense for battered women who preemptively kill their abusers, leaving such women to be convicted of voluntary manslaughter rather than receiving a full acquittal. Though at least some feminist proponents would not consider this outcome ideal,[276] this result would lead to the most just outcomes by balancing society's sympathy for the battered woman's circumstances with the goals of the criminal law to discourage violent self-help and to preserve the sanctity of human life.

The reformed provocation defense proposed here would replace the phrase "heat of passion" with "loss of self-control." Such language would implicitly accept that a person could kill out of emotions other than anger, for example

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WILSON, WHEN VIOLENCE BEGINS AT HOME 150 (2006) ("[O]nce released, women convicted of killing their abusive partners have an incredibly low recidivism rate.").

271 This is the theory of general deterrence, which is based on "the idea that offenders are punished not to deter the offenders themselves, but to discourage other potential offenders." EAMONN CARRABINE ET AL., CRIMINOLOGY: A SOCIOLOGICAL INTRODUCTION 233 (2004).

272 *See* Dressler, *supra* note 13, at 457–65.

273 *See, e.g.*, R v. Kirkham, (1837) 173 Eng. Rep. 422, 423–24 (K.B.) ("[The law] has at once a sacred regard for human life and also a respect for man's failings . . . . [T]hough the law condescends to human frailty, it will not indulge human ferocity.").

274 *See* TONI PICKARD ET AL., DIMENSIONS OF CRIMINAL LAW 441 (3d ed. 2002) ("[O]ne of the traditional justifications for punishment is the deterrent and educative impact of a criminal conviction—in other words, the stigma which accompanies it."); Uniacke, *supra* note 122, at 15 (a murder conviction "carries a very great social stigma").

275 *See* LEE, *supra* note 239, at 18 ("A voluntary manslaughter conviction makes a huge difference in one's possible sentence.").

276 *See generally* Bradfield, *supra* note 252 (discussing the need for the use of self-defense, rather than provocation, in cases where battered women kill their abusers); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988) (arguing that battered women can and should be accommodated within self-defense law).

fear, frustration, and desperation.[277] However, the "loss of self-control" requirement would not be much different from the current "heat of passion" element of provocation. The requirement that the killing be done as a result of a loss of self-control would provide a safeguard against partially excusing defendants who kill out of desire for revenge—that is, cold-blooded, premeditated killings.[278] Thus, if any evidence were presented that the defendant acted out of a premeditated desire for revenge, the defense would not apply.[279]

The proposed defense would have the benefit of not requiring that the killing be committed immediately after a provoking act. In this way, a battered woman defendant who kills in a nonconfrontational situation would still benefit from the defense if she could show that (1) there was a history of ongoing abuse committed by the deceased against her; (2) she legitimately feared serious violence from her abuser; and (3) this fear triggered her reaction. This loss of self-control element still has a reasonableness component, which compares the defendant's reactions to that of a normal, "reasonable" person in the defendant's shoes.[280] Nevertheless, with a showing of past battering and abuse, and consideration of how a normal person would react in the defendant's circumstances, a jury could reasonably find that the reformed provocation defense applies to the battered woman given her legitimate fear.

CONCLUSION

Currently, when a battered woman kills her abuser in the United States, she will generally either be found guilty of an intentional killing or acquitted on the basis of self-defense. If a battered defendant advances a self-defense argument, the use of BWS evidence may place excessive blame on the deceased abuser and focus attention on the woman's so-called psychological

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[277] *See* U.K. MINISTRY OF JUSTICE, MURDER, MANSLAUGHTER AND INFANTICIDE: PROPOSALS FOR REFORM OF THE LAW, IMPACT ASSESSMENT 12 (2008), *available at* http://www.justice.gov.uk/docs/murder-manslaughter-infanticide-impact-assessment.pdf (recognizing that when a battered woman kills, it can be based on fear, rather than anger or outrage).

[278] *See id.* at 13 (discussing the need for a loss of self-control element to safeguard against reducing culpability for revenge or "honour" killings).

[279] U.K. MINISTRY OF JUSTICE, *supra* note 225, at 43.

[280] This reasonableness component would have the same effect as the reasonableness component found in current provocation law. *See* Stephen James Odgers, *Contemporary Provocation Law—Is Substantially Impaired Self-Control Enough?*, *in* PARTIAL EXCUSES TO MURDER, *supra* note 122, at 101, 102–05 (discussing the "loss of self-control" and "ordinary person" requirements of provocation); *see also* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 973 (2002) (discussing the reasonableness component of current provocation law).

dysfunction. This, in turn, may result in the woman being acquitted because of jury sympathy and a feeling that the batterer "got what he deserved," rather than because of a finding, based on the law, that the killing was justified because there was no other alternative.

While other common law countries, such as Australia, have expanded self-defense laws and used BWS to accommodate battered women who kill their abusers in nonconfrontational situations, the ultimate outcome in these countries has been that battered women are portrayed as irrational and dysfunctional. Furthermore, expanding self-defense laws calls into question the issue of what kind of killings should be justified or excused by the law. If traditional standards of imminence and objective reasonableness are removed or distorted, more homicides might be carried out and those that are committed might not be properly punished.

Under the law of provocation, countries like England have recognized that a woman may react to battering and abuse out of fear as well as anger, and the killing of her abuser can be seen as reasonable in this light. However, the doctrine of provocation ensures that the woman still receives some punishment. It is not necessary to pathologize battered women with syndromes and insist that they are passive and helpless. In fact, such labels are hardly consistent with their actions, or the reality of women's experiences in general. By using provocation rather than self-defense law in cases where battered women preemptively kill their abusers, England has avoided the pitfalls presented by BWS while also recognizing that convicting such women of intentional, premeditated murder is not the best approach. England's proposed reforms will make it that much easier for battered women defendants to successfully use provocation as a defense.

The United States should use a reformed version of provocation law to accommodate battered women who kill their sleeping abusers, as this is the best compromise between two extremes and will more readily yield substantive justice for women who kill out of legitimate fear in a nonconfrontational circumstance. A battered woman's reactions can be compared to those of a reasonable, ordinary person in her shoes. If such a comparison is successful her actions will be deemed objectively reasonable, yet she will still receive some punishment.

Provocation originated as a doctrine designed to protect men who killed their adulterous wives.[281] As a result, provocation does not provide sufficient flexibility to address the circumstances of a battered woman who kills her husband. It is necessary to reformulate the defense to extend the time between the provoking act and the defendant's reaction, recognizing that fear can be as strong an emotion as anger. Reformed provocation will not only reduce a battered defendant's level of culpability,[282] it will also better reflect a woman's reality without "pathologizing" her. Allowing a defense of reformed provocation will also better enable courts and society to see a battered woman who kills her sleeping abuser as a reasonable actor in light of the extraordinary danger of her situation.

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[281] *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997) ("Adultery was . . . the classic source of adequate provocation . . . ." (citations omitted)).

[282] *See supra* Part IV.B.

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