

CONFRONTING OUR FEAR:
LEGISLATING BEYOND BATTERED WOMAN SYNDROME
AND THE LAW OF SELF-DEFENSE*

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In urging that reform's failures may be "normal," I am simply suggesting that legal reform is a work in progress. Statutory reform rarely ends anything. It may transform the debate, yet it would be naïve to believe that it could "end" a matter as ancient as sexism. This does not mean that reform is futile, but it may simply mean that reform demands perpetual vigilance.¹

— Victoria Nourse

INTRODUCTION

Battered women's self-defense cases arise less often than they did twenty years ago. Nationally, the likelihood that a female partner will kill her abuser remains extremely rare; a woman is much more likely to be killed by an intimate partner than to kill an intimate partner herself.² Between 1976 and 2005, the number of men murdered by intimates decreased by seventy-five percent, while the number of women killed by intimates remained steady.³ However, the broader social and legal implications, rather than the numbers, continue to make cases in which women kill their intimate partners compelling. Notwithstanding their rarity, they

* This is an abridged version of a longer essay that uses Vermont law as a case for reform: *Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and Self-Defense in Vermont*, Forthcoming, 34 Vt. L. Rev. (2009).

¹ Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 977 (2000).

² U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics (2007), available at <http://www.ojp.usdoj.gov/bjs/homicide/gender.htm>. "Male victims are more likely than female victims to be killed by acquaintances or strangers." *Id.*

³ U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics (2007), available at <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm#intweap>. The inference to be drawn from this statistic relies on a heteronormative assumption that women only kill their *male* abusers. The Bureau of Justice Statistics do not readily account for same-sex intimate relationships. *Id.*

continue to generate debate among scholars and social commentators.⁴ From a sociological standpoint, women who kill anyone—let alone their husbands or other intimates—defy traditional notions of women as “passive” caregivers and nurturers.⁵ The law’s treatment of battered woman defendants serves as a marker in the broader struggle for female equality.⁶ As Elizabeth M. Schneider’s work suggests, how the law responds to battered woman defendants is not a sporadic, “individual” problem, but a social problem that is “shaped by a larger culture of social violence.”⁷

Over the past twenty years much of the legal reform has focused on integrating theories about “battered women’s syndrome” (BWS) into legal doctrine. While not entirely uncontroversial, BWS has achieved acceptance among lawyers, advocates, and social-service providers.⁸ Recognizing the potential for women who kill their abusers to use the BWS theory, courts and legislatures have adopted measures that support the “battered woman” or “battered spouse” defense. Syndrome evidence does not justify the act, but instead supports the notion that battered women who kill their abusers may do so out of reasonable fear.⁹ Every state in the country allows for the admissibility of expert testimony on battered woman syndrome and evidence on battering to varying degrees.¹⁰ Other states provide explicit self-defense jury

⁴ ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 25 (2002). “Contrary to common assumptions, a woman is most likely to use lethal violence against a male partner during an attack on her or her child, not when he is asleep or incapacitated . . .” *Id.*

⁵ *Id.* at 45.

⁶ See Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 477–78 (1996).

⁷ ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING, 230 (2000) [hereinafter BATTERED WOMEN & FEMINIST LAWMAKING].

⁸ Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 221 (2002).

⁹ See BATTERED WOMEN & FEMINIST LAWMAKING *supra* note 7 at 124 (providing overview of “Battered Women Syndrome” defense and explaining, “[e]vidence of battering in a self-defense case is not relevant to justify the killing, but it provides the jury with the appropriate context in which to decide whether a woman’s apprehension of imminent danger of death or great bodily harm was reasonable.”)

¹⁰ Erin M. Masson, J.D., *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R.5TH 749 § 2(a) (2008).

instructions to supplement the use of BWS or general battering evidence.¹¹

These developments have raised both biased fears and legitimate concerns. Some argue that juries will confuse BWS testimony with a separate defense, deeming the prior acts of the abusive spouse an automatic justification for the defendant's actions.¹² Others claim that tailoring the law of self-defense to reach these cases undermines the traditional doctrine's moral framework. A feminist challenge to BWS has also emerged, arguing that when the law unfairly treats battered women as "psychologically impaired" victims, their necessary uses of force become less readily justifiable.¹³ All of these criticisms highlight a deeper problem in the law, in that traditional substantive rules of self-defense cannot adequately account for the broader context in which the killing takes place. As a result, in far too many cases women remain unfairly punished. Scholars and commentators continue to document how, despite advances in BWS reform, battered women who kill are denied the opportunity to fully present both the context and the reasonableness of their actions.¹⁴

This paper argues that BWS has reached the limits of its usefulness. Rather than relying on traditional self-defense coupled with expert testimony on BWS, legislatures should adopt a justifiable domestic homicide statute. This significant change to the substantive law can address the critics' concerns while providing greater access to justice for battered women defendants. Such a statute would recognize the relevance of the domestic context in interpreting these acts. Our growing understanding of domestic violence has shown that confrontations that occur within the domestic differ substantially from one-to-one situations that arise in the public sphere.

¹¹ *E.g.*, GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II: CRIMINAL CASES § 3.10.14 (4th ed. 2008).

¹² *See, e.g.*, *State v. Daws*, 662 N.E.2d 805, 808 (Ohio App. 2d Dist. 1994) (rejecting jury instructions that "tend[] to elevate the battered woman syndrome to the level of an independent affirmative defense. . .").

¹³ *See, e.g.*, *Burke supra* note 8, at 216–218.

¹⁴ *See, e.g.*, Leigh Goodmark, *When is a Battered Woman not a Battered Woman? When She Fights Back*, 20 YALE J. L. & FEMINISM 75, 76–77 (2008) (describing range of women disserved by the current model).

Isolating domestic self-defense from traditional self-defense cases that might otherwise unfold in a barroom brawl or street altercation prevents such archetypal acts from overshadowing reasonable acts informed by the wider context of domestic abuse and control. Adopting a model justifiable domestic homicide statute will acknowledge the difference, just as legislatures across the country did by criminalizing domestic assault with separate statutes distinguishing the context in which the abuse happened as relevant to the legal inquiry.¹⁵

Part One of this paper highlights the need for more ambitious reform while providing a historical and theoretical background on the admissibility of BWS expert testimony and the law of self-defense. Part Two details a proposal for legislative reform and explains the practical and theoretical rationales that support adoption of this approach. This Part contrasts the model statute with other proposed reforms, demonstrating how the more comprehensive remedy offered by the model statute can improve access to justice for battered women.

I. BATTERED WOMAN SYNDROME AND ITS LIMITS

Before the ascendance of the BWS theory, female defendants accused of killing their abusers avoided self-defense and instead argued insanity defenses “almost automatically”.¹⁶ Twenty years ago, women typically had two options: plead temporary insanity or plead guilty to manslaughter.¹⁷ Few could have considered such a choice viable or just. While insanity can provide a “complete” or “partial” defense depending upon the jurisdiction, a successful outcome could range from a mitigated charge resulting in incarceration to indefinite institutionalization.¹⁸ More broadly, insanity defenses used in these circumstances played into misogynistic stereotypes

¹⁵See Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1857-1860 (2006). See also, Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2004).

¹⁶ELIZABETH BOCHNAK, WOMEN’S SELF-DEFENSE CASES: THEORY AND PRACTICE 29 (1981).

¹⁷CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 68 (1989).

¹⁸BATTERED WOMEN & FEMINIST LAWMAKING *supra* note 7, at 117–118.

and ignored the realities of women who live with domestic violence. As Elizabeth Schneider writes, “[psychosis] theory reflects our history of stereotypes about women and a belief that femininity makes crime impossible, thus any woman committing a crime must be *crazy* to go so far outside her social role.”¹⁹ Insanity defenses failed to acknowledge that women who kill their abusers can do so in response to rational, competent fear.

In the late 1970s, Lenore Walker’s BWS theory offered the opportunity for women charged with killing their abusers to pursue self-defense instead.²⁰ Walker identified three stages that typify violent relationships and applied them to the theory of “learned helplessness” to explain why battered women fail to escape their abusers.²¹ According to the BWS model, “the threat of violence [by the abuser] is a permanent and ongoing part of the battered woman’s life. The question is not *whether* he will injure her again but *when*, and not whether he will injure her but how badly or whether he will kill her this time.”²² For those who have never experienced domestic violence, the BWS model may clarify and legitimize the impact of her experience on her behavior by explaining how and why her perceptions of the relationship may deviate from the perceptions of an outsider.

Expert testimony on BWS became an evidentiary mechanism to advance defenses that might otherwise fail. BWS testimony functions within the existing framework of common law self-defense, not as a separate affirmative defense.²³ At common law, an actor is justified in exercising deadly force to protect herself if she, “reasonably believes that [deadly force] is necessary to prevent imminent and unlawful use of deadly force by the aggressor.”²⁴ Generally,

¹⁹ ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 51 (2002).

²⁰ Jennifer Gentile Long & Dawn Doran Wilsey, *Understanding Battered Woman Syndrome and Its Application to the Duress Defense*, 40 APR PROSC 36 (2006).

²¹ *Id.*

²² GILLESPIE *supra* note 17.

²³ See BATTERED WOMEN AND FEMINIST LAWMAKING *supra* note 7 at 124.

²⁴ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01 (2006).

deadly force cannot be justified if another “nondeadly response” might have otherwise mitigated the threat, or if she used deadly force against an attack that she knew to be “nondeadly.”²⁵

Expert testimony supports the view that the defendant took reasonable action to save her own life, or the life of her children, against the imminent threat posed by her abuser.

Asserting self-defense requires the defendant to address not only the legal elements of the claim, such as “imminence” and “reasonableness,”²⁶ but also the biases of judges and juries who may fail to appreciate the dynamics of abusive relationships.²⁷ At a basic level, expert testimony on BWS has functioned to help the court understand the general patterns associated with abuse and why the defendant did not leave the situation.²⁸ Only then could syndrome evidence provide insight into the defendant’s subjective understanding of the “imminence” of the threat she faced, and enable the jury to appreciate whether the defendant also had an objectively “reasonable belief” of imminent harm.²⁹

Depending on the jurisdiction, defense attorneys prepare to rebut challenges to BWS-based self-defense claims at several phases of the trial. Initially, convincing the court to admit expert testimony on BWS imposed a threshold hurdle.³⁰ Today, an array of state appellate decisions addresses the admissibility of BWS expert testimony and more general testimony on battering.³¹ Most states now admit expert testimony on battering,³² but permitted uses may be

²⁵ *Id.*

²⁶ *See, e.g.,* OGLE & JACOBS, *supra* note 19, at 8, 26.

²⁷ BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 7, at 118.

²⁸ Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 463 (2006).

²⁹ *Id.*

³⁰ *See, e.g.,* BOCHNAK, *supra* note 16, at 210. “Because this use of expert testimony is novel, the defense must make a strong and thorough legal argument for its admission, generally including a pre-trial motion, trial memoranda, and offers of proof.” *Id.*

³¹ *E.g.,* State v. Anaya, 438 A.2d 892 (Me. 1981). *See also* GILLESPIE, *supra* note 17, at 226–227 n. 166 (listing early state appellate cases addressing expert testimony on BWS).

³² Masson, *supra* note 10.

limited and vary widely.³³

Approximately a dozen state legislatures have enacted statutes that specifically address the relevance of evidence on battering either as a general matter or in the specific context of self-defense.³⁴ These legislative approaches loosely demonstrate how the function of BWS testimony has transformed, as well the divergence in opinion as to the need for experts. Some statutes, such as Missouri's 1987 law, specifically reference "battered spouse syndrome" or "battered woman syndrome" and place such testimony solely within the province of trained psychiatrists or psychologists.³⁵ Other statutes reference syndrome, but do not explicitly require testimony by experts.³⁶ A third group of states have taken a more generalized approach and do not limit evidence on battering to the BWS or syndrome model.³⁷ All of these state laws deem at least some evidence of prior abuse relevant in self-defense cases, but they reflect a continuum of varying support for the BWS model. The divide as to whether to require expert testimony calls into question whether evidence on battering is only relevant to the defendant's state of mind, or whether BWS merely serves as a vehicle to explain the broader context in which the altercation occurred.

Courts and advocates have also struggled with whether and how the trial court should instruct the jury on the issue of past abuse as it relates to self-defense. Defendants often request

³³ *Id.*

³⁴ CAL. EVID. CODE § 1107 (2008); GA. CODE ANN. § 16-3-21(d)(2) (West 2008); IND. CODE § 35-41-1-3.3 (2008); KY. REV. STAT. ANN. § 503.050 (West 2008); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2008); MASS. GEN. LAWS ch. 233, § 23F (West 2008); MO. REV. STAT. § 563.033 (2008); OHIO REV. CODE ANN. § 2901.06 (West 2008); S.C. CODE ANN. § 17-23-170 (2008); VA. CODE ANN. § 19.2-270.6 (2008); WYO. STAT. ANN. § 6-1-203 (2008).

³⁵ MO. REV. STAT. § 563.033 (2008). *See also* OHIO REV. CODE ANN. § 2901.06 (West 2008) (addressing evidentiary relevance of "battered woman syndrome" when provided by "expert"); WYO. STAT. ANN. § 6-1-203 (2008) (defining "battered woman syndrome" as "subset under the diagnosis of Post-Traumatic Stress Disorder" and permitting admission of testimony by "expert").

³⁶ MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2008); S.C. CODE ANN. § 17-23-170 (2008).

³⁷ GA. CODE ANN. § 16-3-21(d)(2) (West 2008); IND. CODE § 35-41-1-3.3 (2008); KY. REV. STAT. ANN. § 503.050 (West 2008); MASS. GEN. LAWS ch. 233, § 23F (West 2008); VA. CODE ANN. § 19.2-270.6 (2008). *See also* CAL. EVID. CODE § 1107 (2008) (requiring expert testimony but referencing "intimate partner battering and its effects" rather than syndrome evidence).

tailored jury instructions that carefully define the elements of “imminence” or “reasonableness” and explain how the jury should apply the expert testimony in its deliberations.³⁸ State laws on special BWS or syndrome-related jury instructions on self-defense also differ. Massachusetts, California, and Georgia, for example, have adopted pattern jury instructions that specifically apply to the self-defense claims of battered women defendants.³⁹ Other states, such as Ohio, have rejected certain formulations of BWS instructions to avoid “elevat[ing] the battered woman syndrome to the level of an independent affirmative defense, rather than informing the jury that evidence of the syndrome is merely one factor to consider.”⁴⁰ In many states the admission of expert testimony does not guarantee that juries will receive instructions on how to apply the testimony to the elements of the law.

A final point of disagreement arises from cases categorized as “nonconfrontational” homicides.⁴¹ These cases are especially rare relative to confrontational cases, in which the act occurs during one-on-one domestic altercations.⁴² The term “nonconfrontational” applies when the act occurs in the absence of contemporaneous aggression on the part of the abusive partner.⁴³ *State v. Norman*⁴⁴ provides a well-known example. After decades of horrifying abuse, Judy Norman shot her husband while he slept on the couch, claiming self-defense with BWS expert testimony at trial.⁴⁵ The standard argument against the use of self-defense in Norman’s case

³⁸ OGLE & JACOBS, *supra* note 19, at 153–159.

³⁹ *E.g.*, CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 9.35.1 (2008); GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II: CRIMINAL CASES § 3.10.14 (4th ed. 2008).

⁴⁰ *State v. Daws*, 662 N.E.2d 805, 808 (Ohio App. 2d Dist. 1994).

⁴¹ *See* Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 556 (2007).

⁴² Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384 (1991).

⁴³ *See, e.g.*, Dressler, *supra* note 36, at 459–61.

⁴⁴ *State v. Norman*, 378 S.E. 2d 8 (N.C. 1989).

⁴⁵ Dressler, *supra* note 36, at 459–61.

contends that she could not possibly have considered her sleeping partner an “imminent” threat.⁴⁶

If he was sleeping, why didn’t she just leave? According to this critique only someone psychologically disconnected from reality could believe that killing a sleeping partner was the only means of escape.⁴⁷ This purist view of the role of imminence in self-defense may emerge from historical values underlying the doctrine, including the notion that “real men” face their adversaries and fight fair, rather than acting preemptively.⁴⁸ Defendants may face even greater difficulties if the court determines as a matter of law that the nonconfrontational act did not constitute self-defense and declines to instruct the jury on self-defense.⁴⁹

Those who would defend battered women in nonconfrontational situations counter that women who kill their abusers are “rational people acting in self-defense”⁵⁰. For many in abusive relationships, the threat of abuse is *always* imminent.⁵¹ Therefore, the legal definition of “imminence” should accommodate an examination of the defendant’s actions in context.⁵² As the argument follows, an abuse victim’s state of mind is only abnormal to the extent that her entire living situation, although somewhat commonplace in a society saturated by domestic violence, deviates substantially from what the average judge or juror might consider “normal.” The context of abuse is necessary to explain why these women acted reasonably in accordance with a legal doctrine that was not originally intended to recognize such claims.⁵³

Scholars on both sides of the “nonconfrontation” debate increasingly seem to agree that BWS only compounds the negative stereotype that these women are mentally instable.

⁴⁶ *Id.* at 463–64.

⁴⁷ *Id.*

⁴⁸ GILLESPIE, *supra* note 30, at 67.

⁴⁹ OGLE & ROBBINS, *supra* note 19, at 147–48.

⁵⁰ See, e.g., Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN’S L. J. 65, 86 (2008).

⁵¹ GILLESPIE, *supra* note 30, at 68.

⁵² *Id.* at 83.

⁵³ *Id.* at 78–81, 86.

Scholarship citing the Judy Norman case provides a good example.⁵⁴ Self-defense protectionists—such as Joshua Dressler, who does not consider Norman’s conduct an act of self-defense—argue that BWS has become a placeholder for mental incapacity in nonconfrontational cases.⁵⁵ On the other side, those who argue that Norman acted in reasonable self-defense often concede that advancing the BWS theory has the negative consequence of reinforcing the “traditional” insanity label.⁵⁶ Whereas the two sides differ as to whether Judy Norman was legally justified under the doctrine of self-defense, both might agree that the BWS theory is insufficient to completely rationalize these actions.

A growing consensus has emerged among feminist legal scholars as to the severe limitations posed by the BWS model.⁵⁷ As a psychological approach, BWS addresses only a narrow measure of why the defendant had a reasonable belief in imminent harm and places emphasis on the individual perspective of the defendant.⁵⁸ While references to the broader context of the abusive relationship are central to the syndrome analysis, they remain fundamentally tangential. The misuse of BWS evidence and the misconception that battered woman defendants have a psychological disorder, rather than a reasonable fear, becomes readily apparent in state court opinions compelling defendants who call BWS experts to undergo separate psychological exams at the request of the prosecution.⁵⁹ By opening the door to conflicting testimony from psychological experts, these decisions highlight the improper focus

⁵⁴ See Dressler, *supra* note 28, at 462–65; Angel, *supra* note 50, at 86; and Krause, *supra* note 41, at 4.

⁵⁵ Dressler, *supra* note 28, at 464.

⁵⁶ Angel, *supra* note 50, at 78–79. See also BATTERED WOMEN AND FEMINIST LAWMAKING, *supra* note 7, at 80 (“The [battered women’s defense] cases have demonstrated the tenacity of sex-stereotyping: despite the purposes of this legal strategy, old stereotypes of incapacity have been replicated in a new form.”).

⁵⁷ See Burke, *supra* note 8, at 232–67 for a thorough summary of the scientific, legal, and theoretical problems associated with the BWS model.

⁵⁸ See also, V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691 (2003) (discussing how increasing “individualization” in criminal law defenses can negatively impact individuals).

⁵⁹ *Bechtel v. State*, 840 P.2d 1, 9 (Okla. 1992); *State v. Manning* 598 N.E.2d 25, 28 (Ohio 1991); *State v. Myers* 570 A.2d 1260, 1266–67 (N.J. 1990); *State v. Briand*, 547 A.2d 235, 238 (N.H. 1988).

that such testimony places on the individual defendant and the pathology of her subjective state of mind. Understanding the defendant's actions as those that any reasonable person would take under the circumstances requires examination of the unique dynamics of one's relationship with the abuser, as well as the broader social and cultural contexts that foster those dynamics.⁶⁰ As a psychological mode of analysis directed at individual characteristics,⁶¹ the BWS approach provides a limited lens to examine the abusive patterns that lead some to reasonably fear for their lives.

Attempting to use BWS to inform the jury's understanding of abusive relationships when those relationships deviate from BWS norms poses even greater challenges. After several decades of exposure to popular legal discourse, a stereotypical "battered woman identity" has gained dominant acceptance, and failure to conform to it has proven problematic.⁶² The defendant who occasionally fights back against her abuser prior to the final altercation fails to conform to the "theory of learned helplessness" underlying the BWS model.⁶³ According to Leigh Goodmark, the rise of the BWS theory comes at a disadvantage to some defendants, because BWS invokes the image of the "passive, middle-class, white woman" victim who never fights back.⁶⁴ Goodmark finds that those who fight back tend to have the "fewest other options for addressing the violence against them."⁶⁵ The standard BWS theory "oversimplifies" experiences of battering.⁶⁶ Failing to closely conform to the paradigm of the "helpless victim" could have negative consequences when attempting to convince the jury of the reasonableness of the defendant's fear of harm, despite the fact that these fears may be no less justified.

⁶⁰ OGLE & JACOBS, *supra* note 19, at 5.

⁶¹ *Id.*

⁶² Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving From the White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1073-78 (2006).

⁶³ Goodmark, *supra* note 14 at 76-77.

⁶⁴ *Id.* at 77.

⁶⁵ *Id.*

⁶⁶ *Id.*

Women in non-heterosexual relationships, and men as well, may struggle with the BWS model due to its “wife abuse” premise.⁶⁷ Contemporary attempts to promote gender neutrality through use of the term “battered spouse” only contribute to this problem.⁶⁸ While traditional self-defense makes no distinctions relative to the parties’ relationship to one another, the BWS theory brings this relationship into focus to the detriment of homosexual defendants who do not fit the heterocentric model. According to Goodmark, “battered lesbians often face hostility and disbelief when they report abuse by their partners.”⁶⁹ Even as some states enact progressive same-sex marriage reforms,⁷⁰ the BWS model and the juries that apply it have not necessarily adapted accordingly.

Current legal reforms designed to ensure justice for battered women defendants⁷¹ fail to address the full range of social and legal barriers encountered by women with diverse experiences. The BWS model does not encompass many relationships and responses, nor does it provide a complete view of the contextual influences beyond individual psychology that contribute to very real and reasonable fears. Perhaps most harmfully, the BWS model has been manipulated to simply provide a new means of masking and perpetuating the old stereotypes of mental instability that continue to attach to women who kill their abusers. Attempting to convey reasonableness through pathology ignores the possibility that any rational woman in the same circumstance might take the same drastic measures upon weighing her options to escape alive.

⁶⁷ *Id.* at 90.

⁶⁸ *See, e.g.,* State v. Williams, 787 S.W.2d 308, 312 (Mo. 1990) (interpreting Missouri statute on “battered spouse syndrome” as not implying marital status). *See also* Gena Rachel Hatcher, *The Gendered Nature of Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality*, 59 N.Y.U. ANN. SURV. AM. L. 21, 23 (2004).

⁶⁹ Goodmark, *supra* note 14, at 108. Gay men, on the other hand, may face difficulty conforming to such a highly feminized “victim” standard. While this Note focuses on the impact of abusive relationship as they apply to women, the problem of abuse against men deserves consideration.

⁷⁰ *See, e.g.,* S. 115 (Vt. 2009); 2009 VT. ACTS & RESOLVES 3.

⁷¹ *See, e.g.,* WYO. STAT. ANN. § 6-1-203 (2008).

One need only look as far as the rise in domestic homicide committed by abusive partners⁷² to appreciate this reality.

II. LEGISLATIVE SOLUTION

A. Beyond BWS: A Justifiable Domestic Homicide Statute

Further reform of the criminal law offers the best opportunity to have the broadest impact on future defendants who act in defense of their own lives. Alafair Burke summarizes the two basic recommendations for further progressive reform of the current BWS-based approach to self-defense: either widen the evidentiary lens beyond BWS and keep the formal legal standards, or keep the BWS theory and adjust the legal standard.⁷³ A justifiable domestic homicide statute can achieve both reform objectives in smaller measure by refocusing the objective inquiry away from the “battered woman” to the domestic context informing the reasonableness of the act. This subtle evidentiary and doctrinal shift will ensure that the law acknowledges the distinct realities of domestic ties and abusive relationships without forcing women to conform to the psychological stereotypes associated with BWS. The overarching goal of this reform is to enable the rare subset of battered women who kill their abusers to pursue a defense that recognizes them as rational actors, rather than perpetuating the notion that only a syndrome can explain their actions.

Separating defensive actions that arise in the domestic context from traditional self-defense cases can assist prosecutors in making equitable charging decisions that reflect the justifiability of the alleged crime. Prosecutors exercise broad discretion in determining which

⁷² Vermont’s homicide statistics, for example, report that seven out of eleven homicides committed in that state in 2007 resulted from domestic violence against women. 2008 VT. ATT’Y GEN., DOMESTIC VIOLENCE FATALITY REVIEW COMMISSION REPORT 3, available at http://www.atg.state.vt.us/upload/1208265187_2008_Final_Draft_Commission_Report.pdf.

⁷³ Burke, *supra* note 8, at 217.

charges to file or whether to file at all.⁷⁴ Studies show that indictment, prosecution, and sentence determinations reflect gender bias against women who kill their abusers.⁷⁵ Providing a defense that reflects the full justification exculpating the reasonable response may deter prosecutors from filing unwarranted charges.⁷⁶

Conversely, reform that legitimizes the relevance of the domestic context can reduce the likelihood of defense error. The prevalence of negative stereotypes and reticence among battered women to convey instances of abuse pose documented barriers to defense attorneys' attempts to zealously represent potential self-defense clients.⁷⁷ As Sarah Buel notes, "even experienced defense lawyers often fail to listen effectively and support the battered client throughout the legal process."⁷⁸ The fragmented state of the law across the country also invites misinterpretation and harmful oversight on the part of defense attorneys.

Individual state reform efforts enacted over the past several decades have focused on modifying evidence rules, but these reforms retain undue focus on the defendant's state of mind at the expense of broader inquiry into the circumstances that inform responses to violence in the domestic context. Adopting legislation on the admissibility of BWS expert testimony, such as the Missouri approach,⁷⁹ or "battering and its effects," like the California statute,⁸⁰ would offer little on the whole to guarantee justice for battered woman defendants. While these statutes remove significant discretion from the trial courts and provide consistency,⁸¹ such legislation

⁷⁴ LEONARD, *supra* note 4, at 31.

⁷⁵ *Id.* at 27.

⁷⁶ *Id.* at 31 ("When prosecutors choose to charge women for killing abusive partners, they may do so in part because they know that they can get juries to convict women in these circumstances.") *Id.* (internal quotes omitted).

⁷⁷ *Id.* at 30–31.

⁷⁸ Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L. J. 217, 226 (2003).

⁷⁹ MO. REV. STAT. § 563.033 (2008).

⁸⁰ CAL. EVID. CODE § 1107 (2008).

⁸¹ See, e.g., Andrea E. Pelochino, *Justifiable Crimes: Working Toward an End to Injustice for Battered Women Convicted of Crimes Spurred by Their Abusers*, 36 MCGEORGE L. REV. 905, 911 (2005).

only replicates the well-founded policy concerns that have emerged over the past few decades.

The growing consensus as to the issue that legislation should address has shifted considerably since these reforms took hold. As Elizabeth Schneider suggests, state legislation directed toward the self-defense problem exhibit several shortcomings: preventing battered women from being understood within the existing criminal law framework, failing to remedy the challenge of unequal application of the law, and limiting potential utility through restrictive language.⁸² A separate statute for domestic justifiable homicide would not raise these concerns.

A “Justifiable Domestic Homicide” statute designed to advance American criminal jurisprudence would read as follows:

Justifiable Domestic Homicide⁸³

If a person, in the just and necessary defense of his or her life or the life of his or her child, guardian, or ward, kills or wounds a family or household member,⁸⁴ he or she shall be guiltless if the degree of force used is reasonable under the circumstances.

In evaluating reasonableness, the jury may consider: prior use of unlawful force against the person and whether the person had a reasonable belief of possible unlawful force in the future. Evidence of a person’s having done only what the person honestly and instinctively thought was necessary constitutes strong evidence that reasonable action was taken.

B. Basic Elements of a Model Statute

This model statute diverges from the status quo in several important ways. First, the domestic factor becomes a central feature of the defense, paralleling growing recognition of the uniqueness of the domestic relationship and its importance as a factor in the crime of assault.

Separating domestic cases in conformity with existing domestic assault statutes will re-orient the

⁸²BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 7, at 143.

⁸³ The overall structure of the statute is derived from Vermont’s existing justifiable homicide statute, VT. STAT. ANN. tit. 13, § 2305 (2008), because premising these defenses on rationality, rather than abnormal psychology, would continue to exculpate on the basis of justification. The statute isolates *acts* that occur in the domestic context by giving relevance to prior unlawful force and avoiding a formulation that would *excuse the actor*, thereby retaining justification as the underlying premise of the defense.

⁸⁴ See, e.g., VT. STAT. ANN. tit. 13, § 1101 (defining “family or household member” expansively) See also *State v. Swift*, 844 A.2d 802, 805 (2004) (interpreting the Vermont definition).

role of the domestic relationship to support claims of reasonable action premised on fear informed by abuse. The model statute emphasizes greater inquiry into the reasonableness of the act in context instead of focusing explicitly on the “battered woman” as a marker for “reasonableness under the circumstances.” Experience has shown that a “battered woman” identity does not inform one’s rational response to ongoing domestic abuse; the domestic abuse does.⁸⁵ The model statute achieves this shift by adopting the “family or household member” definition from existing domestic assault statutes, while avoiding the narrow and increasingly outmoded language of “battering” and “battered woman syndrome.”⁸⁶ Instead of isolating battered women for “special” treatment under the law, the model statute separates acts occurring in the context of the domestic sphere, subjecting these acts to scrutiny under a particularized standard of reasonableness.

Second, this statute eases the current problem battered women face in addressing the question of why they stayed in the relationship by dispensing of the imminence requirement.⁸⁷ Theoretically, the lack of a discrete definition of “imminence” in the case law might provide flexibility for the defense to pursue jury instructions on self-defense that place less emphasis on temporality. But the difference between “imminent” and “immediate” is significant in these cases.⁸⁸ Though rare, nonconfrontational cases may fail to invoke the self-defense doctrine “solely” due to the imminence standard.⁸⁹ Victoria Nourse’s research also shows that despite the logical expectation that imminence concerns would arise mostly in nonconfrontational cases, seventy percent of appeals challenging imminence issues involved more common,

⁸⁵ See OGLE & JACOBS, *supra* note 19, at 7.

⁸⁶ See *supra* Part II.A (describing model statute).

⁸⁷ See, e.g., *State v. Forant*, 719 A.2d 399, 400 (1998) (reviewing jury instruction defining imminence element as “imminent danger of immediate bodily harm”).

⁸⁸ See, e.g., Victoria Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. R. 1235, 1262 (2001).

⁸⁹ Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 346 (2007).

confrontational scenarios.⁹⁰ Cases involving battered women-defendants did not suggest time-lapse problems, but instead involved guns, fights, or other threatened aggression by abusers.⁹¹

Nourse theorizes that despite how courts have focused on the “imminence” element, temporality and nonconfrontation are rarely concerns in battered woman cases.⁹² Rather than emphasizing the importance of temporality of “imminence,” the addition of words like “immediate” in self-defense instructions can elicit an undue objective inquiry into the defendant’s possible alternatives or opportunities for retreat.⁹³

As the law presently stands in some places, without a concise definition of imminence, jurors may place too much objective importance on why a battered woman-defendant did not leave, giving less consideration to the subjective and objective aspects of the defendant’s reasonable fear. The “imminence” requirement imposes a temporal constraint that imagines confrontation between adversaries without recognizing the constraints created by the past and future ties of the domestic relationship. Arguing that battered women may have the ability, albeit limited, to escape their abusers in the future, even Joshua Dressler implicitly acknowledges that the domestic context in which these acts occur requires a broader examination of past conduct and future opportunity that the “imminence” standard does not readily provide.⁹⁴ Rather than relying on “imminence” as the gatekeeper of temporal reasonableness, the model statute frames temporality within the domestic context, allowing inquiry into “whether the person had a reasonable belief of possible unlawful force in the future,” a factor that *informs* “imminence.” Using a separate defense that does not rest on “imminence” in these rare circumstances will ensure that the element retains its intended, temporal use as a traditional self-defense element.

⁹⁰ Nourse, *supra* note 88, at 1253.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1262–64.

⁹⁴ *Id.*

Furthermore, this approach prevents the over-extension of “imminence” when cases implicate reasonable responses to domestic violence that render this rigid temporal element less useful.

Third, this statute includes the language of “honestly and instinctively” to strike a better balance on the element of reasonableness. In states that do not recognize imperfect self-defense the defendant must either “perceive the situation in a reasonable manner,” or “have some objectively identifiable reason for departing from reasonable behavior” in order to satisfy the element of reasonableness.⁹⁵ Attempting to conform to this formulation of self-defense places battered women defendants in an evidentiary double-bind; they must demonstrate objective rationality, and yet their irrational adversaries render “imminence” a constant that defies legal measure. In jurisdictions that recognize imperfect self-defense, however, killing another because of an unreasonable belief of imminent danger renders the actor guilty of manslaughter instead of murder.⁹⁶ An honest, but incorrect or “mistaken” belief diminishes the actor’s culpability, but does not fully justify the act.⁹⁷ In California, for example, BWS evidence is relevant in murder cases to establish both self-defense, in the case that the defendant “actually and reasonably” believed force was necessary, as well as imperfect self-defense, should the jury find the defendant’s “actual” belief objectively unreasonable.⁹⁸ To this extent, perfect self-defense requires a more stringent all-or-nothing inquiry on the part of the jury, because the jury must find the defendant’s belief both *subjectively* and *objectively* honest and reasonable in order to acquit.

The phrase “honestly” in the model statute addresses the subjective aspect of reasonableness,⁹⁹ while the term “instinctively” emphasizes the more universal, objectively

⁹⁵ See, e.g., *State v. Shaw*, 168 Vt. 412, 721 A.2d 486, 491 (1998).

⁹⁶ CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 134–35 (2003).

⁹⁷ *Id.*

⁹⁸ *People v. Erickson*, 57 Cal. App. 4th 1391, 1399 (Cal. Ct. App. 1997).

⁹⁹ See, e.g., *State v. Wheelock*, 158 Vt. 302, 308, 609 A.2d 972 (1992).

human quality of acting in self-preservation. Rather than provide for imperfect self-defense, the model statute will lead to a two-part inquiry that more accurately reflects the response of a rational actor. Imperfect self-defense defeats the premise that battered women can be rational actors capable of full exculpation, because the doctrine does not encompass reasonable belief of harm.¹⁰⁰ Instead, the “honestly and instinctively” approach can be used to *inform* the objective test, as to whether reasonable action was taken.

This theory of “honestly and instinctively” is derived from the United Kingdom’s Justice and Immigration Act of 2008.¹⁰¹ A provision that revises self-defense addresses aspects of a consultation paper, *Partial Defences to Murder*, published by the United Kingdom Law Commission.¹⁰² The paper considered whether to abolish the doctrine of provocation, as the current doctrine does not provide a defense “to a person in an abusive relationship who acts in genuine fear of serious violence, unless the danger is imminent or they are acting under sudden and immediate loss of self-control.”¹⁰³ The 2008 reform redefines and clarifies the element of “reasonable force” in self-defense.¹⁰⁴ To determine “whether the degree of force used by [the defendant] was reasonable in the circumstances . . . by reference to the circumstances as [the defendant] believed them to be,” the law allows for two considerations, including “evidence of a person’s having only done what the person *honestly and instinctively* thought was necessary for a legitimate purpose.”¹⁰⁵

U.K. policymakers have observed that the domestic deserves legal recognition. In July

¹⁰⁰ See Burke, *supra* note 8, at 241 (“When an actor subjectively but unreasonably believes that her use of force is justified, she has at best a claim of imperfect self-defense, which mitigates punishment but does not fully exculpate.”).

¹⁰¹ Criminal Justice and Immigration Act, 2008, c.4 (U.K.), *available at*

<http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=criminal+justice>.

¹⁰² Law Commission, *Partial Defences to Murder: Provisional Conclusions on Consultation Paper No 173* (UK) (May 1, 2004).

¹⁰³ *Id.* at 1.

¹⁰⁴ Criminal Justice and Immigration Act, *supra* note 101.

¹⁰⁵ *Id.* (emphasis added).

2008, the U.K. Ministry of Justice launched a comprehensive review of the law of homicide based on these developments, recommending that the law of provocation be divided into two separate partial defenses, one triggered by fear and the other triggered by anger to capture instances of “excessive” force.¹⁰⁶ The report recommends two relevant defenses to homicide in the domestic context: self-defense and the partial defense of provocation.¹⁰⁷ The difference between complete self-defense and the partial defense of provocation would depend upon whether the degree of force used was objectively reasonable.¹⁰⁸ While the overall U.K. approach adopts imperfect self-defense,¹⁰⁹ in the context of the model statute, this language merely adjusts the two-part inquiry required under perfect self-defense to more accurately reflect the response of a rational actor. Rather than allowing honesty of belief to subsume the objective inquiry when the act was objectively unreasonable, as in imperfect self-defense, honesty of belief can *inform* the objective reasonableness when coupled with instinct.

Finally, this model statute rejects duress-based reforms proposed to remedy the current regime.¹¹⁰ Relying on duress would only reproduce self-defense criticisms in a new form. Under the Model Penal Code, a defendant can claim duress if she “was coerced [to engage in ‘the conduct charged to constitute an offense’] by the use of, or a threat to use, unlawful force against [her] person or the person of another, that a person of reasonable firmness in [her] situation would have been unable to resist.”¹¹¹ The actor cannot use the duress defense “if the actor recklessly placed [her]self in a situation in which it was probable that [she] would be

¹⁰⁶ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* 2, 10–11 (UK) (July 28, 2008).

¹⁰⁷ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, 10 (UK) (July 28, 2008).

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.*

¹¹⁰ *See*, Dressler, *supra* note 28, at 470; and Long & Wilsey, *supra* note 27, at 38.

¹¹¹ MODEL PENAL CODE § 2.09 (2001).

subjected to duress.”¹¹² Whereas duress widens the contextual lens to examine coercion, traditional duress does not reach the predicament of battered women defendants charged with homicide, nor does it contemplate the sort of “coercion” that battered women face.

Enabling defendants to claim duress as a defense to homicide would require a much more sweeping reconsideration of the doctrine as a whole. At common law, defendants cannot raise duress as a defense to murder.¹¹³ Accordingly, the federal courts, the U.S. military justice system, and most states, by statute or case law, follow this common law rule.¹¹⁴ Only eight states have contradicted the common law rule,¹¹⁵ while only a few other states enable defendants to use duress to mitigate murder to manslaughter.¹¹⁶ Several federal courts have considered the admissibility of BWS evidence to support duress claims to charges other than homicide with mixed results, including a Fifth Circuit decision that did not admit expert testimony “because duress was a purely ‘objective’ test.”¹¹⁷ Attempts to enact reform contrary to this weight of authority would meet strong opposition.

The duress defense also carries its own traditional conceptualization that can inform the objective reasonableness inquiry to the detriment of a relatively non-traditional battered woman actor. The “coercion” element¹¹⁸ of duress requires an assessment of the coercive party’s actions—in this case, the abuser—to determine the defendant’s reasonableness. Because the typical duress case imagines “a gun pointed at the head as the ultimate persuader to do (or not do) something,” the core of this inquiry would tend to examine whether the defendant was

¹¹² *Id.*

¹¹³ Steven J. Mulroy, *The Duress Defense’s Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 172 (2006).

¹¹⁴ *Id.* at 172–73.

¹¹⁵ *Id.* at 173 n.78

¹¹⁶ *Id.* at 174.

¹¹⁷ *Id.* at 199–202 (citing *United States v. Willis*, 28 F.3d 170 (5th Cir. 1994)).

¹¹⁸ MODEL PENAL CODE § 2.09 (2001). Under the MPC, the jury must find the defendant “was coerced”. *Id.*

coerced to act against *a third party*.¹¹⁹ Examining whether the coercive party forced the defendant to act against *himself* could stretch the bounds of objective reasonableness beyond possible exculpation under this defense. Walker's theory, as well as the "coercion and control" model of domestic violence,¹²⁰ suggests that the type of coercion that typifies abusive relationships originates in the abuser's desire to dominate and control his partner, but this theory of coercion does not necessarily extend as far as the duress approach would require.¹²¹ Like traditional self-defense, duress does not offer an alternative for battered women-defendants that would not raise a new set of concerns.

CONCLUSION

Legal reform to promote greater justice for battered women cannot end with battered woman syndrome and traditional self-defense. The first step for advocates is to recognize the limitations posed by the law as it currently stands. In the process of defending the legitimacy of battered women's experiences in the face of cultural and legal bias, reforms to date exhibit a reasonable reluctance to step away from the problem and imagine new solutions. Justifiable domestic homicide will accomplish this by moving the focus beyond the defendant's subjective state of mind and away from the tangential issue of whether she suffers from BWS. Instead of measuring reasonableness against traditional self-defense norms, the model statute acknowledges that actions arising by and through domestic circumstances are unique and require a wider lens. As domestic violence awareness grows and access to resources improves, a woman's failure to leave may only become more incomprehensible to some. Rather than perpetuating arguments in favor of incremental steps that will achieve less-than-ideal solutions, this paper recommends that future reforms adopt a bold approach that reaches the core dilemmas that battered women who

¹¹⁹ Burke, *supra* note 8, at 252, 265.

¹²⁰ See EVAN STARK, COERCIVE CONTROL 5 (2007).

¹²¹ Burke, *supra* note 8, at 253–54.

kill their abusers face when they act in self-preservation.