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Killing for Possession and Killing for Survival: Gender and the Criminal Law of Provocation and Self-Defense

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I. INTRODUCTION

The doctrines of provocation and self-defense tend to excuse typically masculine outbursts of violence. The histories of both doctrines have been grounded in masculine conceptions of violence and reasonableness. These male dominated assumptions have excluded an effective framework for understanding women's experiences and have consequently led to a failure of the criminal justice system to adequately protect women who are the victims of domestic violence.

In Part II, I will discuss the history and origins of the doctrine of provocation. This section breaks down the legal elements of voluntary manslaughter, comparing the common law approach and the modern approach to the language of the Model Penal Code. Part III analyzes why the doctrine of provocation primarily benefits male defendants who kill their intimate partners and how the doctrine condones violence against women. Part IV summarizes the law of self-defense and briefly explains Battered Woman's Syndrome and its applicability to claims of provocation and self-defense. This information will serve as a backdrop for Part V, in which I focus on how the gender biases, present in the law of self-defense, do not adequately protect women who have been victims of domestic violence.

II. HISTORY AND DEVELOPMENT OF PROVOCATION

In criminal law, provocation is a possible partial defense in which the defendant alleges a sudden or temporary loss of control as a response to another's provocative conduct.[1] If successful, the defense will mitigate an intentional murder charge to a voluntary manslaughter charge.[2] Although voluntary manslaughter involves a criminal killing, it carries a lesser sentence

[1] JOHN KAPLAN, ROBERT WEISBERG, & GUYORA BINDER, CRIMINAL LAW CASES AND MATERIALS 381 (2008).
[2] *Id.*

then homicides classified as murder.[3] To fully understand how the doctrine of voluntary manslaughter affects women, an analysis of the common law origin of the provocation doctrine and its evolution is necessary.

A. The English Common Law

The doctrine of manslaughter originated in sixteenth century England as a legal remedy to protect men who attempted to defend their honor through physical attack or mutual violence from the death penalty.[4] Over time this approach came to require a finding of three elements: (1) the defendant was provoked; (2) the defendant remained provoked during the commission of the crime, and (3) the provocation was deemed sufficient to enrage a reasonable man.[5]

The English common law approach, often referred to as murder in the "heat of passion" eventually expanded to include homicides committed in response to a wife's adultery.[6] This inclusion of wife's adultery as adequate provocation reflects the historical treatment of wives as the property of their husbands.[7] Under the doctrine of coverture, a woman's rights were subsumed by those of her husband.[8] As articulated by historian Lawrence Stone, "Women have for millennia been regarded as the sexual property of men and that their value of this property is diminished if it has been or is being used by anyone other than the legal owner."[9] It is important

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[3] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 573 (1972).
[4] *See* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 426 (1982).
[5] *Id*. at 427.
[6] Alafair S. Burke, *Equality, Objectively, and Neutrality*, 103 MICH. L. REV. 1043, 1061-162 2005) (reviewing CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003)).
[7] *Id*.
[8] *Id*.
[9] *See* LAWRENCE STONE, THE FAMILY SEX AND MARRIAGE IN ENGLAND 1500-1800, at 138 (1979).

to note that even as the doctrine of provocation evolved it was only available to men.[10] It took 275 years for an English court to finally acknowledge that women who kill their adulterous husbands could also employ the provocation defense.[11]

B. The American Common Law

Early American common law adopted the English model of provocation. The only noteworthy deviation is that the American common law streamlined what was considered "adequate provocation" by adopting a categorical approach to provocation.[12] Under this approach, adequate provocation was limited to four main categories: physical assault, unlawful arrest, mutual combat, and witnessing the actual adultery of one's spouse.[13] In limiting mitigation to the four aforementioned categories, the common law established a clear standard of when a defendant's violence could be considered reasonable and thus justified or excused.[14]

C. The Modern Trend

The modern approach expanded the definition of adequate provocation by abandoning the legal categories of provocation and replacing it with a reasonable person test.[15] The reasonableness of a defendant's actions is evaluated under a two-prong test that incorporates an objective and subjective inquiry. The first prong requires a finding of adequate provocation.[16]

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[10] *See* Caroline A. Forell, *Gender Equality, Social Values and Provocation Law in Australia, Canada, and the United States*, 14.1 J. OF GEN., SOC. POL'Y. & L. 31 (2006).
[11] Antonia Elise Miller, Note, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249 (2010) [hereinafter Miller, *Inherent Unreasonableness*].
[12] Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80 (1992).
[13] Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 670 (2001) (quoting Coker, *supra* note 10, at 78) [hereinafter Miller, *(Wo)manslaughter*].
[14] *Id*.
[15] KAPLAN, WEISBERG & BINDER, *supra* note 1, at 350-52.
[16] *Id*.

Adequate provocation is recognized as long as a reasonable person would have been provoked.[17] Furthermore, it must be established that the defendant was in fact provoked.[18] The second prong requires a finding of an insufficient time to cool down.[19] In other words, a defendant must show that there was no interval between the provocation and the killing that would allow the person to process the provocation and regain control. This constraint is justified by the notion that after a period of time, a reasonable provoked person would have cooled off between the provocation and the homicide.[20] As noted previously, the time must be objectively insufficient (a reasonable person would not have cooled), and subjectively insufficient (the defendant did not in fact cool off). In addition, the modern approach made clear that adequate provocation included not only reactions out of rage or anger but also any violent, intense, high-wrought or enthusiastic emotion.[21] Moreover, adequate provocation could also be found where there was a period of prolonged taunting and provocation.[22]

D. Extreme Emotional Disturbance and the Model Penal Code

The American Law Institute ("ALI"), the creator of the Model Penal Code ("MPC"), criticized the common law's formulation of voluntary manslaughter as being underdeveloped, claiming that the defense existed in only the "barest skeletal delineation."[23] The MPC version of provocation is referred to as extreme emotional disturbance ("EED") and is contained in section 210.3(b) of the Code. The Code prescribes that:

> (1) Criminal homicide constitutes manslaughter when . . . (b) a homicide which would otherwise be murder is committed under the influence of

[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] LAFAVE & SCOTT, *supra* note 3, at 663.
[21] People v. Berry, 556 P.2d 777, 781 (1976).
[22] *See* State v. Gounagias, 153 P. 9 (1915).
[23] MODEL PENAL CODE § 210.3 cmt. 2 (2004).

> extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[24]

The MPC's formulation of EED "was designed to sweep away 'the rigid rules that have developed with respect to the sufficiency of a particular types of provocation, such as the rule that words alone can never be enough.[25]

The MPC approach is more subjective than the common law or modern trend approaches. Throughout this paper I will generally refer to MPC's approach as a test of subjective reasonableness. However, it is important to note that the MPC's formulation contains both objective and subjective components. The objective component comes into play when evaluating the defendant's reaction to the extreme emotional disturbance and the nature of the extreme emotional disturbance. The EED must be caused by a "reasonable explanation or excuse,"[26] and the defendant's provoked response must be objectively reasonable. Theoretically the inclusion of this objective inquiry was to prevent abuse of the doctrine by creating a limit to the application of the defense.[27]

The subjective element comes into effect when the defendant's extreme emotional disturbance is evaluated "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[28] To be clear, the subjective inquiry is taken into consideration only in determining the defendant's perceptions of the circumstances, not in

[24] MODEL PENAL CODE § 210. 3(1)(b) (2004).
[25] People v. Cassa, 404 N.E.2d 1310, 1312 (1980).
[26] MODEL PENAL CODE § 210.3(1)(b)(2004).
[27] MODEL PENAL CODE § 210.3(1)(b)(2004)cmt.5(a).
[28] MODEL PENAL CODE § 210.3(1)(b)(2004).

assessing the reasonableness of the resulting response.[29] However, it remains unclear what factors a jury should consider in attempting to analyze the reasonableness of a defendant's actions "from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." In general it has been accepted that only physical attributes of the defendant, such as age, race, handicaps, and mental capacity, should be considered, not idiosyncratic moral values.[30] Nonetheless, the ALI has not articulated a bright line test for determining which elements of an actor's situation are relevant.

III. GENDER BIAS IN PROVOCATION

A. Characteristics of Intimate Partner Killings

Although both women and men kill, homicide is an act primarily committed by men.[31] In general, when men kill, they are "more likely to kill acquaintances or strangers," while women commonly kill an intimate partner, such as a boyfriend or husband. [32] Although women are less likely to be the victims of homicide in general, women are much more likely to be the victims then men when it comes to intimate partner homicide.[33] In 2007, the number of females murdered by intimates was 1,640 while the number of males murdered by partners was 700.[34] Females made up 70% of the victims killed by an intimate partner in 2007, a figure that has

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[29] Kevin John Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 68-69 (1998).
[30] MODEL PENAL CODE 210.3(1)(b)(2004) cmt.5 (a)
[31] Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L & WOMEN'S STUD. 255, 261 (1996).
[32] Geris Serran & Philip Firestone, *Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories*, 9 AGGRESSION & VIOLENT BEHAV. 1, 1-15 (2004).
[33] Keller, *supra* note 31, at 261.
[34] *See* BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE (2008), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=5.

changed little since 1993.[35] Evidence from police files, psychiatric reports, case law, and interviews clearly demonstrate that the motives behind intimate partner homicide are sex segregated.[36] Male motives behind intimate homicide predominately revolve around possessiveness.[37] Common possessive motives include "the husband accusing the wife of sexual infidelity, by her decision to end the relationship, and/or by his desire to control her . . . ."[38] In contrast, when women commit domestic homicide, they tend to do so out of fear and as a result of continued abuse.[39] Research further suggests that male victims of female-initiated intimate homicides "often initiate the homicidal act with threats of or actual physical violence."[40] In other words, women kill their abusers, while men kill their partners out of jealously, desertion, or actual or perceived infidelity.

B. The Gendered Reality of Reasonableness

Regardless of whether the objective modern approach or the MPC's subjective approach is applied, the concept of reasonableness is central to the law of provocation. On their face, the modern and MPC approaches to provocation seem gender neutral. Under the modern approach, the key question is whether the provocative incident was sufficient to cause a reasonable man to lose their sense of self-control.[41] Although the modern approach has moved towards an arguably more gender neural standard, with the replacement of the "reasonable man" standard with the "reasonable person" standard, masculine notions of reality characterize the reasonableness requirement of adequate provocation. This gendered characterization of reasonableness has

[35] *Id*.
[36] Serran & Firestone, *supra* note 32, at 12.
[37] *Id*.
[38] *Id*.
[39] Keller, *supra* note 31, at 261.
[40] Serran & Firestone, *supra* note 32, at 13.
[41] Miller, *Inherent Unreasonableness*, *supra* note 11, at 260.

granted protection to angry, jealous men who kill their partners in the heat of passion, but not women who kill their partners for the same reason.

As previously noted, the English courts adopted the "reasonable man" standard in the middle of the nineteenth century.[42] During this time period, married women were considered the property of their husbands.[43] In addition, the reasonable requirement was commonly thought to be inapplicable to women due to their irrational nature.[44] The "reasonable man" standard reveals centuries of discrimination towards women.

Women are not accommodated in the traditional male concept of reasonable provocation. As one scholar observes, "Instead of developing a new standard free from a history of sex discrimination and free of gendered language, the legal community continues to hold females to a standard of reasonableness clearly rooted in the male experience." Female defendants are disadvantaged when the reasonableness standard is objectively applied under the modern approach because what we consider reasonable is influenced by prevailing gender stereotypes and deeply ingrained societal norms. These beliefs make it seem acceptable for a man to kill his partner, but irrational for women to do the same.

A man who kills his wife after finding her with another man is the paradigm example of provocation. Although, his conduct is considered morally wrong and reprehensible, his conduct is not viewed as shocking, but rather expected, or at least easily foreseeable.[45] Conversely, a woman who kills her husband or partner after learning of his infidelity are viewed as irrational

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[42] Burke, *supra* note 6, at 1062.
[43] Laurie J. Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1691 (1986).
[44] *Id*.
[45] Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R. – C.L. REV. 623, 628-29 (1980) [hereinafter Schneider, *Equal Rights*].

and particularly deviant.[46] In commenting on how the law responds to female killers, Professor Schneider notes, "The law has traditionally viewed husband-killing as a crime that strikes at the root of all civil government, threatening a basic conception of traditional society."[47] Reflecting on the different perceptions of female and male intimate-partner killers, William Blackstone explains:

> [I]f the baron kills his feme it is the same as if had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king.[48]

This societal belief that it is almost inherently unreasonable for a woman to kill her partner makes it more difficult for women to avail themselves of the provocation doctrine. As Professor Schneider notes, "It is simply impossible for many, lawyers, judges, legal scholars, and the public at large to imagine that women are acting reasonably when they kill their intimate partners."[49] Considering the different reasons which men and women kill their intimate partners, as previously discussed, it is particularly troubling that women who have killed their batterers have received harsher sentences than men who kill their partners due to perceived or actual infidelity.[50]

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[46] *Id*.
[47] *Id*. at 629.
[48] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 418 n. 103 (1987).
[49] Elizabeth M. Schneider, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Woman who Kill: Resistance to Equality*, 57 U. PITT. L. REV. 477, 504 (1996) [hereinafter Schneider, *Self-Defense*].
[50] Margaret A. Cain, Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 36, 380 (1999) (discussing that when a man kills his partner, the average prison sentence is two to six years, while a woman who kills her batterer receives an average prison sentence of twelve to sixteen years).

C. An Untenable Expansion of Provocation

The MPC's extreme emotional disturbance has greatly expanded the doctrine of provocation in two main ways, which has been particularly disastrous for women. The first problem lies in the MPC's shift to an almost purely subjective test. The MPC asks whether the defendant killed "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse,"[51] but this disturbance is to be assessed "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[52] The only limitation, which is suggested in the Code's Commentary, is that "idiosyncratic moral values are not part of the actor's situation."[53] Because the MPC's subjective approach focuses on the intensity of emotion experienced by the accused, virtually any reaction to any stimulus may be considered in an EED jurisdiction.

This subjective focus has allowed for an almost unlimited array of situations that may be considered adequate provocation. This has led to an instruction on EED in extreme cases, such as where a man killed his girlfriend's lover for taunting him about the girlfriend's likely infidelity;[54] where a man, distraught over losing his passport, beat to death a prostitute because she would not sleep with him for free;[55] where a man fatally shot a former partner for dancing

[51] MODEL PENAL CODE § 210.3(1)(b)(2004).
[52] *Id*.
[53] Reporter's Comments, Model Penal Code and Commentaries, Comment to § 210.3, at 62-63 (1980).
[54] People v. Harris, 25 N.Y.2d 316, 319-22 (2000) (holding that the defendant was entitled to a an instruction on EED for killing his girlfriend's lover, who taunted him about his girlfriend's past and likely future infidelity).
[55] State v. Kaddah, 732 A. 2d. 902, 910-12 (Conn. 1999) (commenting that an EED instruction was properly given in this case).

with another man.[56] These decisions show an impermissible acceptance of typically masculine reactions such as rage and jealously.

Second, the MPC in effect eliminates the no cooling-off period limitation of the modern and common law approach. As explained in *People v. Patterson*, requiring an absence of cooling time does not comport with the MPC's EED formulation because "[a]n action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore."[57] By eliminating the cooling-off period, the MPC opens the door for claims where a provoking incident leads to a homicide days, weeks, or even months later. In fact, under the MPC there does not even have to be a particular triggering event. Instead, "[a] killer who brooded over his homicidal feelings, without even having a fully comprehensible desire for revenge, remains eligible for manslaughter mitigation."[58]

The elimination of the cooling of period limitation and triggering incident allows defendants to come up with any post hoc justification to rationalize their killings. Although it is ultimately up to the jury to decide whether they believe the defendant's extreme emotional disturbance, the subjective focus of this defense generally requires expert testimony on the defendant's mental state. Expert testimony can be problematic because it can give "scientific" legitimacy to even the most unexplainable crimes. As Professor Carolyn Ramsey explains, "Unmoored from common law constraints, the EED defense allows a sympathetic psychological

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[56] CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 36-38 (2003).
[57] *People v. Patterson*, 39 N.Y.2d 288, 303 (1976).
[58] Carolyn v. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform,* 100 J. CRIM. L. & CRIMINOLOGY *1, 17* (2010).

expert to reinterpret the defendant's history of increasingly brutal dominance over the victim as a logical progression from emotional trauma to uncontrollable violence."[59]

Lastly, the expansive scope of EED has allowed mitigation for male defendants who kill their partner simply for leaving the relationship. This is an unprincipled and unacceptable expansion from the common law's requirement of witnessing adultery.

D. Sending a Message

Leaving a relationship, learning of the infidelity of a spouse,[60] or killing in response to a general "loss of control"[61] should not be considered adequate provocation. Court decisions that mitigate murder committed under these conditions condone the behavior of angry and violent men who exploit stereotypical explanations to legitimize their homicides against "their" women.

Provocation is an excuse-based defense.[62] It recognizes the conduct committed as legally wrong, however, it excuses the conduct due to the nature of the provoking incident.[63] The theory being that if the provoking incident was of such a degree, that any reasonable person would have lost control, the actor is less morally blameworthy because he could not help but to react in that way.[64] A finding that it is "reasonable" for a man to kill his girlfriend because she was unfaithful or because she simply did not want to continue the relationship, wrongly casts blame on the victim, where she has done nothing legally wrong. In recognizing provocation in these situations, the law condones domestic violence against women and reinforces the stereotype that men are jealous, angry actors who are incapable of controlling their reactions.

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[59] *Id*. at 18.
[60] Learning of infidelity should not be interpreted to include actually witnessing adultery.
[61] A specific triggering that causes one to lose control is not considered a general loss of control.
[62] Heller, *supra* note 29, at 10 -12.
[63] *Id*.
[64] *Id*.

IV. THE DOCTRINE OF SELF-DEFENSE AND BATTERED WOMAN'S SYNDROME

At common law, an actor was justified in using force upon another to prevent injury to himself if he honestly and reasonably believed such force was necessary to protect himself from imminent unlawful harm.[65] The principle behind self-defense is that a person who is unlawfully attacked by another and who has no opportunity to resort to the law for his defense should be able to take reasonable steps to defend himself.[66]

Today, self-defense is generally divided into two forms: (1) perfect self-defense, and (2) imperfect self-defense. They key factor in determining if is "perfect" or "imperfect" self-defense is the reasonableness of the actor's decision to use force. Perfect self-defense occurs when the actor's belief in the necessity of using force to protect himself is both honest and reasonable.[67] If a defendant is able to claim perfect self-defense, his actions are considered fully justified.[68] Perfect self-defense results in full exoneration.[69] Imperfect self-defense occurs where the actor's belief in the necessity of using force is honest but unreasonable.[70] Imperfect self-defense does not result in acquittal because the actor was unreasonable in his decision to use force. In most jurisdictions, a finding of imperfect self-defense will reduce murder to manslaughter. However, a few jurisdictions do not recognize imperfect self-defense. In these jurisdictions, an actor who has an unreasonable belief of the necessity to use force will be guilty of murder.

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[65] KAPLAN, WEISBERG & BINDER, *supra* note 1, at 515.
[66] *Id*.
[67] People v. LaVoie, 395 P.2d 1001, 1003 (1964).
[68] Heller, *supra* note 29, at 10-12.
[69] *Id*. at 12.
[70] State v. Leidholm, 334 N.W.2d 811, 816 (1983).

Additionally, in order for self-defense to be reasonable, the actor must abide by two additional rules; the rule of necessity and the rule of proportionality.[71] Under the requirement of necessity, the force used in self-defense must only be used to the extent necessary.[72] The concept of necessity is intertwined with the concept of imminence.[73] Imminence requires that the actor be presently under attack in order to justify self-defense. The imminence requirement is inseparable from the rule of necessity because "without imminence there is no assurance that the defensive action is necessary to avoid the harm."[74] The justification for this inseparability is that if harm is not imminent then the actor can and should take steps to avoid the necessity of responding with deadly force. Accordingly, if a threat is not imminent, it is not reasonable to employ fatal force and the claim of self-defense consequently fails.

Under the proportionality rule, a person cannot use force that is excessive to the harm threatened.[75] Thus, the use of deadly force can only be used in self-defense when the unlawful force is deadly or capable of grievous bodily harm.

While Battered Woman's Syndrome ("BWS") is not a legal defense, it may be used to prove other defenses. In the late 1970s psychologist Lenore Walker coined the term battered woman's syndrome to describe the characteristic psychological impact of prolonged domestic abuse on adult women.[76] Domestic abuse can be categorized into three main categories: physical

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[71] Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill their Batterers*, 71 N.C. L. REV. 371, 380-82 (1993).
[72] *Id*.
[73] *Id*.
[74] *Id*. at 380.
[75] *Id*.
[76] Nancy Wright, *Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome" for Self-Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers*, 4 CRIM. L. BRIEF 76, 78 (2009).

injury, sexual abuse and psychological maltreatment.[77] This abuse follows a cyclical pattern consisting of three phases.[78] The first phase is the 'tension-building' period, where the batterer begins to express hostility toward the victim.[79] The second is the 'acute explosion' period, when the abuse takes place.[80] The third stage is the 'loving contrition' period, where the batterer apologizes, seeks forgiveness, and promises to change.[81] Each of the three phases of abuse is characterized by specific behavior patterns on the part of the batter.[82]

Evidence of BWS may be used to support a variety of defenses, including self-defense and provocation. Expert testimony on BWS is used to describe the devastating psychological impact of a lifetime of severe physical, sexual, and psychological violence. This testimony on BWS is critical for the jury to hear, because it demonstrates the reasonableness of a battered woman's use of lethal force to defend herself when claiming either self-defense or provocation. Thus, expert testimony on BWS is essential for battered women who kill their abusers. Although, courts have generally allowed expert testimony on BWS, admission is not guaranteed. Furthermore, states have differed to the extent they will allow evidence of BWS to be considered by the jury.

V. SELF-DEFENSE AND DOMESTIC VIOLENCE

The right to defend oneself when presented with a threat of imminent death or great bodily harm is deeply imbedded in our notions of justice and is incorporated in the criminal law of self-defense. On its face, the doctrine of self-defense seems facially neutral, however, the doctrine has been largely shaped by male perceptions of what constitutes appropriate self-

[77] *Id*.
[78] LENORE E. WALKER, The BATTERED WOMAN SYNDROME 95 (1984).
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.

defense.[83] Consequently, female defendants face substantial obstacles in pleading self-defense.[84] The judicial application of reasonableness, and the traditional rules of self-defense, such as, the imminence requirement and the requirement of equal proportionality pose specific problems for battered women defendants.

This section utilizes the North Carolina Supreme Court's decision in *State v. Norman* to illustrate the defects in the law of self-defense as it applies battered women defendants. The goal of this section is to exemplify the need for changes in the law that will recognize women's reactions to violence and ensure a more equitable treatment of cases involving battered women. The facts of the *Norman* case present the most dramatic and challenging situation for self-defense: an abused woman who kills a sleeping man.

A. The Case of Judy Norman

At fourteen, Judy Norman, the defendant, married John Thomas Norman.[85] For over twenty years, Judy suffered extreme physical and emotional abuse at the hands of her husband.[86] In addition to putting cigarettes out on her, throwing hot coffee on her, and breaking glass against her face, Judy's husband commonly punched her, kicked her, and threw objects at her.[87] He forced her to make money by prostitution, and would beat her if she resisting prostituting herself or if he was dissatisfied with the amount of money she earned.[88] Subjecting her to futher degradation, he frequently treated her like a dog: making her eat out of a dog bowl, bark like a dog, and sleep on the floor of their bedroom like a dog.[89] He also regularly deprived her and

[83] Schneider, *Self-Defense, supra* note 49, at 494.
[84] *Id*.
[85] State v. Norman, 378 S.E.2d 8, 10 (N.C. 1989).
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*.

their children from eating or going to get food.[90] Although she tried to leave him several times, " . . . he had always found her, brought her home, and beaten her."[91]

Two days before his death, John, again forced Judy to prostitute herself at a local rest area.[92] While driving home after beating her at the rest stop, he was arrested for drunk driving. [93] After his release the next morning, "he resumed his drinking and abuse of the defendant."[94] Later that day, police were called to the house in response to the domestic abuse. Although, Judy stated, "her husband had been beating her all day" she refused to file a complaint because she feared that he "would kill her if she had him arrested."[95] Less than an hour later, the police were called back to house. Judy had attempted suicide by ingesting a bottle of pills. While paramedics attended her, Mr. Norman tried to interfere, saying, "Let the bitch die . . . She ain't nothing but a dog . . . She don't deserve to live," and threatened to kill her, her mother, and her grandmother, however, Judy survived.[96]

The next morning, with the help of a hospital therapist, she went to a mental health center to discuss filing charges against her husband and his possible civil commitment.[97] Returning from the center, Judy confronted her husband about having him committed if he refused to stop drinking.[98] In response, he "told her he would 'see them coming' and would cut her throat before they got to him."[99] That day Judy also tried to go to the social service office to apply for welfare benefits, "but her husband followed her there, interrupted her interview, and made her go

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[90] *Id*.
[91] State v. Norman, 378 S.E.2d 8, 10 (N.C. 1989).
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] State v. Norman, 378 S.E.2d 8, 11 (N.C. 1989).
[98] *Id*.
[99] *Id*.

home with him."[100] When they got home, he continued to abuse Judy by putting a cigarette out on her, slapping and kicking her, and threatening to kill and maim her.

Later that evening, Judy was babysitting her daughter's baby.[101] When the baby started to cry, Judy took the baby to her mother's house fearing that it would wake up and anger her husband.[102] After taking a pistol from her mother's purse, Judy walked the short distance home and shot her sleeping husband in the back of the head.[103]

The trial court found Judy guilty of voluntary manslaughter and sentenced her to six years in prison.[104] The Court of Appeals granted a new trial, finding error with the trial court's refusal to submit a possible verdict of acquittal by reason of self-defense.[105] In reversing, the Appeals Court, the North Carolina Supreme Court held as a matter of law, a sleeping victim does not present the imminent threat required before a defendant is entitled to an instruction on either perfect or imperfect self-defense.[106]

B. The Problem with Imminence

Defensive force must be necessary in order to avoid serious bodily harm. As previously explained, the element of necessity incorporates the requirement of imminence. Self-defense requires imminence, "because, and only because, of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm."[107] Thus a finding of imminence is a condition precedent for a finding of necessity.[108] The problem of battered

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[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] State v. Norman, 378 S.E.2d 8, 10 (N.C. 1989).
[104] *Id*. at 9.
[105] *Id*.
[106] *Id*.
[107] Rosen, *supra* note 71, at 380.
[108] *Id*.

women has provoked an inquiry into the traditional requirements of self-defense to determine whether we should maintain a strict requirement of imminence in assessing which attacks trigger a legitimate defensive response."[109]

The case of Judy Norman illustrates how the imminence requirement of self-defense is ill equipped to deal with the problem of battered women. Judy was fourteen years old when she married her husband. For over twenty years Judy was severely beaten, forced into prostitution, and threatened with mutilation and death. She had five children, no money of her own, and nowhere to escape. In the two days preceding the killing, the severity of the beatings and death threats to herself and her family had increased. In response, she had also increased her attempts to escape, even the ultimate escape, suicide, but was unsuccessful. For over twenty years the abuse had only become more severe. Her continued abuse was inevitable and her death was clearly foreseeable. If the harm is inevitable and unavoidable, why must she wait until the harm is imminent?

According the North Carolina Supreme Court, Judy had to wait until the harm was immediate before employing deadly force.[110] Explaining, the court noted that Judy did not face "an instantaneous choice between killing her husband or being killed or seriously injured and that she "had ample time and opportunity to resort to other means of preventing further abuse by her husband."[111] Consistent with this decision, the court found the record devoid of evidence that Judy had reasonable grounds to believe in an imminent attack.[112]

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[109] Kimberly Kessler Frezan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 232 (2004) (quoting George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 567 (1996)).
[110] State v. Norman, 378 S.E.2d 8 (N.C. 1989).
[111] *Id*.
[112] *Id*.

In taking the position that "immediate and "imminent" are synonymous, the court followed the traditional strict interpretation of the requirement. It is this narrow interpretation of imminence that provides the basis for the court's conclusion that Mrs. Norman lacked any belief, reasonable or otherwise, that an imminent threat of death or great bodily harm confronted her.

The North Carolina Supreme Court defended its strict adherence to the imminence requirement because it was necessary to ensure that "deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self-preservation."[113] According to the court, the imminence requirement guarantees that "the defendant reasonably belied that absence the use of deadly force . . . the attack would have caused death or great bodily harm."[114]

However, this is a case of semantics clouding substance; the evidence, considered in the aggregate, clearly supports an inference that her actions were necessary in order to prevent an attack that would cause great bodily harm and that Mrs. Norman believed in an imminent threat. Similarly, Justice Martin, in writing for the dissent, found that the unique and complex situation of battered women warrants a less strict interpretation of the imminence requirement. Justice Martin found that an abused spouse's fear that "'one day her husband [would] kill her in the course of a beating'"[115] created an honest belief that the "danger [was] constantly 'immediate.'"

The imminence requirement unfairly precludes battered women who kill in non-confrontational settings from claiming self-defense. The imminence requirement fails to recognize the common situation of the abused woman, who finds all exits blocked and who reasonably anticipates a severe assault which she does not have the strength to repel, and therefore kills her abuser at a time when the abuser is asleep or otherwise incapacitated. While

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[113] *Id*. at 13.
[114] *Id*.
[115] *Id*. at 19 (Martin, J. dissenting) (quoting Loraine P. Eber, *The Battered Wife's Dilemma: To Kill or to Be Killed*, 32 HASTINGS L. J. 895, 928-29 (1981)).

the harm in this situation may not be imminent, in strict interpretation of the word, the future harm is inevitable. This inevitability component, unique to the domestic violence context, warrants further consideration in applying the requirement of imminence in self-defense.

C. Battered Women as Reasonable Self-Defenders

The crux of self-defense is the concept of reasonableness. As Gillespie explains:

> The ultimate question in a self-defense case is whether the defendant's act was a reasonable one. Even if she can successfully negotiate the legal hurdles of seriousness, imminence, retreat, and the like, she must still convince the jury of two things: that her belief that she was in imminent danger of death or serious injury was reasonable under the circumstances and that her response to that perceived danger was a reasonable one, not an overreaction.[116]

What is considered reasonable is based upon a male standard of conduct. Thus the reasonable requirement in the law of self-defense asks what a reasonable man would have done in a battered woman's situation. This question is at odds with the reality faced by battered woman. What is considered to be a reasonable response to deadly force is based upon a one-time confrontation between two males who are relatively unknown to each other. The basic paradigm goes something like this, "There is a fight. In the heat of the fight man A comes at man B with a weapon, man B picks up a similar weapon, uses similar force, and kills man A."[117] From this scenario flow the requirements of equal force, provocation, and imminence.

This male model of conduct presents particular problems for female victims of domestic violence who claim they acted in self-defense. First, the above standard presumes an encounter between two men of roughly equal size and ability.[118] Women are disadvantaged under this model because men are typically stronger, taller, and heavier. This inequality in size and

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[116] CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMAN, SELF-DEFENSE, AND THE LAW 19 (1989).
[117] DOMESTIC VIOLENCE: HOW THE LAW FAILS WOMEN, http://www.greenleft.org.au/node/311.
[118] Taylor, *supra* note 43, at 1701.

strength between men and women is problematic in light of the equal force requirement, which precludes a person who is attacked without a deadly weapon from responding with a deadly weapon. Preventing someone from employing a knife or a firearm when attacked only with brute force is reasonable when it is applied to the prototype of two males of equal size and strength, however, the requirement becomes more unreasonable as we move further from this limited scenario. For example, requiring a five-foot-five inch woman to somehow repel an assault by a six-foot-two inch intoxicated man without employing weapons in her defense seems neither reasonable nor fair.

Second, the above standard also presumes a single encounter between two parties who are relatively unknown to each other. This presumption excludes the domestic violence context where the attacker and the victim are in a relationship. In this context, the attacker has usually established himself as the dominant one in the relationship. Furthermore, battered women who defend themselves are not responding to a single attack but rather an ongoing threat of violence.

Because the traditional definition of self-defense has been centered on male behavior it is hard for jurors to identify actions taken in self-defense outside this context. Female defendants who kill their male batterers and claim they acted in self-defense are at a disadvantage because their reasonable response to physical violence is likely to differ then a man's due to her difference in size, strength, and prior victimization."[119] Therefore, in order for female defendants to have a fair chance of claiming self-defense, the way we interpret the law must reflect situations beyond the prototypical male-based model.

[119] *Id.*

i. Preconceived notions of battered women

Battered women defendants must also overcome preconceptions of battered women in general, such as the erroneous belief that battered women are masochists who enjoy being battered, and the belief that these women could have easily left the relationship at any time.[120] In a brief study evaluating public opinion on battered women, Ewing and Aubrey surveyed 216 randomly selected people.[121] Each subject was given the identical scenario of abuse, and then asked if they agreed or disagreed with a series of statements about the incident.[122] The "results showed that 63.7% of the participants thought that the wife could simply leave the relationship if she was afraid, and 41% thought if the wife did not leave and the abuse continued then the wife was masochistic.[123]

The common belief that "she could have just left" or that she enjoys being abused is problematic when applying the necessity and reasonableness requirement. For example, if members of a jury believe that a battered woman can simply just leave the relationship to avoid being abused, it is hard for them to find that her actions were necessary, because she could have simply ended the relationship and thus avoided the necessity of responding with force. Likewise, her claim that she acted reasonably is also diminished because if she could have just left, but chose to stay despite the abuse, her actions are not going to be perceived as reasonable. However, these beliefs reflect a misunderstanding of the effects of domestic violence and ignore the complex reality that these women face.

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[120] Alison Morse, *Social Science in the Courtroom: Expert Testimony and Battered Women*, 21 HAMLINE L. REV. 287, 314 (1998).
[121] Charles Patrick & Aubrey Moss, *Battered Woman and Public Opinion: Some Realities About the Myth*, JOURNAL OF FAMILY VIOLENCE VOL. 2, NO. 3, 257, 257-264 (1987).
[122] *Id*.
[123] *Id*.

First, women who stay in abusive relationships are not inherently irrational people. Women of domestic violence do not leave for several reasons, including unwillingness to abandon or hurt others, lack of financial independence, lack of alternatives, fear of change or uncertainty, and the belief that things will get better.[124] These beliefs are not unique to battered women.[125] Instead, these are common reasons for anyone who has stayed in a situation longer than they should have, whether that situation is a job, school, living arrangement, or relationship. However, in the domestic violence context, these reasons are aggravated by the violent and controlling nature of the abuser. Abusers tend to isolate their victims from outside help by attempting "to exercise total power over "their" women, by cutting them off from friends and family, by making sure that they have no independent source of money, and by threatening them with more severe physical abuse and even death if they attempt to leave."[126]

Related to the presumption that battered women can leave the relationship at any point, abused defendants must also overcome the generally unpleasant idea that killing their batterer was the only reasonable option to stop the abuse. Those who criticize a woman's decision to resort to deadly force generally argue that she could have done something else: she could have left, she could have gone to a shelter, she could have gone to the police, she could have gotten a restraining order. Yes, theoretically, in every case she could have done something else. However, whether any other choice was actually *reasonable* or even *feasible* in her situation is a separate question.

Not only do women of domestic violence generally lack the financial independence to leave their relationship; they also have nowhere to go if they did. Although women's shelters

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[124] Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, available at http://works.bepress.com/marna_angel/1 3 (2007).
[125] *Id*.
[126] *Id*.

provide a potentially safe place to escape an abusive relationship, her area may lack shelters. In fact there are more animal shelters than there are women's shelters in the United States.[127] Further, even if she had access to a shelter, it may only be a temporary or short-term facility.

In addition, there is inadequate police protection and judicial support for victims of domestic violence. Many women who have been abused by their partners have tried, and failed, to get help from the police. As scholars Caroline Forell and Donna Matthews note, "[T]he law is often ineffectual. For example, in a [1994] U.S. Department of Justice study, Marianne Zawitz estimated that nearly 90 percent of women killed by intimates had previously called the police, and half of these [women] had called five or more times."[128] Furthermore, even if the police were effective at helping battered women, they cannot provide continuous protection from her abuser everywhere and all the time. Restraining orders have also proved ineffective in keeping an abuser away. Most importantly, women are at the greatest risk of death when they separate from their abusive partner.[129] Indeed, "most scholarly and empirical research indicates that a woman leaving her abuser is directly related to an escalation of violence by the abuser that can be lethal."[130]

In commenting on the lack of alternatives for women who have ultimately killed their partners, Gillespie notes:

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[127] EMPLOYMENT AND HOUSING RIGHTS FOR VICTIMS OF DOMESTIC VIOLENCE: STATISTICS, http://www.legalmomentum.org/programs/ehrsa/statistics.pdf (2006).
[128] CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF A MAN 206 (2000).
[129] *See* MYTHS AND FACTS ABOUT DOMESTIC VIOLENCE, http://www.clarkprosecutor.org/html/domviol/myths.htm ("The danger to a victim increases by 70% when she attempts to leave the relationship, as the abuser escalates his use of violence when he begins to lose control"); *see also* WALKER, *supra* note 78, at 11 ("The most dangerous point in the domestic violence relationship is at the point of separation").
[130] Schneider, *Self-Defense*, *supra* note 49, at 504.

> If she is like the overwhelming majority of battered women, she also knows, first hand, that she cannot rely on the police, the courts, neighbors, relatives, or anyone else for protection against her violent mate. Every attempt to get help is likely only to reinforce her perception that she has no alternative but to protect herself.[131]

Although the idea is unsettling, the reality of the situation is that some battered women lack any *meaningful alternative*. In order for female defendants who kill their abuser to have a fair chance in establishing a claim of self defense, it is necessary to recognize the complex situation and choices battered women face.

ii. Gender and Emotion

The law of self-defense fails to reflect the different ways that women and men tend to experience emotion and respond to stressful incidents. Instead the law reflects typically male reactions to emotion. This failure to reflect the emotional experiences and reactions of women negatively impacts women defendants who do not react the way the law presumes they should, like a man.

Numerous studies have demonstrated that women and men approach emotion differently and respond differently to hormones in times of stress.[132] Different theories have been advanced in an attempt to explain this difference such as, "sex differences in experience, genetics, neuroanatomy, neurochemistry, and gender socialization."[133] Irrespective of the nature of the difference, studies have generally found that men are quicker to use "physical force to achieve

[131] GILLESPIE, *supra* note 116, at 13.
[132] Katherine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARVARD JOURNAL OF LAW & GENDER 447 (2005).
[133] *Id*. at 448.

their desired ends," whereas, women are more likely to use verbal persuasion to achieve their goals.[134]

The law presumes and it seems reasonable that if your partner hits you, you should walk away.[135] However, this assumption does not reflect the emotional complexity of domestic violence relationships and the way in which women may respond to stress and violence.[136] Scholar Katherine Baker argues that if we recognize the different ways that women and men tend to experience emotion, we need not explain a battered women's inability to leave the relationship as irrational or unreasonable.[137] Noting that the law only recognizes either hitting back or running away, the so-called "fight or flight" response, as the appropriate reaction to a stressful incident, she argues that the law exhibits male bias.[138] Acknowledging the research and experiments observing the "fight or flight" response, Baker points out that these studies had used only males as subjects.[139] After experiments began focusing on female reactions, studies revealed a new response, which they labeled "tend and befriend."[140] As opposed to fighting or fleeing to a stressful stimulus, "one who tends and befriends in times of stress reacts by reaching out to support groups and taking particularly good care of dependents."[141]

Research indicates that women are more likely to tend and befriend due to the way in which oxytocin affects women as opposed to men.[142] The hormone, oxytocin, "is released at times of intense emotional attachment, such as when falling in love, when in labor or nursing,

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[134] *Id*. (discussing Nagy Jacklin & Eleanor E. Maccoby, *Social Behavior at Thirty-Three Months in Same-Sex and Mixed-Sex Dyads*, 49 CHILD. DEV. 566 (1978)).
[135] *Id*. at 458.
[136] *Id*.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*. at 458-57.

and when experiencing certain stressful events."[143] Release of this hormone makes people feel like they "have bonded with one another."[144] However, the effect that a release of this hormone has on the body may differ between men and women due to the way oxytocin reacts with estrogen and testosterone: estrogen enhances the effects of oxytocin while testosterone bocks oxytocin's effects.[145] Baker and other scholars theorize that women are more likely to feel attachment then men because women have higher estrogen levels and lower testosterone levels than men.[146] Although the data on the effect of oxytocin in still developing, this biological difference between the sexes may help to explain why female victims of domestic violence do not respond to physical abuse the way the law presumes that they should, by just walking away.[147]

D. The Catch 22 in Battered Woman's Syndrome

Doctor Lenore Walker introduced the concept of Battered Woman Syndrome ("BWS") in the 1970s to help remedy how the criminal law of self-defense was not adequately taking into account experiences of battered women.[148] BWS is most commonly used where a female defendant is claiming self-defense for killing her batterer.[149] The main goal in introducing expert testimony on BWS is to demonstrate that the defendant's actions in self-defense were "reasonable." As explain by Professor Schneider:

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[143] *Id*. at 457.
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*.
[148] Holly Maguigan, *Battered Women and Self-Defense, Myths and Misconceptions in Current Reform Proposals*, 140 U. P.A. L. REV. 379, 421 (1991).
[149] 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) [hereinafter Schneider, *Describing and Changing*].

> Expert testimony on battered woman syndrome was developed to explain the common experiences of, and the impact of repeated abuse on, battered women. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered women's action and to redress this historical imbalance, at least where the testimony was proffered as relevant to self-defense.[150]

Furthermore, expert testimony on BWS can assist the jury in putting the victim's personal battering experience in context by assisting "the factfinder in making sense of the information obtained about a particular battered woman and her situation by placing that information within the parameters of what is known about battered women generally.[151]

Testimony on BWS typically includes Lenore Walker's "cycle of violence" theory, which is premised on the notion that abusive relationships follow a cyclical pattern consisting of three phases.[152] It is this pattern that creates in the victim a "learned helplessness," in other words, a sense that she cannot escape from the abusive relationship.[153] In explaining this recurring pattern of abuse, the expert is able to explain why a battered woman has special knowledge of the imminence of an attack, as well as why retreat was not a reasonable alternative.[154] Expert testimony is essential in providing the jury with information about "otherwise puzzling aspects of the defendant's behavior—especially her failure to leave or get help or tell anyone,"[155] and about how "the battered women's prediction of the likely extent and imminence of violence is particularly acute and accurate."[156]

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[150] *Id*. at 207.
[151] *Id*.
[152] *Id*. at 132.
[153] State v. Leidholm, 1983 N.D. LEXIS 296, 22 (N.D. 1983).
[154] GILLESPIE, *supra* note 116, at 159.
[155] *Id*.
[156] Schneider, *Describing and Changing*, *supra* note 149, at 211.

However, the admission of BWS to explain the reasonableness of a victim-defendant's actions against her abuser has been a hotly contested area of criminal law.[157] Despite the benefits and perhaps the necessity of introducing expert testimony on BWS to explain the reasonableness of the defendant's actions, its introduction can have a paradoxical effect.

Significant criticism has been focused on the use of the word "syndrome" and how this label tends to "conjure up images of a psychological defense—a separate defense and/or an impaired mental state defense."[158] In critiquing the characterization of BWS as a mental health disorder, Professor Coughlin argues that "The [battered woman syndrome] defense itself 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.[159] Scholars further argue that BWS reinforces negative stereotypes of women by playing "into the traditional belief that abused women who kill their abusers are mentally unbalanced rather than acting reasonably in response to a threat of imminent death or great bodily harm."[160] Furthermore, scholars argue that because testimony regarding BWS is inherently filled with implications that the victim-defendant is somehow psychologically impaired or incapacitated, its use contradicts the very purpose of introducing the testimony in the first place: to "shed light on the reasonableness of the defendants behavior.[161]" Thus using testimony about a "syndrome" to explain what a reasonable person would do is a contradiction in terms.

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[157] GILLESPIE, *supra* note 116, at 160.
[158] Schneider, *Describing and Changing*, *supra* note 149, at 199.
[159] Anne M. Coughin, *Excusing Women*, 82 CALIF. L. REV. 1, 7 (1994).
[160] Angel, *supra* note 124, at 14.
[161] Schneider, *Describing and Changing*, *supra* note 149, at 199.

In addition, testimony on BWS may also not be effective due to its focus on a psychological diagnosis of "learned helplessness." Walker's concept of "learned helplessness," which is premised on the theory that an abused woman becomes more passive and controllable by her abuser as time goes on,[162] is internally contradictory in the case of an abused woman who kills her abuser. On the one hand the jury is presented with information that suggests that her partner's persistent abuse and psychological domination created in the defendant a learned helplessness, whereby the defendant believed she was unable to leave the relationship. And on the other hand, the jury is presented with the fact that she killed her batterer. This theory of learned helpless in the context of a woman who kills her abuser leaves the members of the jury wondering: How helpless could she have been if she managed to kill her abuser?

In spite of its shortcomings, testimony on BWS is still necessary for battered woman defendants because it remains the only alternative for women to present evidence of the general effects of battery at their trial.[163] However, it is necessary to recognize the doctrine's shortcomings and change the focus of how expert testimony on BWS is used. Instead of focusing on the helplessness or incapacity of the defendant, testimony should be centered on the societal pressures and conditions that place women in inescapable violent relationships.

VI. CONCLUSION

The doctrines of provocation and self-defense focus on typically masculine emotions, realities, and reactions. The provocation doctrine favors quick actions made in anger or as a result of a loss of control. The most common provocation claims involve cases of infidelity or perceived infidelity. Self-defense, on the other hand, requires no more than equal force to defend

[162] WALKER, *supra* note 78, at 174.
[163] Myrna S. Reader, *Proving the Case: Battered Woman and Batterer Syndrome: The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 790, 802 (1996).

a reasonable belief of an imminent attack. These doctrines have proved to be ineffective when dealing with battered women defendants. Fear, not anger, is the primarily emotion when women kill an intimate partner. This emotion increases as abused women realize that it is impossible to escape. Furthermore, provocation and self-defense extend over time for battered women who are subjected to repeated abuse. In order for female defendants who kill their batterers to have an equal chance of claiming self-defense, it is necessary that the law reflect their complex situation.

Overall, it is essential to accept that sometimes the only reasonable alternative available to battered women, to escape their life of abuse, is to kill their batter. This paper does not suggest that every female defendant who was previously abused should be acquitted, or that all battered women are entitled self-defense, or that there should be a special "battered woman defense." Instead, society and the law need to recognize the drastic problem of domestic violence including the social norms that make violence against women permissible and understandable. Similarly, local government actors, such as the police and social services agencies, need to be better equipped to deal with the problem of domestic violence, so that these agencies become reasonable alternatives for battered women utilize. Furthermore, expert testimony needs to emphasize the societal pressures that place women in inescapable violent relationships, rather than emphasizing the helplessness or particular psychological profile of the individual defendant.

In regards to the law of provocation, the doctrine needs to be sharply curtailed so that adequate provocation does not include partner infidelity, separation from a relationship, or a general loss of self-control. Restricting provocation in this way would help combat the belief that male violent rage is a normal aspect of masculinity, while still allowing the defense of women who resort to deadly force to defend themselves against their abusers.