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

> 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

Christine Grace stabbed her boyfriend in the kitchen of their Colchester, Vermont home on a winter night in 1989.[2] The image of a 22-year-old woman on trial for murder in northern Vermont captured the attention of Court TV, which broadcast live coverage for several weeks. As Christine spoke from the witness stand, her voice shook, and when she explained her fear of Ralph "Chicky" Bessette, she cried.

On the night in question, Christine and 25-year-old Chicky had an alcohol-fueled argument that rapidly escalated into a physical altercation. Toxicology reports later showed that Chicky's blood alcohol content was three times the legal limit to drive. When one of their friends attempted to call for help, Chicky ripped the phone off the wall and told the woman to go home. Two friends remained, watching as Christine and Chicky wrestled violently on the kitchen floor. Scott Hurlburt stayed out of the way; it was not his business, he said. Chicky invited Nicole Manning Russin to join in. "If you want to hit [Christine], go ahead and hit her," he said. Two-hundred-pound Chicky pinned Christine against the kitchen stove. The hostility did not end until Christine reached behind her, pulled a knife from the butcher block, and struck him in the back and neck.

For Christine, the reality of the threat against her encompassed more than that moment or that evening. After enduring years of abuse, Christine

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1. Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 978 (2000).

2. The following passage re-enacts the events leading up to *State v. Grace*, 160 Vt. 623, 649 A.2d 225 (1993), as recounted in a Court TV production based on the live video recording of Grace's trial. *Trial Story: Vermont v. Grace, A Battered Woman's Defense: Fear, Not Anger* (Court TV, 1991) (on file at Vermont Law School).

would have recognized a look in Chicky's eyes that only she could understand. Friends later testified that Chicky routinely abused Christine when he was intoxicated. They recalled instances when he left bruises on her neck and legs, slammed her against the wall, or attempted to run her down with his car. On one occasion, Chicky choked Christine until she passed out. Christine began wearing contact lenses after Chicky broke her eyeglasses several times. On trial for second-degree murder, Christine reticently recounted specific incidents to the jury, including an instance in which Chicky chased her out of the trailer with a rifle and followed her outside to hunt her down. "It would just be okay if he killed me," she told the jurors, "because the hurt would be gone."

Hoping to escape family sexual abuse and a strained relationship with her mother, Christine made a pact with herself to fall in love and leave home at an early age. She started dating Chicky at age 15 and moved in with him on the day she turned 18. After she finished high school, Chicky insisted that Christine stay home instead of working, because he did not want her to meet someone else. He steadily isolated her from her own friends and family, replacing her acquaintances with his own. The abuse began with verbal insults and gradually escalated into violent outbursts that Christine came to expect every weekend. "I was just hoping things would get better," she explained.

Christine's public defenders, Bud Allen and Bradley Stetler, prepared a self-defense case on her behalf. They secured Dr. Angela Browne, a preeminent expert in the dynamics of abusive relationships, to testify on the subject of "Battered Woman Syndrome" (BWS). Nonetheless, the jury found Christine Grace guilty of involuntary manslaughter, and she received a suspended sentence of two-and-a-half to ten years imprisonment with indefinite probation—a relatively good outcome at the time.

In 20 years, this area of Vermont law has not changed. Grace's 1993 appeal to the Vermont Supreme Court presented an opportunity for the Court to set consistent guidelines for instructing juries on self-defense in future cases. However, the proper application of self-defense remains unclear. Vermont trial courts retain significant discretion under the Vermont Rules of Evidence as to when to admit expert testimony on BWS and context evidence on battering. In comparison to those states that have directly addressed questions of admissibility and jury instructions on self-defense in BWS cases, Vermont lingers decades behind. This Note proposes that instead of adopting reforms that already exist in other states, Vermont should move beyond BWS and the law of self-defense with a new justifiable domestic homicide statute that encompasses our current

understanding of the role domestic relationships play in informing reasonable acts of self-preservation.

Judges and legislators conceptualize intimate partner violence differently than they did 20 years ago. Vermont did not even recognize a separate crime of domestic assault in 1989.[3] In fact, Vermont did not adopt comprehensive domestic violence legislation until 1993—a month after the Vermont Supreme Court decided Grace's final appeal.[4] In the early '90s, Grace's second-degree murder trial and her use of expert testimony on BWS to support her self-defense claim offered sufficient controversy to capture the attention of Court TV.

Today the concept would not warrant such publicity, in part because of national legal reforms that have focused on integrating theories about BWS into legal doctrine. While not entirely uncontroversial, over the past several decades BWS has achieved acceptance among lawyers, advocates, and social-service providers.[5] 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.[6] 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.[7] Every state in the country allows for the admissibility of expert testimony on battered woman syndrome and evidence on battering to varying degrees.[8] Other states provide explicit self-defense jury instructions to supplement the use of BWS or general battering evidence.[9]

These developments have raised both 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

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3. On June 15, 1993, Act 95 "[a]n Act relating to criminal justice," became law with a provision that criminalizes domestic assault. 1993 Vt. Acts & Resolves 95.

4. *Id. State v. Grace* was decided May 21, 1993. *Grace*, 160 Vt. at 623, 649 A.2d at 225 (1993).

5. 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).

6. *See, e.g.*, WYO. STAT. ANN. § 6-1-203 (2009) (providing for admission of expert testimony on battered woman syndrome); State v. Myers, 570 A.2d 1260, 1266–67 (N.J. 1990) (allowing expert testimony on battered woman syndrome).

7. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 124 (2000) [hereinafter BATTERED WOMEN & FEMINIST LAWMAKING] (providing overview of "Battered Woman Syndrome" self-defense theory 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").

8. Erin M. Masson, J.D., Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R.5TH 749 § 2(a) (1998).

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

justification for the defendant's act of murder.[10] 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 use of force becomes less readily justifiable.[11] 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 that rely on BWS, women are 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.[12]

This Note argues that BWS has reached the limits of its usefulness as a self-defense theory, despite its potential legitimacy as a psychological condition. Rather than perpetuating reliance on traditional self-defense coupled with expert testimony on BWS, the Vermont legislature 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. At its core, a model statute recognizes the relevance of the domestic context in interpreting these acts. Our growing understanding of domestic violence has shown that domestic confrontations differ substantially from one-to-one situations that arise in the public sphere. Isolating domestic self-defense from traditional self-defense cases, which 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 have by criminalizing domestic assault through separate statutes distinguishing the context of the abuse as relevant to the legal inquiry.[13]

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10. *See, e.g.*, State v. Daws, 662 N.E.2d 805, 819 (Ohio App. 2d 1994) (rejecting jury instructions that "tend[] to elevate the battered woman syndrome to the level of an independent affirmative defense. . .").

11. *See, e.g.*, Burke, *supra* note 5, at 216–18 (describing how BWS theory limits opportunity for battered women by ultimately serving as an excuse rather than a justification).

12. *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).

13. *See* Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1857–59 (2006) (providing overview of state domestic violence laws). *See also* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959 (2003) (addressing the "disconnect between battering as it is practiced and battering as it is criminalized").

Part One of this Note demonstrates the need for more ambitious reform. This Part provides a historical and theoretical background on the admissibility of expert testimony on BWS, the law of self-defense, and the current law in Vermont. Part Two details the proposed model statute 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 complements Vermont's existing state law and progressive values. Though the language of the model statute is tailored to Vermont law, the general approach applies more broadly; hopefully other states will consider similar initiatives.

I. BACKGROUND

A. Women and Domestic Homicide

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.[14] Between 1976 and 2005, the number of men murdered by intimates decreased by 75%, while the number of women killed by intimates remained steady.[15] However, the broader social and legal implications, rather than the numbers, have made cases in which women kill their intimate partners compelling. Notwithstanding their rarity, the issues raised by battered women's self-defense continue to generate debate among scholars and social commentators.[16] 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.[17] The law's treatment of battered-woman defendants serves as a marker in the broader struggle for

14. JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEPT. OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 40 (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.*

15. *Id.* at 53, *available at* http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm#intweap. The inference to be drawn from this statistic relies on the heteronormative assumption that women only kill their *male* abusers. The Bureau of Justice Statistics do not specifically account for how many homicides occurred in same-sex intimate relationships. *Id.*

16. 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.* (internal citation omitted).

17. *Id.* at 45.

female equality.[18] 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 . . . ."[19]

The national statistics also mask the prevalence of intimate homicide in rural places like Vermont. In 2005, the highest percentage of intimate homicides occurred in rural areas.[20] Lisa R. Pruitt identifies the unique practical constraints faced by women living in rural areas that can compound the challenge of leaving an abusive relationship.[21] These barriers include the need to travel long distances and the lack of reliable transportation, the scarcity of childcare options, the lack of stable housing, and economic inequality.[22] In rural places, spatial isolation and a paradox of "neighborly" patriarchal privacy intensifies the significance of the domestic context in battered women's lives and complicates their ability to leave.[23] When no other means of escaping the relationship alive exist, rural women—including those in Vermont—who experience domestic abuse may be more likely to find themselves in situations that force them to act in defense of their lives.

B. 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."[24] Twenty years ago, women typically had two options: plead temporary insanity or plead guilty to manslaughter.[25] 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

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18. *See* Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 477–78 (1996) (citing cases of battered-women defendants highlighting "how the criminal law takes account of the relations of domination in shaping defenses or excuses").

19. BATTERED WOMEN & FEMINIST LAWMAKING, *supra* note 7, at 230.

20. FOX & ZAWITZ, *supra* note 14, at 77, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/int_urbtab.htm. The statistics suggest a strong correlation between size of location and likelihood of "intimate" homicide: 5.8% for large cities, 11.3% for small cities, 13% for suburban areas, and 17.8% for rural areas. *Id.*

21. Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 424.

22. *Id.* at 430–38.

23. Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J.L. GENDER & SOC'Y 347, 354–59 (2008).

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

25. CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 76 (1989).

incarceration to indefinite institutionalization.[26] More broadly, insanity defenses used in these circumstances played into misogynistic stereotypes and ignored the realities of women who live with domestic violence. As Robbin S. Ogle and Susan Jacobs write, 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."[27] 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.[28] 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.[29] According to the BWS model,

> [t]he 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 beat her up again but when, and 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.[30]

For those who have never experienced domestic violence, the BWS model may clarify and legitimize the impact of a battered woman's 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.[31] 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."[32] Generally, deadly force cannot be justified if another "nondeadly response" might have otherwise mitigated the threat, or

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

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

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

29. *Id.* at 36–37.

30. GILLESPIE, *supra* note 25, at 68 (emphasis in original).

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

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

if she used deadly force against an attack that she knew to be "*nondeadly*."[33] 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,"[34] but also the biases of judges and juries who may fail to appreciate the dynamics of abusive relationships.[35] At a basic level, expert testimony on BWS has functioned to help juries understand general patterns of abuse and why the defendant did not leave the situation.[36] 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.[37]

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.[38] Today, an array of state appellate decisions addresses the admissibility of BWS expert testimony and more general testimony on battering.[39] Most states now admit expert testimony on battering, but permitted uses may be limited and vary widely.[40]

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.[41] These legislative approaches loosely demonstrate how the function of BWS testimony has

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33. *Id.*

34. *See, e.g.*, OGLE & JACOBS, *supra* note 27, at 8, 26 (detailing "traditional" self-defense case utilizing BWS theory, in which prosecutor argues lack of "imminent harm" and "reasonableness").

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

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

37. *Id.*

38. *See, e.g.*, BOCHNAK, *supra* note 24, 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.").

39. *See, e.g.*, State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (stating that "where [a] psychologist is qualified to testify about the battered wife syndrome, and the defendant establishes her identity as a battered woman, expert evidence on the battered wife syndrome must be admitted . . . "); *see also* GILLESPIE, *supra* note 25, at 226–27 n.166 (listing early state appellate cases addressing expert testimony on BWS).

40. Masson, *supra* note 8.

41. CAL. EVID. CODE § 1107 (West 2008); GA. CODE ANN. § 16-3-21(d)(2) (2007); IND. CODE ANN. § 35-41-1-3.3 (LexisNexis 2008); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (LexisNexis 2006); MASS. GEN. LAWS ch. 233, § 23F (2008); MO. ANN. STAT. § 563.033 (West 1999); OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2006); S.C. CODE ANN. § 17-23-170 (2003); VA. CODE ANN. § 19.2-270.6 (2008); WYO. STAT. ANN. § 6-1-203 (2009).

transformed, as well as 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.[42] Other statutes reference the syndrome, but do not explicitly require testimony by experts.[43] A third group of states have taken a more generalized approach and do not limit evidence on battering to the BWS or syndrome model.[44] 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 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.[45] 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.[46] 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 . . . ."[47] In many states the admission of expert testimony does not guarantee that

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42. MO. ANN. STAT. § 563.033 (West 1999). *See also* OHIO REV. CODE ANN. § 2901.06 (LexisNexis 2006) (addressing evidentiary relevance of "battered woman syndrome" when provided by an "expert"); WYO. STAT. ANN. § 6-1-203 (2009) (defining "battered woman syndrome" as "subset under the diagnosis of Post-Traumatic Stress Disorder" and permitting admission of testimony by "expert").

43. MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (LexisNexis 2006); S.C. CODE ANN. § 17-23-170 (2003).

44. GA. CODE ANN. § 16-3-21(d)(2) (2007); IND. CODE ANN. § 35-41-1-3.3 (LexisNexis 2008); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); MASS. GEN. LAWS ch. 233, § 23F (2008); VA. CODE ANN. § 19.2-270.6 (2008). *See also* CAL. EVID. CODE § 1107 (West 2009) (requiring expert testimony but referencing "intimate partner battering and its effects" rather than "syndrome" evidence).

45. OGLE & JACOBS, *supra* note 27, at 153–59.

46. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS—CRIMINAL § 9.35.1 (2009); GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II: CRIMINAL CASES § 3.10.14 (4th ed. 2008).

47. State v. Daws, 662 N.E.2d 805, 819 (Ohio App. 2d 1994).

juries will receive instructions on how to apply the testimony to the distinct elements of the law.

A final point of disagreement arises from cases categorized as "nonconfrontational" homicides.[48] These cases are especially rare relative to confrontational cases, such as in the *Grace* scenario, in which the act occurs during a one-on-one domestic altercation.[49] The term "nonconfrontational" applies when the act occurs in the absence of contemporaneous aggression on the part of the abusive partner.[50] *State v. Norman*[51] provides a well-known example. After decades of horrifying abuse, Judy Norman shot her husband while he slept in bed, claiming self-defense with BWS expert testimony at trial.[52] In such cases, the standard argument against the use of BWS contends that the defendant could not possibly have considered her sleeping partner an "imminent" threat.[53] If he was sleeping, why did she not 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.[54] This purist view of the role of "imminence" in self-defense may emerge from the historical values underlying the doctrine, including the notion that "real men" face their adversaries and fight fair, rather than acting preemptively.[55] Defendants may face even greater difficulties if the court determines as a matter of law that the nonconfrontational act did not constitute self-defense, thereby declining to give a self-defense instruction to the jury.[56]

Those who would defend battered women in nonconfrontational situations counter that women who kill their abusers are "rational people acting in self-defense."[57] For many in abusive relationships, the threat of abuse is *always* imminent.[58] Therefore, the legal definition of "imminence"

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48. *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). Krause summarizes a common criticism: "[A] battered woman who kills her abuser under nonconfrontational circumstances will *never* be able to establish that she faced such an objectively imminent threat." *Id.*

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

50. *See, e.g.*, DRESSLER, *supra* note 36, at 459–61 (citing the case of Judy Norman, who shot her abusive husband while he slept in their home).

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

52. DRESSLER, *supra* note 36, at 459–61.

53. *Id.* at 463–64.

54. *Id.*

55. GILLESPIE, *supra* note 25, at 67.

56. OGLE & JACOBS, *supra* note 27, at 147–48.

57. Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 85 (2008) (arguing that Judy Norman acted in reasonable self-defense, despite the nonconfrontational manner in which the act occurred).

58. GILLESPIE, *supra* note 25, at 68.

should accommodate an examination of the defendant's actions in context.[59] 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.[60]

Scholars on both sides of the "nonconfrontation" debate increasingly seem to agree that BWS only compounds the stereotype that these women are mentally unstable. Scholarship citing the Judy Norman case provides a good example.[61] Self-defense purists—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.[62] 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 old insanity label.[63] 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 explain these cases.

A growing consensus has emerged among feminist legal scholars as to the severe limitations posed by the BWS model.[64] 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. 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 women defendants all suffer from psychological disorders, rather than responding to reasonable fears, becomes readily apparent in state court opinions compelling defendants

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59. *Id.* at 68, 185–87.

60. *Id.* at 69–74.

61. *See* Dressler, *supra* note 36, at 462–66 (arguing against use of self-defense in the Norman case); Angel, *supra* note 57, at 86 ("Reasonable people agreed at the time that Judy Norman deserved a reasonable self-defense charge . . . ."); Krause, *supra* note 48, at 555–56 (challenging Dressler's assumptions about the *Norman* case).

62. Dressler, *supra* note 36, at 464.

63. Angel, *supra* note 57, 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.").

64. For a thorough summary of the scientific, legal, and theoretical problems associated with the BWS model see Burke, *supra* note 5, at 232–66.

who call BWS experts to undergo separate psychological exams at the request of the prosecution.[65] By opening the door to conflicting testimony from psychological experts, these decisions highlight the improper focus that BWS 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.[66] As a psychological mode of analysis directed at individual characteristics,[67] the BWS approach provides only 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.[68] 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.[69] 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.[70] Goodmark finds that those who fight back tend to have the "fewest other options for addressing the violence against them."[71] The standard BWS theory "oversimplifies" experiences of battering.[72] Failing to closely conform to the paradigm of the "helpless victim" may prevent the defense from convincing the jury of the reasonableness of the defendant's fear of harm, despite the fact that these fears may be no less justified.

Women in non-heterosexual relationships, and men as well, may struggle with the BWS model due to its "wife abuse" premise.[73] Contemporary attempts to promote gender neutrality through use of the

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65. 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).

66. OGLE & JACOBS, *supra* note 27, at 5.

67. *Id.*

68. 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).

69. Goodmark, *supra* note 12, at 77.

70. *Id.*

71. *Id.*

72. *Id.* at 85.

73. *Id.* at 90.

term "battered spouse" only contribute to this problem.[74] 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 being abused by their partners."[75] Even as some states enact progressive same-sex marriage reforms,[76] the BWS model and the juries that apply it have not necessarily adapted accordingly.

State-based legal reforms designed to ensure justice for battered women defendants[77] 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. Further, it does not provide a complete view of the contextual influences beyond the individual's psyche 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. One need only look as far as Vermont's 2007 homicide statistics—reporting that seven out of 11 homicides occurring in the state that year resulted from domestic violence against women[78]— to appreciate this reality.

C. Syndrome Evidence and the Battering Context in Vermont

Twenty years after a Vermont jury failed to exonerate Christine Grace, Vermont law still does not provide definitive answers on BWS expert testimony or domestic self-defense. In 1993, Representative Virginia Milkey introduced H. 425, "An act relating to expert testimony on domestic

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74. *See, e.g.*, State v. Williams, 787 S.W.2d 308, 311 (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).

75. Goodmark, *supra* note 12, 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 relationships as they apply to women, the problem of abuse against men deserves consideration.

76. *See, e.g.*, S. 115, 2009 Leg. Sess. (Vt. 2009) ("An act relating to civil marriage."); 2009 Vt. Acts & Resolves 3.

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

78. VT. ATT'Y GEN., DOMESTIC VIOLENCE FATALITY REVIEW COMM'N REPORT 3 (2008), *available at* http://www.atg.state.vt.us/upload/1208265187_2008_Final_Draft_Commission_Report.pdf.

violence," in the Vermont House of Representatives.[79] The bill provided for broad admissibility of "expert testimony on the effects of battering and domestic violence including the 'battered woman syndrome.'"[80] Both chambers of the Vermont Legislature considered a spate of domestic violence and sexual assault legislation that year.[81] These efforts culminated in the successful passage of Act 95, with provisions criminalizing stalking and domestic assault.[82] Rep. Milkey's bill on expert testimony, however, never left the House Judiciary Committee.[83] Rather than taking a step back to 1993 and merely adopting BWS-based reforms, Vermont has an opportunity to ensure justice by moving beyond BWS and providing a defense that fully recognizes the unique relevance of the domestic context.

Without a specific statute or case law that addresses the admissibility of BWS or battering evidence in the self-defense context, Vermont law defers significant discretion to trial courts to weigh admissibility against other factors. Several Vermont Supreme Court opinions issued over the last 20 years reference BWS in ways that reveal a progression in how the court conceptualizes women's responses to abusive relationships, without providing for its proper use. Prosecutors in domestic assault cases can raise issues of battering to bolster witness credibility without admitting BWS experts. Where trial courts have admitted BWS experts, they have limited the testimony to general context issues rather than the state of mind of the battered woman in question. Adopting more comprehensive reform will enable battered women to admit general context evidence that supports their claims of reasonable action without relying on BWS or otherwise facing the uncertainty of the current regime.

Christine Grace's appeal of her involuntary manslaughter conviction in 1993 represents the closest the Vermont Supreme Court has come to addressing the issue of battered women's self-defense.[84] The decision,

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79. Vt. House Journal, Biennial Session 1993, 163 (1993).

80. H. 425, 1993 Leg. Sess. (Vt. 1993).

> If a person is charged with any criminal offense and the defense involves the explanation or clarification of the person's mental condition and perceptions at the time of the commission of the offense, the person may introduce expert testimony on the effects of battering and domestic violence including the "battered woman syndrome."

Id.

81. *See, e.g.*, S. 46, 1993 Leg. Sess. (Vt. 1993) ("An act relating to criminal justice"); H. 426, 1993 Leg. Sess. (Vt. 1993) ("An act relating to a domestic violence task force"); H. 235 (Vt. 1993) ("An act relating to stalking and domestic violence"); H. 184, 1993 Leg. Sess. (Vt. 1993) ("An act relating to criminal justice"); H. 235 (Vt. 1993) ("An act relating to stalking and domestic violence").

82. 1993 Vt. Acts & Resolves 95.

83. Vt. House Journal, Biennial Session 1993, 1028 (1993).

84. State v. Grace, 160 Vt. 623, 649 A.2d 225 (1993).

however, provides no definitive guidance on the issues of admissibility and tailored jury instructions that are otherwise well-settled in other states. The *Grace* trial court admitted the testimony of Angela Browne, a preeminent BWS expert, leaving no admissibility issue to appeal. Instead, Grace contested several aspects of the trial court's jury instructions, including the use of the term "imminent" in the instruction on self-defense.[85] The court opted not to rule on this issue, however, citing a failure to preserve the error at the trial court level and the lack of a plain error argument on appeal.[86] On these points, *Grace* offers no legal certainty or guidelines for the future, leaving an apparent need for a legislative remedy.

In the absence of legislation, other Vermont cases speak to the admissibility of evidence on battering as it relates to different legal questions. In a 1990 divorce appeal, *Blair v. Blair*,[87] the Vermont Supreme Court cited *State v. Kelly*,[88] the 1984 New Jersey case supporting the admission of expert testimony on BWS in the self-defense context.[89] The court also cited Lenore Walker and a law review article on BWS and self-defense.[90] The *Blair* appeal centers on the trial court's finding that Karen Blair somehow exaggerated her description of the violence and threats made by her husband during the four-year marriage because she failed to leave.[91] The discussion that references BWS does not examine Karen Blair's individual state of mind. Rather, the court cites BWS authorities to legitimize the more general premise that women in abusive relationships may reasonably respond to their experiences in a manner that defies societal expectations. *Blair* does not explicitly address the admissibility of expert testimony on BWS, but the court's use of these sources suggests a tacit acceptance of the BWS model as a means of illuminating the realities of abusive relationships.

Three years later, only months after issuing the *Grace* opinion, the Vermont Supreme Court more directly examined the admissibility of expert testimony on BWS in the first of a series of cases that address the use of BWS evidence to establish witness credibility.[92] *State v. Verrinder*[93] (1993) and *State v. LaPrade*[94] (2008) consider the relevance of BWS expert

85. *Id.* at 623, 649 A.2d at 226.
86. *Id.* at 625, 647 A.2d at 227.
87. Blair v. Blair, 154 Vt. 201, 575 A.2d 191 (1990).
88. *Id.* at 204, 575 A.2d at 193 (citing State v. Kelly, 478 A.2d 364, 370 (N.J. 1984)).
89. *Id.*
90. *Id.* at 204–05, 575 A.2d at 193.
91. *Id.* at 203–04, 575 A.2d at 192–93.
92. State v. Verrinder, 161 Vt. 250, 259, 637 A.2d 1382, 1389 (1993).
93. *Id.*
94. State v. LaPrade, 2008 VT 83, 184 Vt. 251, 958 A.2d 1179 (2008).

testimony and the trial court's ability to use discretion in admitting such testimony under the Vermont Rules of Evidence. *State v. Swift*[95] (2004) and *State v. DeSautels*[96] (2006) address the importance of providing evidence to assist the jury in understanding the victim-witness' behavior and whether a BWS expert must supply this contextual evidence. The following discussion explains the state of the law in the witness credibility context as it might apply to battered women claiming self-defense.

Vermont Rule of Evidence (VRE) 702[97] sets guidelines for the admission of expert testimony similar to the corresponding Federal Rule.[98] This rule requires that a qualified expert offering opinion or other testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ."[99] The testimony must satisfy the following: 1) be "based upon sufficient facts or data;" 2) be "the product of reliable principles and methods;" and 3) "appl[y] the principles and methods reliably to the facts of the case."[100] As this series of Vermont cases shows, VRE 702, applied in conjunction with VRE 403,[101] leaves significant discretion to trial courts to limit the content of expert testimony. In other states, legislatures have removed this discretion with statutes that, to varying degrees and for varying purposes, explicitly make evidence of domestic abuse relevant.[102] Without a similar statute in place, the Vermont cases rest significantly on the Vermont Rules of Evidence as the measure of admissibility, which in turn err on the side of trial court discretion and legal uncertainty.

The first case in this series, *State v. Verrinder*, upheld the trial court's decision to exclude certain expert testimony on BWS offered for the purpose of establishing the credibility of Verrinder's lead witness, Debra Bullock.[103] Verrinder appealed the second-degree murder conviction that arose from an altercation between himself and Kenneth Bullock, the murder victim and Debra's abusive husband.[104] The trial court allowed Verrinder's

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95. State v. Swift, 2004 VT 8A, 176 Vt. 299, 844 A.2d 802 (2004).

96. State v. Desautels, 2006 VT 84, ¶ 12, 180 Vt. 189, 195, 908 A.2d 463, 473 (2006).

97. VT. R. EVID. 702.

98. *Id.* at Reporter's Notes.

99. VT. R. EVID. 702.

100. *Id.*

101. *See, e.g.*, State v. LaPrade, 2008 VT 83, ¶ 27, 184 Vt. 251, 958 A.2d 1179 (2008) ("The admissibility of expert testimony is specifically governed by Rule 702 of the Vermont Rules of Evidence, and is also subject to the requirements of Rule 403."). Under VT. R. EVID. 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." VT. R. EVID. 403.

102. *See* Part I.B *supra* (discussing state statutes specifically addressing relevance of BWS evidence).

103. State v. Verrinder, 161 Vt. 250, 260, 637 A.2d 1382, 1389 (1993).

104. *Id.* at 251, 637 A.2d at 1384.

BWS expert to testify generally for the purpose of rehabilitating Debra's credibility after the State suggested that her failure to leave her husband indicated that her situation was not life-threatening on the day of the killing.[105] The court acknowledged the potential relevance of expert testimony on BWS as a means of explaining Debra's actions and found that Verrinder could make a case that Debra Bullock was a "battered woman" given the sufficiency of the evidence heard by the jury.[106]

The trial court did not allow the expert to testify as to whether Debra "suffered from" BWS.[107] The Vermont Supreme Court affirmed this decision on the basis of VRE 702,[108] which "leaves the question of admissibility [of expert testimony] within the discretion of the court."[109] Accordingly, the trial court did not abuse its discretion when it "struck a balance between providing the defense with rehabilitation testimony and forestalling inflammatory evidence of the victim's abusive conduct not relevant to defendant's self-defense."[110] Similar to *Blair,* the *Verrinder* court found BWS relevant to establish the context of battering, enabling jurors to better understand a battered woman's actions, but considered the individual, diagnostic aspect of BWS expert testimony less relevant. Another important aspect of the *Verrinder* opinion lies in the court's willingness to submit BWS experts to VRE 702 review, in contrast to the handful of states that eliminate trial court discretion by explicitly rendering such evidence relevant by statute.[111]

In 2004, the Vermont Supreme Court returned to the witness credibility issue, but failed to resolve whether BWS experts must testify to support the implication that a witness's behavior was influenced by an abusive relationship.[112] In *State v. Swift*, the court reversed and remanded the conviction of a defendant charged with second-degree domestic assault and two counts of threatening a witness based on the defendant's appeal of the trial court's instruction to the jury.[113] The trial court instructed the jury not to consider that the complaining witness "remain[ed] in or retur[ed] to an apparently abusive relationship as evidence to question the witness'[s] credibility."[114]

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105. *Id.* at 260, 637 A.2d at 1389.
106. *Id.* at 265, 637 A.2d at 1392.
107. *Id.* at 259, 637 A.2d at 1388.
108. VT. R. EVID. 702.
109. *Verrinder*, 161 Vt. at 260, 637 A.2d at 1389.
110. *Id.* at 260, 637 A.2d at 1389.
111. *See supra* Part I.B at 15–16 (describing various state admissibility statutes).
112. State v. Swift, 2004 VT 8A, ¶¶ 13–22, 176 Vt. 299, 304–06, 844 A.2d 802, 806 (2004).
113. *Id.* ¶ 1.
114. *Id.* ¶ 10 (emphasis removed).

The *Swift* court rejected the trial court's instruction, because "the State had not presented any evidence on Battered Women's Syndrome (BWS) to support the theory that the instruction articulates."[115] Ultimately the trial court "[took] the issue of complainant credibility away from the jury. . . ."[116] The court distinguished *Swift* from *Blair*, holding that *Blair* does not "support the proposition that, as a matter of law and in the absence of expert testimony on the subject of BWS, a victim's credibility cannot be challenged in a criminal case by reference to her continued voluntary contact with the accused abuser."[117] In effect, the court held that evidence of battering cannot limit the jury's role in evaluating witness credibility, but the opinion also identified the potential relevance of expert testimony on battering.

Swift left open the issue of whether a BWS expert must testify in order for the prosecution to highlight how battered women may respond differently as witnesses in the context of an abusive relationship. Two years later, the Vermont Supreme Court clarified *Swift* in its review of a prosecutor's closing argument in *State v. Desautels*.[118] On appeal from a sexual assault and domestic violence conviction, the defendant challenged the prosecutor's comments "on the tendency of victims of domestic violence to stay in their abusive relationships" without offering expert testimony on the subject.[119] The court emphasized that *Swift* rested upon whether "the jury remained free to give whatever weight it chose to the evidence regarding the victim's credibility," and found it reasonable for the prosecutor to "appeal[] to the jury's common knowledge that some abusive relationships continue despite repeated battery."[120] Once again, the court returned to the premise that context evidence on abusive relationships is relevant to help the jury weigh witness credibility brought into question by seemingly contrary behaviors on the part of the victim-witness. Thus, in 2006, 30 years after the BWS model first emerged and society's understanding of abusive relationships began to evolve, the court did not consider BWS experts necessary for such a "common knowledge" purpose.

Most recently, *State v. LaPrade*[121] has solidified the case law on BWS in the witness credibility context. The defendant, appealing an aggravated domestic violence conviction, challenged the trial court's admission of

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115. *Id.* ¶ 12. The opinion cites *State v. Kinney*, 170 Vt. 239, 762 A.2d 833 (2000), to support the premise that "syndrome evidence is usually admissible in Vermont," and conflating BWS with the separate issue of child rape syndrome. *Id.* ¶ 12.

116. *Id.* ¶ 23.

117. *Id.* ¶ 20.

118. State v. Desautels, 2006 VT 84, ¶ 28, 180 Vt. 189, 200–01, 908 A.2d 463, 474 (2006).

119. *Id.* ¶ 23.

120. *Id.* ¶ 27–28.

121. State v. LaPrade, 2008 VT 83, 184 Vt. 251, 958 A.2d 1179 (2008).

"expert testimony regarding BWS" for lack of relevance and unfair prejudice.[122] The Vermont Supreme Court referred to *Swift*'s dicta on the potential relevance of such testimony and affirmed the trial court's decision to limit the extent of the testimony by preventing the expert from "comment[ing] on the parties or the specific facts of the case" and retaining the jury's ability to weigh witness credibility.[123] The court cited Vermont Rules of Evidence 702 and 403, as well as *Verrinder*, emphasizing that "[t]he question of admissibility is vested to the discretion of the trial court . . . ."[124] While relevant, the admissibility of BWS expert testimony remains subject to trial court discretion under VRE 702 and 403.

Taken together, *Verrinder*, *Swift*, *Desautels*, and *LaPrade* acknowledge the relevance of evidence on battering to assist jurors in appreciating the reasonableness of the seemingly contrary behaviors and statements of domestic violence victim-witnesses. This evidence has relevance regardless of whether an expert testifies on BWS to support these inferences. The cases also reflect considerable changes in the way Vermont judges understand domestic violence. In 1990, the *Blair* trial court considered evidence of domestic violence to be "blown way out of proportion" given the proponent's failure to leave,[125] whereas in 2006, the Vermont Supreme Court considered the idea that "some abusive relationships continue despite repeated battery" to be a matter of "common knowledge."[126] At the same time, the cases show that evidence that highlights these dynamics to explain witness behavior remains necessary to provide a wider view of the context in which these crimes occur.

Whereas expert testimony on BWS is clearly admissible, the Court's willingness to affirm trial courts that supply jury instructions referencing past abuse without expert testimony—as well as decisions that limit the extent to which BWS experts can testify—confirm that reliance on the BWS model may have run its course. While BWS experts cannot provide an ultimate opinion as to whether a witness suffered from BWS in Vermont, they can supply general context evidence on how abusive relationships tend to influence witness behavior. The relevance of expert testimony, therefore, does not rest upon the specific psychological diagnosis of the individual or an explanation of the unique perspective of the witness in question. Instead, expert testimony serves as a vehicle to admit evidence on the abusive nature of the relationship in question and to legitimize the reasonableness of the

122. *Id.* ¶¶ 26–28.
123. *Id.* ¶ 26.
124. *Id.* ¶ 27.
125. Blair v. Blair, 154 Vt. 201, 203–04, 575 A.2d 191, 193 (1990).
126. State v. Desautels, 2006 VT 84, ¶ 27, 180 Vt. 189, 201, 908 A.2d 463, 474 (2006).

victim-witness's response. Accordingly, the Vermont Supreme Court does not view BWS expert testimony as the only means of highlighting and clarifying this important context for the jury.

BWS expert testimony is not the only available means to present relevant evidence that supplies a wider picture of the context of domestic abuse that can inform witness behavior. *LaPrade*, which supports the admissibility of BWS expert testimony,[127] also brings into focus the relevance and admissibility of general context evidence on the prior bad acts of the abusive partner to illuminate the behavior of the victim-witness. In addition to the BWS challenge, LaPrade also appealed the trial court's admission of "evidence of prior bad acts and a prior conviction of . . . domestic assault."[128] LaPrade raised VRE 404(b), which deems inadmissible "other crimes, wrongs, or acts" to prove the accused "acted in conformity therewith" but also provides exceptions to admit the evidence for other purposes.[129] Because the trial court convicted LaPrade of first-degree aggravated domestic assault, he argued that evidence of prior violent altercations against the victim-witness prejudiced the jury contrary to VRE 404(b).[130] The Vermont Supreme Court's discussion of this aspect of LaPrade's appeal provides striking commentary on the relevance or "probative value" of evidence that frames the broader context of abuse in which domestic assaults often occur.

The Court affirmed the trial court, holding that a victim-witness need not recant her complaint or refuse to testify for evidence of "prior assaultive conduct against the same victim" to be "probative of both context and motive," and therefore admissible under VRE 404(b).[131] The Court explained:

> What is clear from the record, however, is that the jury might well have found C.B.'s behavior—particularly her decision not to call the police herself when she repeatedly saw defendant near her apartment after the charged incident—incongruous or difficult to reconcile with her claim that defendant had recently broken into her apartment and strangled her. This is just the sort of incongruity that "context" evidence is meant to remedy in domestic-violence cases. *The jury would have been unable to*

127. State v. LaPrade, 2008 VT 83, ¶ 29, 184 Vt. 251, 262, 958 A.2d 1179, 1187 (2008).
128. *Id.* ¶ 10.
129. VT. R. EVID. 404(b).
130. *LaPrade*, 2008 VT 83, ¶ 11.
131. *Id.* ¶ 19.

> *make an adequate determination of C.B.'s credibility without hearing further testimony about the nature of her relationship with defendant*.[132]

From the court's reasoning emerges a concept that readily transfers to the issue of battered women's self-defense: jurors cannot fully appreciate an isolated act of violence between intimate partners without understanding the broader context of abuse in which the act occurred. VRE 404(b) does not permit admissibility "to prove character . . . in order to show . . . [action] in conformity therewith."[133] In the self-defense scenario, VRE 404(b) becomes even less of a concern than in *LaPrade*, because similar context evidence detailing the prior acts of the deceased abusive partner would only be relevant to the reasonableness of the defendant's act. If the Vermont Supreme Court recognizes that jurors require the full picture of abuse in order to understand the behavior of a victim-witness in a domestic assault trial, the same principle should apply with equal force to the reasonableness of a battered-woman defendant's actions in killing her abuser.

Admissibility, however, remains at the discretion of trial courts in Vermont. At face value, the Vermont Supreme Court's willingness to deny the appeals of defendants convicted on domestic violence related charges and to acknowledge the relevance of expert and non-expert testimony on the domestic abuse context might suggest that the case law would favor the admissibility of evidence on battering as it applies to self-defense. But a third-party witness who fails to leave an abusive relationship, or who becomes afraid or unwilling to testify against her abuser, does not pose the same challenge to contemporary norms or the traditional doctrine of self-defense as battered women on trial for killing their abusers. While other states have addressed potential admissibility problems, either by statute or by judicial decision, Vermont law does not provide the same level of legal certainty, leaving open an opportunity to move beyond BWS.

D. Self-Defense in Vermont

The law of self-defense in Vermont, which requires "perfect" self-defense and promotes excessive reliance on the "imminence" element,[134] poses a different set of challenges and uncertainties for battered women defendants. In *State v. Grace*, the case most directly on point on this issue,

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132. *Id.* ¶ 22 (emphasis added).

133. VT. R. EVID. 404(b). Vermont Rules of Evidence 404(a)(2) applies to evidence of the character of the alleged victim. VT. R. EVID. 404(a)(2).

134. State v. Shaw, 168 Vt. 412, 412, 721 A.2d 486, 486 (1998).

the Vermont Supreme Court did not address Grace's argument that the trial court improperly instructed the jury on the law of self-defense, because the court held that Grace failed to adequately object to the instruction at trial.[135] Vermont criminal statutes define justifiable homicide as "kill[ing] or wound[ing] another . . . [i]n the just and necessary defense of [one's] own life . . . ."[136] The case law interprets the statute in accordance with the generally accepted common law approach.[137] This two-part inquiry requires the defendant claiming self-defense have "an honest belief of imminent peril" measured both subjectively, as an assessment of the "honesty of the belief" and objectively, in terms of "whether the particular defendant had an objective, discernible reason for such belief."[138] Unlike some states, Vermont does not recognize imperfect self-defense, meaning that the defendant must either, "perceive a situation in a reasonable manner," or "have some objectively identifiable reason for departing from reasonable behavior" in order to satisfy the element of reasonableness.[139] Relative to other states, Vermont's interpretation of the role of objectivity and the standard of imminence could limit the ability of battered women defendants to obtain justice.

Beyond the issue of imperfect self-defense, the definition of "imminence" is not carefully delineated or clearly required in the Vermont case law. Christine Grace's defense counsel must have recognized the importance of defining this temporal element broadly, challenging the use of the term "imminent" in the trial court's instruction to the jury as contrary to the law of self-defense in Vermont, and contesting the definition of "imminent" as "almost immediately forthcoming."[140] Grace argued that, "the term 'imminent' does not require a temporal relation between the threat and the resultant act, and the [trial] court's use of the word 'immediately' improperly limited the jury's application of self-defense to acts occurring within a narrow time span."[141] As a result, the jury could not consider "the fear of danger" from Grace's perspective.[142]

The Vermont Supreme Court acknowledged that the plain language of

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135. State v. Grace, 160 Vt. 623, 625, 649 A.2d 225, 227 (1993).

136. VT. STAT. ANN. tit. 13, § 2305 (2007).

137. *Compare, e.g.*, State v. Wheelock, 158 Vt. 302, 308, 609 A.2d 972, 976 (1992) (holding a "defendant must have an honest belief of imminent peril, . . . grounded in reason"), *with* DRESSLER, *supra* note 32, § 18.01 (2006) ("At common law, a non-aggressor is justified in using force upon another if he reasonably believes that such force is necessary to protect himself from imminent use of unlawful force by the other person.").

138. *Wheelock*, 158 Vt. at 308, 609 A.2d at 976.

139. *Shaw*, 168 Vt. at 417, 721 A.2d at 491.

140. State v. Grace, 160 Vt. 623, 625, 649 A.2d 225, 227 (1993).

141. *Id.*

142. *Id.*

Vermont's justifiable homicide statute does not require "imminent danger," but cited *State v. Wheelock* as precedent supporting the inclusion of the imminence element.[143] Conversely, the Court noted that the term "*may* be used in a self-defense instruction."[144] The Court's use of the word "may" leaves confusion as to whether "imminence" is required at all, only further complicated by the Court's conclusion on this point. Ultimately, the Court declined to rule on the trial court's definition of "imminent," finding that Grace failed to preserve the issue and did not provide a plain error argument in the alternative.[145]

This aspect of the *Grace* opinion could be problematic for future battered woman defendants. Other Vermont case law on self-defense only deepens the ambiguity on "imminence." Since 1982, the Court has adopted a variety of phrases to define the element, such as "immediate and unavoidable,"[146] "a reasonable expectation of immediate harm,"[147] and "imminent danger of immediate bodily harm."[148] 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.[149] Though rare, nonconfrontational cases may fail to invoke the self-defense doctrine "solely" due to the imminence standard.[150] Victoria Nourse's research also shows that despite the logical expectation that imminence concerns would arise mostly in nonconfrontational cases, 70% of appeals challenging imminence issues involved more common, confrontational scenarios.[151] Cases involving battered-women defendants did not suggest time-lapse problems, but instead involved guns, fights, or other threatened aggression by abusers.[152] Nourse theorizes that despite how courts have focused on the "imminence" element, temporality and nonconfrontation are rarely concerns in battered-woman cases.[153] Rather than emphasizing the importance of the temporality of "imminence," the

143. *Id.* (internal quotations omitted).

144. *Id.* (emphasis added).

145. *Id.*

146. State v. Darling, 141 Vt. 358, 361, 449 A.2d 928, 929 (1982).

147. State v. Wheelock, 158 Vt. 302, 305, 609 A.2d 972, 974 (1992).

148. State v. Forant, 168 Vt. 217, 219, 719 A.2d 399, 400 (1998).

149. *See, e.g.*, Victoria Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1261–62 (2001) (noting the difference between immediate and imminent).

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

151. Nourse, *supra* note 149, at 1252–54.

152. *Id.*

153. *Id.*

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.[154] This ambiguity in the Vermont law highlights yet another reason why a new approach is long overdue.

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 as Christine Grace did. 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.[155] 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 charges to file or whether to file at all.[156] Studies show that indictment, prosecution, and sentence determinations reflect gender bias against women who kill their abusers.[157] Providing a defense that reflects the full justification, which exculpates the reasonable response, may deter prosecutors from filing unwarranted charges.[158]

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154. *Id.* at 1262–64.

155. Burke, *supra* note 5, at 217.

156. LEONARD, *supra* note 16, at 31.

157. *Id.* at 27.

158. *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.") (internal quotes omitted).

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.[159] As Sarah Buel notes, "even experienced defense lawyers often fail to listen effectively and support the battered client throughout the legal process."[160] 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,[161] or "battering and its effects," like the California statute,[162] would offer little on the whole to guarantee justice for battered woman defendants. While these statutes provide consistency and remove significant discretion from the trial courts,[163] such legislation only replicates the well-founded policy concerns that have emerged over the past few decades. The growing consensus regarding the issues 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.[164] A separate statute for domestic justifiable homicide would eliminate these concerns.

A "Justifiable Domestic Homicide" statute designed to complement existing Vermont law and to position Vermont as a leader among American jurisdictions would read as follows:

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159. *Id.* at 30–31.

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

161. MO. ANN. STAT. § 563.033 (West 2008).

162. CAL. EVID. CODE § 1107 (West 2008).

163. *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).

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

Justifiable Domestic Homicide[165]

> 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, as defined by VT. STAT. ANN. tit. 13, § 1101,[166] he or she shall be guiltless if the degree of force used is reasonable under the circumstances.
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> 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 Vermont's existing domestic assault statues will re-orient the 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

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165. The overall structure of the statute is derived from Vermont's existing justifiable homicide statute, VT. STAT. ANN. tit. 13, § 2305 (2008). This defense is premised on rationality, rather than abnormal psychology, which suggests exculpation based on justification. The statute isolates *acts* that occur in the domestic context by giving relevance to prior unlawful force. This approach avoids a formulation that would *excuse the actor*, therefore excuse fails as a doctrinal premise for the defense.

166. The terminology limiting this reach of the statute to the domestic context is derived from Vermont's domestic assault statute. VT. STAT. ANN. tit. 13, § 1042 (2008). The statute utilizes the phrase, "family or household member," which separates assaults occurring in the domestic context from traditional criminal assault. *Id*. The definitions section of the Vermont domestic relations statute defines the term "household members" as "persons who, for any period of time, are living or have lived together, are sharing or have shared occupancy of a dwelling, are engaged in or have engaged in a sexual relationship . . . ." VT. STAT. ANN. tit. 15, § 1101(2) (2008). The domestic assault statute utilizes this definition. VT. STAT. ANN. tit. 13, § 1041 (2008). The Vermont Supreme Court has implicitly affirmed the contextual distinction between simple assault and domestic assault, emphasizing the "broad temporal scope" of the definition of "household members." State v. Swift, 2004 VT 8A, ¶ 19, 176 Vt. 299, 302, 844 A.2d 802, 805 (2004). The court ruled that the defendant, by sharing an apartment with the victim for six months, reached the "household members" definition, despite the fact that the victim and defendant did not have an intimate relationship at the time of the assault. *Id*.

ongoing domestic abuse; the domestic abuse does.[167] The model statute achieves this shift by adopting the "family or household member" definition from existing statutes, while avoiding the narrow and increasingly outmoded language of "battering" and "battered woman syndrome."[168] 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.[169] As the law presently stands in Vermont, 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.[170]

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,"[171] 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. Furthermore, this approach prevents the over-extension of "imminence" when cases implicate reasonable responses to domestic violence that make this rigid temporal element less useful.

Third, this model 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, like Vermont, the

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167. *See* OGLE & JACOBS, *supra* note 27, at 7.

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

169. *See, e.g.*, State v. Forant, 168 Vt. 217, 219, 719 A.2d 399, 400 (1998) (reviewing jury instruction defining imminence element as "imminent danger of immediate bodily harm").

170. *Id.*

171. *See supra* text accompanying note 165.

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.[172] 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 reduces the act to manslaughter instead of murder.[173] An honest, but incorrect or "mistaken" belief diminishes the actor's culpability, but does not fully justify the act.[174] In California, for example, BWS evidence is relevant in murder cases to establish both self-defense, where the defendant "actually and reasonably" believed force was necessary, as well as imperfect self-defense, if the jury finds the defendant's "actual" belief objectively unreasonable.[175] 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,[176] while the term "instinctively" emphasizes the more universal, objectively 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.[177] 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.[178] A provision of the Act revises self-defense and addresses aspects of a consultation paper, *Partial*

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172. State v. Shaw, 168 Vt. 412, 418, 721 A.2d 486, 491 (1998).

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

174. *Id.*

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

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

177. *See* Burke, *supra* note 5, 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 wholly exculpate.") (citation omitted).

178. 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.

Defences to Murder, published by the United Kingdom Law Commission.[179] The paper considered whether to abolish the doctrine of provocation, because 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."[180] The 2008 reform redefines and clarifies the element of "reasonable force" in self-defense.[181] 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 . . . ."[182]

U.K. policymakers have observed that domestic relationships deserve legal recognition. In July 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.[183] The report recommends two relevant defenses to homicide in the domestic context: self-defense and the partial defense of provocation.[184] The difference between complete self-defense and the partial defense of provocation would depend upon whether the degree of force used was objectively reasonable.[185] While the overall U.K. approach adopts imperfect self-defense,[186] 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.[187] Relying on duress would only reproduce self-

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179. LAW COMM'N, PARTIAL DEFENCES TO MURDER: PROVISIONAL CONCLUSIONS ON CONSULTATION PAPER NO. 173, 1 (2004).

180. *Id.*

181. Criminal Justice and Immigration Act, *supra* note 178.

182. *Id.* (emphasis added).

183. MINISTRY OF JUSTICE, MURDER, MANSLAUGHTER AND INFANTICIDE: PROPOSALS FOR REFORM OF THE LAW, CONSULTATION PAPER 19/08, at 10 (2008).

184. *Id.*

185. *Id.* at 11.

186. *Id.*

187. *See* DRESSLER, *supra* note 32, at 470; Long & Wilsey, *supra* note 28, at 38.

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'] 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."[188] 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 subjected to duress."[189] 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.[190] Accordingly, the federal courts, the U.S. military justice system, and most states, by statute or case law, follow this common law rule.[191] Only eight states have contradicted the common law rule,[192] while only a few other states enable defendants to use duress to mitigate murder to manslaughter.[193] 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."[194] 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" element[195] 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 coerced to act against *a third*

188. MODEL PENAL CODE § 2.09 (Official Draft 1962).

189. *Id.*

190. 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).

191. *Id.* at 172–73.

192. *Id.* at 173 n.78.

193. *Id.* at 174.

194. *Id.* at 201 (citing United States v. Willis, 28 F.3d 170, 176–77 (5th Cir. 1994)).

195. MODEL PENAL CODE § 2.09 (Official Draft 1962). Under the MPC, the jury must find the defendant "was coerced." *Id.*

party.[196] 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 "coercive control" model of domestic violence,[197] 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.[198] Like traditional self-defense, duress does not offer an alternative for battered women-defendants that would not raise a new set of concerns.

CONCLUSION

Ensuring justice for battered women cannot end with battered woman syndrome and traditional self-defense because the story in Vermont will not end with Christine Grace. If Grace could have availed herself of justifiable domestic homicide, the testimony of friends and family describing the abuse that informed her understanding of the danger she faced would have taken on new relevance. Expanding the focus beyond Grace's subjective state of mind and whether she suffered from BWS, justifiable domestic homicide would have directed the jury to focus on the domestic relationship and apply this evidence when considering the reasonableness of her actions within this unique context.

The first step for battered women advocates in Vermont and across the country is to recognize the limitations posed by the law as it currently stands.

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. Instead of measuring reasonableness against traditional self-defense norms, the model statute takes this step and acknowledges that actions arising in domestic circumstances are unique and require a wider lens. The statistical unlikelihood of future cases like Christine Grace's does

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196. Burke, *supra* note 5, at 252, 265 (quoting GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 105 (1996)).

197. *See* EVAN STARK, COERCIVE CONTROL 5 (2007).

> [U]nlike other capture crimes, coercive control is personalized, extends through social space as well as over time, and is gendered in that it relies for its impact on women's vulnerability as women due to sexual inequality. . . . Men deploy coercive control to secure privileges that involve the use of time, control over material resources, access to sex, and personal service. Like assaults, coercive control undermines a victim's physical and psychological integrity.

Id.

198. Burke, *supra* note 5, at 253–55.

not render ambitious reforms any less deserving of legislative attention. As domestic violence awareness and access to resources improve, a woman's failure to leave may only become more incomprehensible to some. Rather than perpetuating arguments in favor of incremental reform that will achieve less-than-ideal solutions, this Note recommends that Vermont adopt a bold approach that reaches the core dilemmas that battered women face when they act in self-preservation.

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