

**KILL OR BE KILLED: WHY NEW YORK’S
JUSTIFICATION DEFENSE IS NOT ENOUGH FOR THE
REASONABLE BATTERED WOMAN, AND HOW TO
FIX IT**

Abigail Finkelman

TABLE OF CONTENTS

I.	INTRODUCTION	268
II.	INTIMATE PARTNER VIOLENCE	270
	A. What Is IPV?	270
	B. The Numbers	271
	C. Why Doesn’t She Leave?	271
III.	SURVEY OF SELF-DEFENSE LAW	274
	A. The Elements of Self-Defense Under Current Law ...	274
	B. Current State Law as Applied to IPV Victims Who Kill Their Partners	275
	C. The Model Penal Code	276
	D. States Other Than New York	278
	E. New York State	281
IV.	BATTERED PERSON SYNDROME	283
V.	PROPOSED CHANGE TO NEW YORK’S STATUTE	286
VI.	IMPLICATIONS OF THE CHANGE	288
	A. Concerns	288
	B. Jury Nullification	289
	C. Other Beneficiaries	290
	D. Rape	290
VII.	CONCLUSION	291

I. INTRODUCTION

The most dangerous place for a woman in America is her own home.¹ Each year in the United States, millions of women are beaten, burned, strangled, raped, and stabbed by their partners.² Each day, nearly three women are killed by a current or former romantic partner.³ Seventy percent of mass shootings occur at home.⁴ The legal system often offers little or no protection against this violence, particularly for women of color.⁵ Just leaving isn't an option.⁶ Yet when women fight back, when they kill their abusers to save their own lives, they are told they were not acting in self-defense.⁷

And indeed, under the current law, women who killed their abusers often were not acting in self-defense; they were, legally, just committing murder. It is time for the law to change. The American legal system was quite simply not designed to handle Intimate Partner Violence (IPV). In the 23 years since the passage of the Violence Against Women Act, only two states have explicitly amended their self-defense laws to account for

¹ This Note generally assumes that abusers are male and victims are female. Although Intimate Partner Violence (IPV) can be and is committed by people of any gender against people of any gender, the majority of severe IPV, and the vast majority of fatal IPV, is committed by men against women; women are also significantly more likely to be killed by *former* partners who are male. Beyond that, as a practical matter, there is substantial data and legal scholarship on battered women and, as of yet, very little on battered men; the law has, unfortunately, not caught up to modern relationships. *See generally* CATHERINE A. MACKINNON, *SEX EQUALITY* 772-783 (2016) (discussing the gender dynamic and providing data from 1994-2010); *see also* JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU OF JUSTICE STATISTICS, *NONFATAL DOMESTIC VIOLENCE, 2003-2012* 1 (2016) (finding that 76% of nonfatal domestic violence is committed against females).

² *See* MICHELE C. BLACK, ET AL, CENTERS FOR DISEASE CONTROL, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT* 38 tbl.4.1 (2011) (putting the lifetime estimated number of female victims of IPV-related rape, physical violence, and/or stalking in the United States at 34,273,000).

³ *See* VIOLENCE POLICY CENTER, *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA* (2017).

⁴ Melissa Jeltsen, *We're Missing the Big Picture on Mass Shootings*, THE HUFFINGTON POST (Aug. 25, 2015, 1:44 PM, last updated Jan. 11, 2017), https://web.archive.org/web/20180301121731/https://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women_us_55d3806ce4b07addcb44542a.

⁵ *See* ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 26 (2002) (citing to studies finding that "many women make repeated but failed attempts to enlist the help of law enforcement for their abusive situations"). For an analysis of how race impacts domestic violence proceedings, *see* Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 *CARDOZO J.L. & GENDER* 147 (2012).

⁶ *See, e.g.,* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 *ST. LOUIS U. PUB. L. REV.* 155, 158 (2004) (noting that attempts to leave abusive situations often lead to increased violence).

⁷ *See generally*, Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *YALE J.L. & FEMINISM* 75 (2008).

IPV.⁸ More commonly, states have offered different standards of “reasonableness” for battered women and have eliminated retreat requirements in the home.⁹ These changes, though an improvement on the status quo prior to the 1990s, are nonetheless inadequate to address the reality of self-defense in an abusive partner situation.

New York State’s justifiable homicide statute stands out as particularly unhelpful for victims of IPV. The inadequacy of the statute is highlighted by the people incarcerated in New York’s prisons; in 2005, of the women incarcerated for killing someone they knew, a full two-thirds had been abused by the person they killed.¹⁰ In addition, although New York in general allows testimony on the effects of battering, judges retain substantial discretion to determine the scope and admissibility of the testimony.¹¹

Therefore, this Note proposes a rewrite to New York’s justification statute to more appropriately address the realities of battery and the unique circumstances which lead victims of IPV to kill their abusers in ways that fall outside the current self-defense definitions.

Part II of the Note examines Intimate Partner Violence broadly—what it is, how prevalent it is, why victims of even the most horrific violence often stay in their relationships, and why staying may be a completely reasonable thing to do. This Part aims to demonstrate the necessity of changing New York’s law. Part III looks at self-defense statutes in the United States. It considers the Model Penal Code, the laws in states other than New York, and New York’s current statute. Although the legal system in the United States is based on common law, self-defense instructions, when they are given, “most often mirror the language of the state statute that authorize[.]” them.¹² Part IV discusses Battered Person Syndrome and the difference between an excuse and a justification. Finally, Part V offers new language for New York’s justification statute, and Part VI discusses the implications of adopting that language.

⁸ Those states are Arkansas and Kentucky; see Section III(C) of this Note for further detail.

⁹ See Kit Kinports, *Deconstructing the “Image” of the Battered Woman: So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 162-3 (2004) (discussing the changes made).

¹⁰ STATE OF NEW YORK, DEP’T OF CORRECTIONAL SERVICES, FEMALE HOMICIDE COMMITMENTS: 1986 VS. 2005 14 (2007).

¹¹ *People v. Seeley*, 186 Misc. 2d 715, 721 (2000). See also Tanya Brannan, *Barbara Sheehan’s Murder Defense Left Out All This*, WOMEN’S ENEWS (Oct. 20, 2011), <https://web.archive.org/web/20160409175324/http://womensenews.org/2011/10/barbara-sheehans-murder-defense-left-out-all> (discussing the limitations on testimony).

¹² ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 151 (2002).

II. INTIMATE PARTNER VIOLENCE

A. *What Is IPV?*

According to the Centers for Disease Control, Intimate Partner Violence “describes physical violence, sexual violence, stalking and psychological aggression (including coercive acts) by a current or former intimate partner.”¹³ Such violence “is linked to both immediate and long-term health, social, and economic consequences.”¹⁴ The New York State Office for the Prevention of Domestic Violence (OPDV) provides a broader definition of domestic violence (“also called intimate partner violence”) as “a pattern of coercive tactics, which can include physical, psychological, sexual, economic and emotional abuse, perpetrated by one person against an adult intimate partner, with the goal of establishing and maintaining power and control over the victim.”¹⁵

The OPDV also goes further, specifying that people think of domestic violence as physical abuse, but that’s only part of the picture. Many victims are never physically or sexually assaulted but are controlled and terrorized by their partners’ use of non-physical tactics such as: verbal, emotional/psychological abuse; coercion and threats; isolation; minimizing, denying, blaming; using children; intimidation; and economic abuse.¹⁶

The reference to non-physical tactics is particularly important in the context of this Note. Although non-physical IPV by itself is unlikely to justify homicide, it nonetheless plays an important role in the need for the expanded law. The actions which directly prompt a victim to kill her abuser may not be physical; abusers often openly tell their victims that they will kill them and give the victims reason to believe they are serious.

Consider, for example, Sheila Beasley.¹⁷ Sheila’s husband brutally beat and assaulted her for years. He had threatened to kill her many times before, but on the night she finally shot him while he slept, part of her reasoning for believing that he would in fact kill her when he awoke was that he had engaged in other, different psychological abuse, including

¹³ *Intimate Partner Violence: Definitions*, CENTERS FOR DISEASE CONTROL, <https://web.archive.org/web/20171119212804/https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html>.

¹⁴ *Intimate Partner Violence*, NATIONAL INSTITUTE OF JUSTICE, <https://web.archive.org/web/20171017093141/https://www.nij.gov/topics/crime/intimate-partner-violence/Pages/welcome.aspx>.

¹⁵ *Frequently Asked Questions*, OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, <https://web.archive.org/web/20170625201256/http://www.opdv.ny.gov/faqs/index.html> (hereinafter OPDV FAQ).

¹⁶ OPDV FAQ.

¹⁷ Sheila’s story can be found in ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 182-83 (2002).

showing her a picture of a little girl resembling their daughter in a casket. To Sheila, who knew him well, this non-physical behavior was a sign that he really did mean what he said and would kill her if she did not kill him first.¹⁸

B. *The Numbers*

More than six million people are the victims of rape, physical violence, and/or stalking by an intimate partner each year.¹⁹ In New York State, an estimated 2.5 million women and 2.4 million men have been the victims of rape, physical violence, and/or stalking by an intimate partner at some point in their lives.²⁰ In New York in 2013, nearly 300,000 domestic violence and sexual assault hotline calls were received.²¹ That same year, 300,000 orders of protection were issued.²² Over 55% of women murdered in America are murdered in connection with IPV, a number which rises to more than 60% for Hispanic women.²³

C. *Why Doesn't She Leave?*

The question which inevitably arises during discussions of IPV is, of course: Why don't these women leave?²⁴ The answer, an answer the women know full well, is that it is not that simple. First, to be clear, many victims do leave but end up returning to their abusers for reasons ranging from a lack of resources (particularly if, as is common, the abuser purposely kept them from working, going to school, or maintaining relationships outside the home) to believing lies, to simply being worn

¹⁸ *Id.*

¹⁹ MICHELE C. BLACK, ET AL, CENTERS FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 38 tbl.4.1 (2011) (estimating the number of victims over 12 months at 6,982,000).

²⁰ *Id.* at 74-77 tbl.7.4, tbl.7.5 (2011); note that “[m]ost of the violence reported by men was physical violence; 2.1% of men, overall, experienced stalking by an intimate partner.”

²¹ OPDV FAQ.

²² *Id.*

²³ Camila Domonske, *CDC: Half Of All Female Homicide Victims Are Killed By Intimate Partners*, NPR (July 21, 2017, 2:22 PM), <https://web.archive.org/web/20180217205839/https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> (discussing a report from the Centers for Disease Control and Prevention which found that “[m]ore than 55 percent of [female homicides] were related to partner violence” and that “Hispanic women who were killed, meanwhile, were the most likely to be killed in connection to partner violence (61 percent of all homicides of Hispanic women)”).

²⁴ For a general overview of the many reasons victims stay, see Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 20-25 (1999), available at https://web.archive.org/web/20171021182359/http://www.ncdsv.org/images/50_Obstacles.pdf.

272 EQUAL RIGHTS & SOCIAL JUSTICE [Vol. 25: 2

down by an abuser who ignores restraining orders.²⁵ Beyond that, the most dangerous time in an IPV relationship is when the victim tries to leave.²⁶ According to Wendy Mahoney, the executive director of the Mississippi Coalition Against Domestic Violence, “women in abusive relationships are about 500 many times more at risk [of being killed] when they leave.”²⁷ Even if she does leave successfully, 14.3% of IPV-related homicide victims were killed by a former intimate partner, like Marylou Sakissian.²⁸ Marylou’s ex-boyfriend is accused of breaking into her home, zip-tying her, beating her with a hanger, and strangling her to death.²⁹ He was reportedly angry with Marylou for taking out a restraining order against him.³⁰

Victims know this. They may not be aware of the specific data, but they are aware that their abusers threaten to kill them if they leave, and they are aware of the seemingly endless cases of such threats being carried out. For example, a Google search for woman killed by ex, narrowed to the randomly-selected week of 11/01/17-11/08/17, revealed six women in four states murdered by former partners during that period—in only the first three pages of results. The youngest of the women was 17.³¹ These results are not unusual; the same search repeated

²⁵ For a discussion of the failure of restraining orders and other legal approaches, see Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004).

²⁶ See, e.g., Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 181 n.142 (2004); Catherine Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 681 (2003); Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154, 164-67 (2015); Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL’Y & L. 229 (2009).

²⁷ Jerry Mitchell, *Most Dangerous Time for Battered Women? When They Leave.*, CLARION-LEDGER (Jan. 28, 2017), <https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552>.

²⁸ EMIKO PETROSKY, ET AL, CENTERS FOR DISEASE CONTROL AND PREVENTION, RACIAL AND ETHNIC DIFFERENCES IN HOMICIDES OF ADULT WOMEN AND THE ROLE OF INTIMATE PARTNER VIOLENCE — UNITED STATES, 2003–2014, 743 tbl.2 (2017).

²⁹ Hannah Fry, *Huntington Beach Woman Got Restraining Order and Installed Security System Before Being Killed*, LOS ANGELES TIMES (Mar. 7, 2018), <https://web.archive.org/web/20180311001517/http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-becher-update-20180307-story.html>.

³⁰ *Id.*

³¹ See Erica Byfield, *Brooklyn Girl, 17, Shot, Killed by Ex-Boyfriend; Another Man Wounded: Sources*, NBC 4 NEW YORK (Nov. 8, 2017), <https://web.archive.org/web/20180219225647/https://www.nbcnewyork.com/news/local/Teenage-Girl-Shot-Killed-Coney-Island-Brooklyn-Man-Shot-Arm-455870073.html>; Victoria E. Freile & Lauren Peace, *Police: Sodus Man Killed Ex-Girlfriend After She Rejected His Advances*, DEMOCRAT & CHRONICLE (Nov. 4, 2017), <http://www.democratandchronicle.com/story/news/2017/11/03/sodus-death-being-investigated/828532001>; Alice Fabbre, *Daughter of Woman Apparently Killed by Ex-Cop Husband Says He Tried to Control Her*, CHICAGO TRIB. (Nov. 1, 2017),

at other times found similar disturbing numbers, and further disturbing stories, like that of Jasmine Dunbar, a young mother whose ex-boyfriend is accused of killing her, setting her body on fire, watching her burn, and leaving her 7-month-old baby on the side of the road on a chilly night.³²

Threatening to harm or kill children is another common tactic used by abusers to control their victims, as in the case of Lynda Branch, who suffered years of sadistic torture, and finally told her husband her was leaving him after he tied her to their kitchen table, “inserted a candle in her vagina, lit it, and watched it burn to her flesh”; he responded by threatening to shoot both her and their daughter.³³ These are not idle threats. The majority of shootings in the United States where four or more people are killed are related to domestic violence—meaning the victims are typically a current or former partner and her children.³⁴ That does not

<https://web.archive.org/web/20180220155406/http://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-officer-murder-suicide-20171101-story.html>; WGNO Web Desk, *Man Shoots Ex-Girlfriend, Then Himself, After North Shore Police Chase*, WNGO (Nov. 6, 2017), <https://web.archive.org/web/20180217025403/http://wgno.com/2017/11/06/man-shoots-ex-girlfriend-then-himself-after-north-shore-police-chase>; Jonathan Glover, *Spokane Police End Multi-Agency Manhunt by Arresting Suspect in Fatal Stabbing*, THE SPOKESMAN-REVIEW (Nov. 7, 2017), <https://web.archive.org/web/20180209025746/http://www.spokesman.com/stories/2017/nov/07/police-spokane-valley-woman-stabbed-to-death>; CBS2, *Police: Woman Shot To Death By Stalker She Met Through Online Dating Site*, CBS NEW YORK (Nov. 2, 2017), <https://web.archive.org/web/20180311085218/http://newyork.cbslocal.com/2017/11/02/police-allege-woman-shot-by-stalker>.

³² See Crimesider Staff, *Man Who Went for Paternity Text with Ex Accused of Killing Her, Leaving Baby by Road*, CBS INTERACTIVE (Mar. 9, 2018), <https://web.archive.org/web/20180309194554/https://www.cbsnews.com/news/man-who-went-for-paternity-test-with-ex-accused-of-killing-her-leaving-baby-by-road>. As of November, 2018, Jasmine’s ex-boyfriend had been indicted on four counts, including murder in the first degree, and the state had announced its intention to seek the death penalty. *State v. Ware*, Case No. CR2018-112187-001, docket available at <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2018-112187>.

³³ See Bridget B. Romero et al., *Deconstructing The “Image” Of the Battered Woman: The Missouri Battered Women’s Clemency Coalition: A Collaborative Effort In Justice For Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 199 (2004). Lynda eventually had her sentence commuted in 2004, and was released in 2007, after serving more than twenty years in prison, see AP, *Missouri: Killer of Abusive Husband Released from Prison*, THE JOPLIN GLOBE (May 4, 2007), http://www.joplinglobe.com/archives/missouri-killer-of-abusive-husband-released-from-prison/article_f3bd68a5-e796-57b1-9b55-7ad9347e74e3.html; AP/WKMU, *Second Woman to be Released from Prison for Killing Husband*, ST. LOUIS PUB. RADIO, <https://web.archive.org/web/20180311100010/http://news.stlpublicradio.org/post/second-woman-be-released-prison-killing-husband#stream/0>.

³⁴ See generally EVERYTOWN FOR GUN SAFETY, MASS SHOOTINGS IN THE UNITED STATES: 2009-1016 (2017), available at https://everytownresearch.org/wp-content/uploads/2017/04/Analysis_of_Mass_Shooting_062117.pdf; see also Melissa Jeltsen, *We’re Missing the Big Picture on Mass Shootings*, THE HUFFINGTON POST (Aug. 25, 2015, 1:44 PM), last updated Jan. 11, 2017), https://web.archive.org/web/20180301121731/https://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women_us_55d3806ce4b07addcb44542a (finding that 64 percent of mass shooting victims are women and children, even though “women typically make up only 15

274 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2

include abusers who kill fewer than four people, such as John Battaglia, who got “revenge” on his wife for leaving him.³⁵ Battaglia had an extensive history of domestic violence, and was on probation when, during his weekly visit with his two young daughters, he called their mother and made her listen while he shot them.³⁶

Leaving an abuser sounds like the safest course—from the outside looking in. On the inside, many women, quite reasonably, fear for their lives, and the lives of their children, if they leave or try to leave.³⁷

III. SURVEY OF SELF-DEFENSE LAW

A. *The Elements of Self-Defense Under Current Law*

The basic elements of self-defense are largely consistent throughout state laws, whether common law or statutory, and in the Model Penal Code. The use of deadly force in self-defense is justifiable “where the defendant reasonably believes that the force is necessary to protect him or her from imminent death or serious bodily injury.”³⁸ While this standard may seem simple and logical, it is a formulation that is insufficient to serve the needs of people living with sustained IPV.

This insufficiency should not be surprising, as American self-defense law, like most law, was not crafted with the domestic sphere in mind; rather, “it was developed in cases involving men.”³⁹ Indeed, for the country’s first hundred years or so, physical “chastisement” of a wife was perfectly legal, and there would be no reason for an abused wife to fight back, as no court would have cared.⁴⁰ In New York State, it was not until

percent of total gun violence homicide victims, and children only 7 percent”).

³⁵ Sarah Mervosh, *In Killers’ Minds, Love Never Left*, THE DALLAS MORNING NEWS (2014), https://web.archive.org/web/20180307220108/http://res.dallasnews.com/interactives/2014_deadly_affection/part3. Battaglia was eventually executed for the murders; see Kristine Phillips & Marwa Eltagouri, ‘Well, Hi, Mary Jean’: Texas Man Taunts His Ex-Wife During His Execution, THE WASHINGTON POST (Feb. 2, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/01/texas-to-execute-man-who-killed-his-young-daughters-while-their-mother-was-on-speaker-phone/?utm_term=.24a757088a87.

³⁶ *Id.*

³⁷ There has been some acknowledgement of that in recent years; see, e.g., *People v. Ortega*, 942 N.E.2d 210, 215 (N.Y. 2010) (the Court of Appeals finding that “[n]either cohabitation nor a current romantic relationship is necessary for one individual to subject another to acts that will be considered domestic violence. Rather, domestic violence is characterized by a current, or former, intimate relationship between the parties”).

³⁸ ISABELLE SCOTT & NANCY MCKENNA, *DOMESTIC VIOLENCE PRACTICE AND PROCEDURE*, §8:47 (2017).

³⁹ Professor Holly Maguigan, quoted in Matthew Termine, Transcript: *Battered Women, Self-Defense, and the Law*, 79 *FORDHAM L. REV. RES GESTAE* 1, 5 (2011).

⁴⁰ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2130 (1996).

1979 that the courts held that women who were beaten by their husbands had the right to enforcement of the law; prior to that, officers would, “as a matter of policy,” refuse to act even when faced with bloodied and bruised women.⁴¹ It took another five years for a ruling stating that “there is no rational basis for distinguishing between marital rape and nonmarital rape.”⁴²

New York was hardly behind the times on these issues; it was only the 18th state to outlaw marital rape, and even in 1984 the decision, the first one in the nation to come from a court rather than from the legislature, was criticized, with at least one prominent law professor concerned that women might use accusations of rape to help them in divorce proceedings, as men would find it “embarrassing . . . to have to face these charges.”⁴³ That women might find it embarrassing to have to stand up and say they were raped was apparently of no concern.⁴⁴

B. *Current State Law as Applied to IPV Victims Who Kill Their Partners*

The primary issues with self-defense law as applied to IPV are the “imminence” and “proportionality” requirements. The imminence requirement, which is present in nearly all states, is usually interpreted to mean that the justification defense is only available to people who kill in the midst of an attack. Thus, a woman who has been abused for years may not claim self-defense if she kills her partner while he is sleeping, watching television, or engaged in any act other than actively attacking her,⁴⁵ because she is, according to the traditional interpretation, not “imminently” in danger.⁴⁶ The related “proportionality” requirement,

⁴¹ CATHERINE A. MACKINNON, *SEX EQUALITY* 784-786 (3rd ed. 2016) (discussing and citing to *Bruno v. Cold*, 396 N.Y.S.2d 974, 1977 (N.Y. Sup. Ct. 1977)).

⁴² *People v. Liberta*, 64 N.Y.2d 152, 163 (1984).

⁴³ See David Margolick, *Top State Court Rules Husbands Can Be Charged in Rape of Wives*, N.Y. TIMES (Dec. 21, 1984), <http://www.nytimes.com/1984/12/21/nyregion/top-state-court-rules-husbands-can-be-charged-in-rape-of-wives.html?pagewanted=1&pagewanted=all> (stating that New York was the first state to criminalize marital rape judicially); David Margolick, *New York Joins 17 States That Deny Wives Are Property; Rape in a Marriage is No Longer Within Law*, N.Y. TIMES (Dec. 23, 1984), <http://www.nytimes.com/1984/12/23/weekinreview/new-york-joins-17-states-that-deny-wives-are-property-rape-marriage-no-longer.html> (quoting Professor Yale Kamisar of the University of Michigan Law School).

⁴⁴ Professor Kamisar’s worry might be assuaged by the fact that rape is already drastically underreported: “fewer than a third [of victims] report their rape to the police; an even smaller number pursue their allegation to an arrest,” Eliza A. Lehner, Note, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207 (2017).

⁴⁵ It is important to note here that “such cases actually constitute a small percentage of the cases in which battered women kill their spouses, the vast majority being cases involving confrontation in which women claim they feared imminent harm,” Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 258 n.128 (2008).

⁴⁶ See, e.g., Christine M. Belew, Comment: *Killing One’s Abuser: Premeditation, Pathology*,

276 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2

sometimes known as the “necessary force” requirement, allows for deadly force only in response to certain types of violence—typically, deadly force or serious bodily injury, with some variation among the states. But the harm in IPV may not always be death or serious bodily injury.⁴⁷ It may “merely” mean beatings that don’t break bones, degradation, threats, having one’s every move controlled, being completely isolated from friends and family, and a host of other non-permanent injuries. Strictly applying the proportionality requirement leaves abused women with the perverse choice of either acting preemptively and going to prison or waiting until the violence gets “bad enough” that they are permitted to retaliate—and hoping that they don’t die in the process.⁴⁸

Many scholars have argued that one⁴⁹ or both⁵⁰ of these requirements are inappropriate for determining whether a justification defense is permissible when a victim kills her abuser. Unlike other situations, IPV is a unique type of violence in which the violence will (a) almost always recur and (b) almost always escalate, in what Robbin Ogle and Susan Jacobs have termed “a slow homicidal process.”⁵¹

C. *The Model Penal Code*

The Model Penal Code, which is the basis for self-defense statutes throughout the United States,⁵² provides for a self-defense justification

or Provocation?, 59 EMORY L.J. 769, 769 (2010) (citing to *Commonwealth v. Grove*, 526 A.2d 369 (Pa. Super. Ct. 1987)).

⁴⁷ Defined by the Model Penal Code as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Model Penal Code §210.0(3).

⁴⁸ Even then, whether a given act is sufficiently violent is left up to courts to decide. For example, the California Supreme Court explicitly held that a woman’s brutal rape did not qualify as “great bodily injury,” a decision not overruled for nearly 20 years. See CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 65-67 (1989); *People v. Escobar*, 3 Cal. 4th 740, 751 (1992).

⁴⁹ For arguments against the imminence requirement, see, e.g., Ashley D. Brosius, *An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense*, 100 IOWA L. REV. 775 (2015); Carol Jacobsen et al, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN’S L.J. 31, 35 (2007); Kit Kinports, *The Myth of Battered Woman Syndrome*, 24 TEMP. POL. & CIV. RTS. L. REV. 313, 315 (2015).

⁵⁰ For arguments against the proportionality requirement, see, e.g., Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 26 (2015); Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 74 (2010).

⁵¹ ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 77 (2002).

⁵² Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model*

defense in § 3.04, Use of Force in Self-Protection. The Code offers the following formulation:

“Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.⁵³”

As in most criminal codes, the MPC justification defense does not apply if the actor “can avoid the necessity of using such force with complete safety by retreating,”⁵⁴ although “the actor is not obliged to retreat from his dwelling.”⁵⁵ Despite this wording, which has been adopted by several of the states, there have been cases in MPC states in which the justification defense was denied on the grounds that the parties were co-dwellers.⁵⁶

As in most codes, the MPC also addresses deadly force in particular, saying that the use of deadly force “is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”⁵⁷ Although this list is more expansive than the traditional “death or serious bodily injury” formulation, it is still inadequate to address IPV, where the violence on the “present occasion” may not rise to the level of serious bodily injury, but the violence on a previous occasion has—and the victim has good reason to believe that the violence on a later occasion surely will again.

The MPC replaced the “imminent unlawful force” requirement with an “immediacy of necessity” requirement in its justification defense, and this is significant; such a formulation allows victims to argue that although the harm may not have been imminent, the force nonetheless needed to be used immediately. Unfortunately, only six states⁵⁸ have adopted that language in full; the “imminent danger” requirement remains prevalent elsewhere.⁵⁹ Of those six states, five have retained the

Penal Code, 52 HARV. J. ON LEGIS. 17, 22 (2015) (claiming that the MPC’s “wording provides the current prototype for the doctrine of self-defense in all states”).

⁵³ Model Penal Code §3.04(1) (Use of Force in Self-Protection).

⁵⁴ Model Penal Code §3.04(2)(b)(ii).

⁵⁵ Model Penal Code §3.04(2)(b)(ii)(A).

⁵⁶ *See, e.g.*, *State v. Shaw*, 185 Conn. 372, 388 (1981) (Bogdanski, C.J., dissenting); *State v. Ruland*, 1991 Ohio App. LEXIS 1996, 8 (1991) (noting that “A substantial minority of courts, however, hold that where the defendant and his assailant are co-dwellers, the defendant is obliged to retreat before employing deadly force, provided that a reasonable and safe means of avoiding the danger exists”).

⁵⁷ Model Penal Code §3.04(2)(b).

⁵⁸ *See* ARIZ. REV. STAT. ANN. §13-404; DEL. CODE ANN. tit. 11 §464; HAW. REV. STAT. ANN. §703-304; NEB. REV. STAT. ANN. §28-1409; N.J. STAT. ANN. §2C:3-4; 18 PA. CONS. STAT. §505.

⁵⁹ *See* ABIGAIL FINKELMAN, *STATE SELF-DEFENSE STATUTES* (2017), *available at*

278 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2

MPC's "on the present occasion" language, which, though broader than an imminence clause, nonetheless renders the statute too narrow for many IPV situations.⁶⁰ The sixth state, Arizona, both removed "on the present occasion" and does not differentiate between deadly and nondeadly force, leaving it entirely up to the actor to determine the necessary level of force.⁶¹

To better address this deficiency, Hava Dayan and Emanuel Gross have proposed amending § 3.04 by inserting the language "circumstances of a severe and prolonged pattern of domestic violence" into the section, which would "create a legal presumption that a real and concrete danger exists in cases of severe and continuous domestic violence."⁶² Such a presumption currently only exists in two states, Arkansas and Kentucky.⁶³ In the rest of the country, there is no explicit statutory acknowledgement that IPV can be a serious enough threat to warrant fighting back.⁶⁴

D. *States Other Than New York*

Despite mostly having the same basic elements, justification defense laws vary widely throughout the country.⁶⁵ The majority of states do not specifically discuss IPV in their statutes, or in their codes at all; among those that do, the context is typically regarding Battered Person Syndrome (BPS) as an excuse, rather than IPV as a justification.⁶⁶ BPS and its limitations are further discussed in Part IV of this Note.

A few states have fairly broad statutes which leave the necessary level of force up to the person using it, though almost all retain some form of imminence or immediacy requirement. Arizona, Iowa, and North Dakota do not distinguish between deadly and nondeadly force in their

<https://bit.ly/2qks98L>.

⁶⁰ The MPC commentaries make it clear that the domestic sphere was not what the drafters thought about when writing the defense; rather, they explained that the immediacy of force language would provide a "privilege to use defensive force to prevent an assailant from going to summon reinforcements, given a belief that it is necessary to disable him to prevent an attack by overwhelming numbers—so long as the attack is apprehended on the 'present occasion.'" MODEL PENAL CODE AND COMMENTARIES, Part I §†3.04 at 39-40.

⁶¹ ARIZ. REV. STAT. ANN. §†13-404.

⁶² Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 32-35 (2015).

⁶³ See ARK. CODE ANN. §†5-2-607 and KY. REV. STAT. §†503.050; see Part III(D) of this Note for further discussion of those particular statutes.

⁶⁴ See ABIGAIL FINKELMAN, STATE SELF-DEFENSE STATUTES, available at <https://bit.ly/2qks98L>.

⁶⁵ *Id.*

⁶⁶ See, e.g., BURNS IND. CODE ANN. §†35-41-3-11; MO. REV. STAT. §†563.033.

justification statutes; the statutes simply refer to “force” generally.⁶⁷ California extends justifiable homicide to the resistance of “any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person”;⁶⁸ nine states allow the defense for any forcible felony;⁶⁹ and Alabama and Colorado list specific felonies, but include among them both first- and second-degree assault.⁷⁰

On the other end of the proportionality spectrum, Maine permits deadly force only when the other party is “about to” commit murder, kidnapping, robbery, or rape; Texas allows it against “unlawful deadly force” or “to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery”; and Vermont limits deadly force to the protection of life or against “a person attempting to commit murder, sexual assault, aggravated sexual assault, burglary or robbery, with force or violence.”⁷¹ The inclusion of robbery is particularly startling when considered in the context of IPV: in these three states, a storeowner being robbed at gunpoint would have the statutory right to kill the robber, but a woman being burned with cigarettes or splashed with acid in her home by her husband would not.⁷²

There are other variations on justifiable homicide statutes, but, as mentioned previously, only two state codes directly address the unique needs of victims of IPV. The first is Arkansas, where the “use of deadly physical force in defense of a person” statute states that deadly physical force is justified if there is a reasonable belief that the other party is:

“(1) Committing or about to commit a felony involving force or violence; (2) Using or about to use unlawful deadly physical force; or (3) Imminently endangering the person’s life or imminently about to victimize the person as described in § 9-15-103 from the continuation of a pattern of domestic abuse.⁷³”

The Arkansas Code goes on to define “domestic abuse” as

⁶⁷ See ARIZ. REV. STAT. ANN. §13-404; IOWA CODE ANN. §704.3; N.D. CENT. CODE ANN. §12.1-05-03.

⁶⁸ CAL. PENAL CODE §197 (DEERING). However, this statutory language notwithstanding, California courts generally require a fear of death or great bodily harm to allow for perfect self-defense; see Erin Liotta, *Double Victims: Ending the Incarceration of California’s Battered Women*, 26 BERKELEY J. GENDER L. & JUST. 253, 275 (2011).

⁶⁹ See FLA. STAT. §776.012; GA. CODE ANN. §16-3-21; 720 ILL. COMP. STAT. ANN. 5/7-1; IND. CODE ANN. §35-41-3-2; LA. R.S. §14:20; MO. REV. STAT. §563.031; MONT. CODE ANN. §45-3-102; 21 OKLA. STAT. §643; UTAH CODE ANN. §76-2-402.

⁷⁰ See ALA. CODE §13A-3-23; COLO. REV. STAT. ANN. §18-1-704. In Alabama, assault in the second degree is defined as “serious physical injury” (ALA. CODE. §13A-6-21); in Colorado, it is any “bodily injury” (COLO. REV. STAT. ANN. §18-3-203).

⁷¹ ME. REV. STAT. ANN. tit. 17-A, §1108; TEX. PENAL CODE ANN. §§9.31, 9.32; VT. STAT. ANN. tit. 13, §2305.

⁷² CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 125 (1989).

⁷³ ARK. CODE ANN. §5-2-607.

“[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members,” as well as illegal sexual contact between family members.⁷⁴ Although the justification statute retains the imminence language, the addition of broadly-defined domestic abuse allows for deadly force where it would might otherwise be viewed as disproportionate; there can be no question that the Arkansas legislature intended that victims of IPV be able to use the defense.

The inclusion of “the infliction of fear” in the definition of domestic violence is of particular note and particularly helpful for those in IPV situations. Abusers often threaten to kill their victims and give victims good reason to believe those threats will be carried out. The typical formulation does not recognize the very reasonable fears caused by those threats as sufficient justification to act in self-defense, requiring instead that there be some action occurring; adding the infliction of fear could change the outcome for many women who kill their abusers. For example, Dixie Shanahan’s horrifically violent husband of 19 years told her that he was “gonna’ kill this baby one way or another” while he beat, punched, and pulled the hair out of a pregnant Dixie in front of their daughter; he then pointed a loaded gun at her and told her once again that he would kill her.⁷⁵ When Dixie tried to call the police, he “moved towards her.”⁷⁶ Dixie grabbed the gun, shot him, and was sentenced to fifty years in prison for doing so.⁷⁷ Had Iowa law allowed for the infliction of fear to be taken into account, Dixie’s actions would have been quite clearly “reasonable.”

Kentucky takes a slightly different approach to the problem. The Kentucky “[u]se of physical force in self-protection” statute allows physical force “when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person,” and allows for deadly physical force “when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to [Kentucky’s Castle Doctrine].”⁷⁸

For the purposes of the justification defense, Kentucky provides a unique definition of “imminent,” where it means “impending danger, and, in the context of domestic violence and abuse . . . belief that danger is

⁷⁴ ARK. CODE ANN. §9-15-103.

⁷⁵ See, e.g., Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 277-78 (2007).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ KY. REV. STAT. §503.050.

imminent can be inferred from a past pattern of repeated serious abuse” (emphasis added).⁷⁹ Although imminence is still required, this is nonetheless a significant improvement for victims, who can use their own experience in this relationship to decide if violence is imminent, which they can usually tell in advance.⁸⁰ It should be noted, however, that while the outcome is good, the legislature’s intention in writing this provision was to “codify the battered spouse defense into Kentucky law,” which, as is discussed in Part IV of this Note, is problematic.⁸¹

E. *New York State*

As compared to many other states, New York’s justification defense statute is relatively narrow, and it is distinctly unfriendly to victims of IPV who fight back against their abusers. The Penal Law reads:

“1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter’s conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person

⁷⁹ KY. REV. STAT. §503.010(3).

⁸⁰ See, e.g., ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 26 (2002) (citing to ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987)) (stating that “[f]requently, a woman’s lethal action is provoked by a sudden change in the pattern of violence, which signals to her that death is imminent”); Victoria Law, *How Many Women are in Prison for Defending Themselves Against Domestic Violence?*, BITCH (Sept. 16, 2014), <https://www.bitchmedia.org/post/women-in-prison-for-fighting-back-against-domestic-abuse-ray-rice> (quoting one anonymous victim who killed her abuser as saying “You know that this is the end. You see it in their eyes that they’re going to kill you.”).

⁸¹ W. Robert Lotz, *A Survey of Criminal Law Statutes Enacted in 1992*, 20 N. KY. L. REV. 745, 754 (1993) (“The definition of ‘imminent’ under KRS 503.010(3) was amended to allow a jury to infer a belief that danger was imminent from a past pattern of repeated serious abuse. These amendments codify the battered spouse defense into Kentucky law.”).

282 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2

under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is: [in his or her dwelling, or a law enforcement officer]; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and [he or she is the lawful occupant of the building].⁸²

New York's statute thus (1) does not adopt the Model Penal Code's "immediately necessary" standard, (2) retains the imminence requirement, and (3) does not include bodily harm, forcible felony, or similar on its list of acts justifying deadly force.

Further, although New York does include rape and criminal sexual acts on the list of acceptable reasons for use of deadly force, it limits them to forcible rapes and criminal sexual acts, rather than all rapes and criminal sexual acts. Rape "by forcible compulsion," or rape in the first degree, is a class B felony; rape "without [the victim's] consent where such lack of consent is by reason of some factor other than incapacity to consent" or rape in the third degree, is a class E felony.⁸³ New York defines "forcible compulsion" as "use of physical force; or a threat, express or implied, which places a person in fear of immediate death or physical injury [or kidnapping, to himself or others]."⁸⁴ According to the Legislature, a rape or sexual assault carried out by a threat of anything other than "immediate death or physical injury" is not a rape or sexual assault which justifies the use of deadly force, but in the context of an abusive relationship, not every rape may be that direct.

Forced sex is an extraordinarily common part of IPV, and is even more common among victims who fight back against their abusers.⁸⁵ It is

⁸² N.Y. C.L.S. PENAL §†35.15.

⁸³ N.Y. C.L.S. PENAL §§†130.35(1), 130.25(3). There are also provisions for rape due to inability to consent; *see* N.Y. C.L.S. PENAL §§†130.35(2-4), 130.30, 130.25(1-2). The distinctions for criminal sexual acts are similar but apply to oral and anal sex; *see* N.Y. C.L.S. PENAL §§†130.40, 130.45, 130.50. New York, unlike a number of other states, does not consider oral and anal sex to be rape; for further discussion on the implications of that separation, *see* Ann Johnson, *Gender, Victimization, and Evolving State Standards: A Study of New York and Michigan Sexual Assault Legislation*, 79 ALB. L. REV. 1355 (2015/2016).

⁸⁴ N.Y. C.L.S. PENAL §†130.00.

⁸⁵ *See, e.g.*, JUDITH MCFARLANE & ANN MALECHA, *SEXUAL ASSAULT AMONG INTIMATES:*

not difficult to think of a myriad of situations where an abuse victim might have sex against her will which would not fall under the “forcible” umbrella but which are nonetheless rape, particularly when the rapist is the victim’s long-term partner and sex whenever he wants it “or else” has simply become part of the relationship. New York’s decision to exclude non-consensual, non-forcible rape from its justification statute further sharply limits the occasions on which the legal system deems it “justified” for IPV victims to fight back against their abusers.

IV. BATTERED PERSON SYNDROME

There are two types of affirmative defenses in the United States: justification defenses and excuse defenses.⁸⁶ There is a fine line between the two, but classic self-defense is seen as a justification, as in “justifiable homicide.”⁸⁷ In the simplest terms, a justification defense “is one in which the defendant claims she did the right thing or took the most appropriate action under the circumstances,” while an excuse defense focuses “on the individual defendant and whether he is blameworthy or culpable. In other words, the defendant’s act is presumed to have been wrongful, but the defendant asks us to excuse him for some other reason.”⁸⁸ Battered Person Syndrome (BPS)⁸⁹ has been used as both an excuse and a justification, and it has been criticized from both angles.⁹⁰ To some people, particularly many feminists, BPS is seen as insulting,

FREQUENCY, CONSEQUENCES AND TREATMENTS 3 (2010) (finding that 68% of physically abused women reported sexual assault); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1453 (2014) (stating that half of all women who are raped are raped by an intimate partner); ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 26 (2002) (citing to ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987), on rape and women who kill their abusers).

⁸⁶ Ashley D. Brosius, *An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense*, 100 IOWA L. REV. 775, 790 n.109 (2015) (citing to ISABELLE SCOTT & NANCY MCKENNA, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE 999 (West 2011) and CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 588 (West, 2d ed. 2009)).

⁸⁷ Christine M. Belew, *Killing One’s Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 783 n.118 (2010) (citing to Joshua Dressier, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 461 (2006)).

⁸⁸ CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 588-89 (West, 2d ed. 2009).

⁸⁹ Also known as Battered Wife Syndrome, later expanded to Battered Spouse Syndrome and now to simply Battered Person Syndrome, as recognition grew that abusive relationships were (1) not limited to heterosexual couples and (2) not limited to married couples. However, all four formulations (Woman/Wife/Spouse/Person) are still commonly used.

⁹⁰ For a general discussion of the difference between justification and excuse, see Marcia Baron, Symposium on Criminal Responsibility, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005).

treating women as somehow inferior or infantilizing them; to others, BPS gives an excuse where there ought not be one.⁹¹

The concept of BPS first came about in the late 1970s as “Battered Woman Syndrome” and, though originally treated with deep skepticism by most courts, became an accepted part of a defense.⁹² When BPS is raised, where it is allowed to be raised, an expert testifies about the effects of sustained battering on a victim’s psyche, including “learned helplessness,” a “high tolerance for cognitive inconsistency,” a “sense that alternatives are not available,” and an ability to “‘rate’ the tolerability or survivability of their partner’s violence.”⁹³ It is then argued that, due to these effects, battered women should not be held to the classic “reasonable man” standard (the objective standard), and that there should be a “reasonable battered woman” standard (the subjective standard) instead.⁹⁴ The expert will explain that, due to past abuse, the battered woman’s perception of the situation was warped, to an extent that she genuinely perceives danger—even when the reasonable man would not.⁹⁵

In a majority of states, the objective standard still reigns, and courts are “reluctant to find that a battered woman who preemptively kills her batterer acts in self-defense.”⁹⁶ In certain other jurisdictions, the standard has been changed to be a subjective standard, in which, per the North Dakota Supreme Court,

“the issue is not whether the circumstances attending the accused’s use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect

⁹¹ For feminist critiques of BPS, *see generally*, Sharon Angella Allard, *Rethinking Battered Women Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191 (1991); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Batter Woman Syndrome*, 1995 WIS. L. REV. 1003 (1995); Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN’S L.J. 65 (2008); Christine M. Belew, Comment: *Killing One’s Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769 (2010); Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994).

⁹² Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 161 (2004) (stating that BPS “testimony is routinely admitted in every state”).

⁹³ Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN’S RTS. L. REP. 227, 228-29 (1986).

⁹⁴ *See* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 162 (2004). There has been a recent movement to shift from speaking of a syndrome to speaking of the “effects of battering,” including Post-Traumatic Stress Disorder, which may have effects ranging from flashbacks to hypervigilance (*see* Kit Kinports, *The Myth of Battered Woman Syndrome*, 24 TEMP. POL. & CIV. RTS. L. REV. 313, 318-19 (2015)).

⁹⁵ *See* Lauren Danice Shuman, Note & Comment, *Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser*, 56 HOW. L.J. 983, 1005 (2013) (explicitly separating a reasonable person and a battered woman).

⁹⁶ Christine M. Belew, Comment: *Killing One’s Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 781 (2010).

himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in the accused an honest and reasonable belief that he must use force to defend himself against imminent harm.⁹⁷

Under the objective reasonableness standard, a woman who kills her abuser when he is not presently abusing her is of course not acting reasonably. Under the BPS subjective reasonableness standard, there is an acceptance that a woman who kills her abuser when he is not presently abusing her is acting reasonably based on what she “honestly believed.”⁹⁸ This does not, however, acknowledge that her actions may have been objectively reasonable, and indeed courts and legislatures often makes it clear that her actions were objectively unreasonable.

For example, when the Oklahoma Court of Criminal Appeals agreed that it was appropriate to allow testimony on BPS, the Court adopted a new jury instruction to be given in cases where a BPS defense was raised.⁹⁹ There were only two differences between the instructions: first, the usual line stating that someone was “justified in using deadly force in self-defense if that person reasonably believed that use of deadly force was necessary” was changed to “justified in using deadly force in self-defense if that person believed that use of deadly force was necessary”; and second, the line stating that “although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger” was changed to “although the danger to life or personal security may not have been real, if a person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that she was in imminent danger.”¹⁰⁰ Oklahoma, like many states, is willing to accept that a battered woman genuinely believes she is in imminent danger—but is not willing to accept that she is reasonable.

Neither the objective standard nor the subjective battered woman standard considers the possibility that a woman who kills her abuser when he is not presently abusing her is acting as any reasonable person would. Despite a growing awareness of the fact that leaving an abusive relationship is likely not an option,¹⁰¹ there has not been any major move towards acknowledging that acting to leave the relationship in the only way possible is a perfectly rational thing to do and not a sign of a battered

⁹⁷ *State v. Leidholm*, 334 N.W.2d 811, 817 (N.D. 1982) (italics in original).

⁹⁸ *Id.* at 818.

⁹⁹ *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992).

¹⁰⁰ *Id.* at 11.

¹⁰¹ *See, e.g., In re Elizabeth B. v N.Y. State Off. of Children & Family Servs.*, 149 A.D.3d 8, 11 (N.Y. App. Div. 2017), where the Appellate Division stated that “it is well recognized that the most dangerous time in an abusive relationship occurs when the victim attempts to separate from the abuser.”

psyche.

V. PROPOSED CHANGE TO NEW YORK'S STATUTE

As discussed above, there are several concerns with New York's justification statute which need to be addressed. First, New York should remove the "imminence" requirement, and instead adopt the MPC's "immediate need for force" language, to allow for people to use force even when there is not an "imminent" threat; thus, a woman who shot her sleeping husband could argue that she had good reason to believe she would be assaulted in the morning, and that while said assault might not be imminent, there was nonetheless an immediate need to prevent it.

Second, the circumstances under which deadly force is permissible should be expanded to more appropriately account for IPV situations where the threat in question may not fall into one of the few categories inscribed in the statute.

Third, this Note proposes adopting Arkansas's language about domestic abuse.¹⁰² This would send an unequivocal message to judges and juries that the legislature recognizes IPV as a serious issue and recognizes that the unique contours of an abusive relationship may make the decision to use fatal violence a rational and justified one.

This is my suggested language, with additions in bold and underline and subtractions struck out:

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be **immediately** necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use ~~or imminent use~~ of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

¹⁰² ARK. CODE ANN. §§5-2-607, 9-15-103.

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is: [in his or her dwelling, or a law enforcement officer]; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or (c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and [he or she is the lawful occupant of the building]; **or**

(d) He or she reasonably believes that the other person is endangering the person's life or the life of a third party or is going to victimize the person or a third party from the continuation of a pattern of severe domestic violence.

Although “intimate partner violence” is, as noted in Part I, generally the preferred terminology, this proposal retains Arkansas’s use of “domestic” violence for two reasons. First, “domestic violence” and “domestic abuse” are already widely used throughout New York law and administrative codes (including the Office for the Prevention of Domestic Violence).¹⁰³ Second, “domestic violence” can be interpreted to cover a wider spectrum of close relationships, including elderly adults and adult children, extended family, and in-laws. Although the systemic issue of victims killing in self-defense and going to prison for doing so is specific to partners, it is possible to conceive of similar situations with all of those “domestic” permutations—particularly elder abuse—and the law should apply to those.

Any invocation of the new portion of the justification defense would be accompanied by expert testimony on the way IPV works, the way it escalates, and the difficulty or impossibility of leaving an abusive relationship. The purpose of such testimony would not be to explain why an abuse victim’s worldview would lead her to honestly but subjectively—and incorrectly—believe that that lethal force was necessary, as is the case with testimony on BPS. Rather, the purpose would be to demonstrate that, under the circumstances, the force was objectively necessary, that the “reasonable man” would take the same actions this woman did.

According to Professor Holly Maguigan, expert testimony is crucial in IPV cases not because “judges and juries don’t know about domestic violence” but because “they think they do.”¹⁰⁴ Unlike in a case where the

¹⁰³ OPDV FAQ.

¹⁰⁴ Matthew Termine, Transcript: *Battered Women, Self-Defense, and the Law*, 79 FORDHAM L.

experiences are foreign to the jury, or where the issues are deeply technical, it is precisely because IPV is so common that experts are needed to break down the myths and explain the context around victims killing their abusers.¹⁰⁵

VI. IMPLICATIONS OF THE CHANGE

A. Concerns

One concern that inevitably arises when discussing any expansion of the self-defense statute is the fear that women might kill their abusers because they can “get away with it.” This implies that the current state of the law is deterring IPV victims from killing their abusers. The evidence shows otherwise. Deterrence theory is predicated on the assumption that if I see someone go to prison for doing X under Y circumstances, I am less likely to do X under Y circumstances, because I do not want to go to prison. But as Leigh Goodmark points out, “the experience of being battered is not necessarily generalizable. In the midst of a battering incident, the victim is thinking only about the unique circumstances of her situation, assessing the lethality of her attacker and the likelihood that she or someone close to her will be killed.”¹⁰⁶ Even if a victim is aware of the change in the law, she is unlikely to, in the moment, pause to figure out whether it applies to her.

In addition, women who are imprisoned for killing their abusers regularly say they would make the same choice again, even knowing the outcome.¹⁰⁷ It is clear that when they kill their abusers, they’re doing it out of desperation, to save their lives—and, often, the lives of their children—not because they think they won’t be punished. They are also not killing simply because they want their husbands dead; according to one attorney who has represented hundreds of women who killed their abusers, “I’ve met only one woman who wanted to kill her husband. Battered women don’t want to do it. And they won’t do it if they don’t

REV. RES GESTAE 1, 4 (2011) (Professor Maguigan, paraphrasing IPV expert witness Mary Ann Dutton).

¹⁰⁵ For a general discussion of the uses of expert testimony in these cases, see Domestic Violence Symposium, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921 (2012); see also Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN’S RTS. L. REP. 227 (1986).

¹⁰⁶ Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 304 (2007).

¹⁰⁷ See, e.g., Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 308 (2007) (citing to Staci Hupp, *Shanahan Says She Would Do It Again*, DES MOINES REG., May 13, 2004, at 1A).

absolutely have to.”¹⁰⁸

Even for women who “want to do it,” this new language does not declare open season on all spouses who quarrel or even on all abusers. The statute provides justification for deadly force only against abusers who have a pattern of severe violence, recognizing where the “slow homicidal process” leads in the end, and the impossibility of avoiding that end.¹⁰⁹

Of course, as in all cases, the question of whether or not the violence was severe enough to justify the killing would be left to that most idiosyncratic of groups: the jury. And many juries might well still find victims who kill guilty. Yet merely providing the jury with the specific language of “severe domestic violence” in part (d) would tell them that there is a level of violence which, when it is persistent, it is reasonable and legal to end through any means necessary. Sending that message to juries (and judges, and prosecutors) is a crucial part of any reform.¹¹⁰

B. Jury Nullification

This additional language would also help to address the problem of jury nullification in IPV cases. At present, juries are often, understandably, reluctant to convict abuse victims.¹¹¹ As tragic as it is when victims are punished for acting to protect themselves, it is also problematic when juries, faced with the prospect of incarcerating someone who acted out of understandable desperation, take the law into their own hands.¹¹² However tempting it may be to view such outcomes as righteous and just,¹¹³ a legal system where “jurors refuse to follow the law and instead reach a result that is in accord with their own feelings of

¹⁰⁸ *Id.* at 279 n.94 (citing to ANN JONES, *WOMEN WHO KILL* 346-47 (1996) (italics in original)).

¹⁰⁹ ROBBIN S. OGLE & SUSAN JACOBS, *SELF-DEFENSE AND BATTERED WOMEN WHO KILL* 77 (2002).

¹¹⁰ For more on juries and IPV victims who kill, see Emily C. Hodell et al., *Factors Impacting Juror Perceptions of Battered Women Who Kill Their Abusers*, 18 *PSYCH. PUB. POL. AND L.* 338 (2012).

¹¹¹ And might be even more reluctant if they knew the stakes: when the jurors who convicted Dixie Shanahan learned she would be in jail for 50 years, they asked the governor to commute her sentence; they had never dreamed that she would spend the rest of her life in jail. (Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 *U. KAN. L. REV.* 269, 270 (2007)).

¹¹² See Christine M. Belew, Comment: *Killing One's Abuser: Premeditation, Pathology, or Provocation?*, 59 *EMORY L.J.* 769, 785-86 (2010) (discussing jury nullification as it relates to IPV victims who kill their abusers).

¹¹³ Some people do in fact view it that way; see, e.g., Elisabeth Ayyildiz, *When Battered Women's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 *AM. U. J. GENDER & LAW* 141, 161-67 (1995) (arguing that juries “should be encouraged to refuse to convict a battered woman who kills her batterer”).

290 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2]

justice” is not, in the end, a fair or just system.¹¹⁴ Further, what juries often end up doing is “splitting the difference,” and acquitting the defendant of murder but convicting her of some lesser crime, thus sending a distinctly mixed message about what, exactly, society wants from these women.¹¹⁵

C. Other Beneficiaries

As discussed in Part III, New York’s justification statute is among the narrowest in the country. Implementing the changes proposed in this Note would move New York to the forefront of self-defense law. The age of harsh mandatory minimums and mass incarceration has passed, and Americans are increasingly waking up to the problems in our justice system.¹¹⁶ There are any number of situations where the current law is inadequate and a broader one would be more appropriate, and the proposed change to § 35.15(1) (changing from “imminent use” to “immediately necessary”) would apply to nonfatal violent encounters outside of the domestic sphere.

D. Rape

Although the current statute is remarkably limited regarding rape and sexual assault, this Note does not include an amendment to that portion of it. As noted previously, sexual violence is a major factor in IPV.¹¹⁷ But as long as the Legislature insists on retaining levels of rape,

¹¹⁴ Christine M. Belew, Comment: *Killing One’s Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 785 (2010).

¹¹⁵ See, e.g., Dan Bilefsky, *Cleared of Murder, Sheehan Reports to Jail on Gun Conviction*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/nyregion/barbara-sheehan-is-jailed-after-weapons-conviction.html> (discussing a case in which an abused woman shot her husband while he was shaving; after three days of deliberation, a previously-deadlocked jury reached a “compromise” wherein she was acquitted of second-degree murder and one gun possession charge, but convicted of a second gun possession charge, for which she was eventually sentenced to five years in prison (Dan Bilefsky, *5-Year Term for Woman Who Killed Her Husband*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/2011/11/11/nyregion/barbara-sheehan-sentenced-to-5-years-in-prison.html>)).

¹¹⁶ See generally, INIMAI CHETTIAR & MICHAEL WALDMAN, SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (2015) (essays from prominent Democrats and Republicans committed to reducing mass incarceration); see also Keith Humphreys, *The Decline of Mass Incarceration Is Good for Everyone*, WASH. POST: WONKBLOG (Jan. 11, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/01/11/the-decline-of-mass-incarceration-is-good-for-everyone> (reporting that the national imprisonment rate is at “a generational low”).

¹¹⁷ See, e.g., JUDITH MCFARLANE & ANN MALECHA, SEXUAL ASSAULT AMONG INTIMATES: FREQUENCY, CONSEQUENCES AND TREATMENTS 3 (2010) (finding that 68% of physically abused women reported sexual assault); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1453 (2014) (stating that half of all women who are raped are raped by an

and only considering certain acts under certain circumstances to be “real” rape, it would seem to be inconsistent to change just this portion of the law to punish some rapists.¹¹⁸ If sexual violence is present in a relationship, that would fall within the “pattern of severe domestic violence,” allowing even “non-forcible” rape to be considered justification for using deadly force.

VII. CONCLUSION

The proposed changes to New York’s justification statute would fundamentally alter the way we think about IPV, and about battered women in particular. Rather than say that killing an abuser is unjustified but is excused, these changes acknowledge a proposition which we accept in other cases: When someone is faced with the choice of either (a) suffering immense harm and/or dying; or (b) using deadly force against the person who is causing that immense harm and/or death, the latter is justified.

Under no other circumstances does the American legal system require people to simply allow horrific violence to be inflicted upon themselves. It may require that they retreat, but only if they can do so with complete safety—which abuse victims quite often demonstrably cannot. And in most states, it does not require them to retreat when in their own homes.¹¹⁹ It may also require that they only act in the moment that the violence is occurring—but that requirement exists because the law, written by men, presumes that the violence will at some point end. In abusive households, this presumption no longer holds true. The violence will not end. The violence will only increase. He may not be tying her to the bed with barbed wire,¹²⁰ or “stomp[ing]” her,¹²¹ or

intimate partner); ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 26 (2002) (citing to ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987), on rape and women who kill their abusers).

¹¹⁸ See Margaret Hartmann, *Victim of NYPD Rapist Comes Forward to Change New York’s Rape Laws*, N.Y. MAGAZINE (Feb. 11, 2013), <http://nymag.com/daily/intelligencer/2013/02/nypd-rapists-victim-comes-forward-to-change-law.html>; Kenneth Lovett, “Rape Is Rape” Law Advocate, *Sexual Assault Survivor Leaves New York*, N.Y. DAILY NEWS (July 20, 2015), <http://www.nydailynews.com/new-york/nyc-crime/rape-rape-vic-leaves-n-y-article-1.2297482>

(articles discussing a rape survivor’s failed three-year quest to get the Legislature to amend the law to treat forced oral and anal sex as rape).

¹¹⁹ For a general discussion of the “Castle Doctrine,” “Stand Your Ground” laws, and IPV, see Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237 (2008).

¹²⁰ Bridget B. Romero et al., *Deconstructing the “Image” of the Battered Woman: The Missouri Battered Women’s Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 193 (2004).

¹²¹ ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 137 (2002)

292 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25: 2

choking¹²² or beating her unconscious,¹²³ at this precise moment, but he has before, and he will again; “[t]he question is not whether . . . but when” he will do it.¹²⁴ Preventing that when is both justified and reasonable.

¹²² ROBBIN S. OGLE & SUSAN JACOBS, *SELF-DEFENSE AND BATTERED WOMEN WHO KILL* 111 (2002).

¹²³ ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 105 (1987).

¹²⁴ CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 68 (1989).