SELF-DEFENSE, RESPONSIBILITY, AND PUNISHMENT:
Rethinking the Criminalization of Women Who Kill Their Abusive Intimate Partners

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Introduction

The problem of mass incarceration in the United States has received increasing attention over the last several years, prompting the public to raise questions surrounding decriminalization, prison reform, and alternatives to incarceration. But despite this burgeoning discourse, one significant aspect of the problem has been consistently neglected: the population of incarcerated women. The United States has the highest incarceration rate of women in the world, with over 231,000 women behind bars in either state or federal prisons or jails.[1] Not only that, but women have now become the fastest growing segment of the carceral population.[2] Over the last four decades, the number of incarcerated women in the United States has increased nearly fivefold, twice as fast as men.[3] Even in states where attempts to reduce prison populations have been successful in bringing down the number of incarcerated men, women's populations continue to grow steadily.[4]

1. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, Prison Policy Initiative (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html [https://perma.cc/R22G-GXTH].

2. *See* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, Prison Policy Initiative (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

3. Niki Monazzam and Kristen M. Budd, *Incarcerated Women and Girls*, The Sentencing Project (May 12, 2022), https://www.sentencingproject.org/publications/incarcerated-women-and-girls [https://perma.cc/25QA-22GZ].

4. Sawyer, *supra* note 2 ("Michigan reduced the number of men incarcerated in its state prisons by 8% between 2009–2015, but counterproductively incarcerated 30% more women over the same period. Texas cut its men's prison population by 6,000—but backfilled its prisons with an additional 1,100 women. Idaho backfilled *half* of the prison beds it emptied from its men's prisons by adding 25% more women to its prisons. And in

Universally, women commit fewer and less serious crimes than men—something that has been explained extensively through gender socialization, gender norms, and stereotypes. Conversely, however, little conversation has been devoted to understanding the pathways that do lead some women to engage in criminal behavior. As a result, women involved in the legal system are stigmatized twice: for being an offender, and specifically for being a *female* offender—that is, for failing to live up to the standard of what a "real woman" is supposed to be, namely gentle, meek, pure, and obedient.

Nonetheless, statistics reveal one major common trait among criminalized women:[5] a history of gender-based violence prior to incarceration, most often at the hands of an intimate partner.[6] The American Civil Liberties Union estimates that 60 percent of female state prisoners nationwide, and as many as 94 percent of certain female prison populations, have a history of physical or sexual abuse.[7] In particular, one study found that as many as 90 percent of women in prison for killing men had previously been

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Iowa and Washington, the modest reductions in the men's populations were completely cancelled out by growth in the women's populations.").

5. Data is admittedly limited due to the U.S. Department of Justice's failure to track this information, but it is thought that existing figures are underestimated.

6. This Article focuses only on violence perpetrated by a current or former intimate partner (spouse, dating partner, sexual partner, cohabitating partner, person with whom the victim shares a child, or any other person with whom the victim holds or previously held an intimate relationship). It does not seek to discuss violence perpetrated by a non-intimate partner (for example, stranger, acquaintance, procurer, or trafficker), nor domestic abuse understood more broadly in the sense of family violence (for example, child abuse, elder abuse, or abuse inflicted by any other member of a household or extended family). To avoid such confusions, I consciously avoid using the term "domestic violence" throughout the Article, preferring the more precise term "intimate partner violence." *See generally* Linda E. Saltzman et al., *Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements*, Centers for Disease Control & Prevention (2002), https://www.cdc.gov/violenceprevention/pdf/ipv/intimatepartnerviolence.pdf [https://perma.cc/7A9V-7NXT].

7. *See National Standards to Prevent, Detect, and Respond to Prison Rape*, Fed. Reg., https://www.federalregister.gov/documents/2012/06/20/2012–12427/national-standards-to-prevent-detect-and-respond-to-prison-rape [https://perma.cc/QC9Q-T7YM https://perma.cc/QC9Q-T7YM]. *See also Caught in the Net: The Impact of Drug Policies on Women and Families*, Am. C.L. Union, https://www.aclu.org/caught-net-impact-drug-policies-women-and-families [https://perma.cc/T32J-ZPSL] (last visited Aug. 29, 2022); *Words From Prison – Did You Know . . . ?*, Am. C.L. Union, https://www.aclu.org/other/words-prison-did-you-know [https://perma.cc/Z759–2M4N] (last visited Aug. 20, 2022).

battered by those same men.[8] Overall, female prisoners are three to four times more likely to have experienced abuse than their male counterparts.[9] This disproportionate prevalence suggests the existence of a causal link between a history of intimate partner violence (IPV) and female crime. Put bluntly, female offenders are often incarcerated as a direct or indirect result of the abuse they suffered; and in the case of female violent offenders, they are likely to be incarcerated specifically *for responding* to that abuse violently as a method of self-defense or mode of escaping coercive, entrapping situations.[10]

Intimate partner violence is common: approximately one in four American women[11] have experienced it during the course of their lifetime.[12] In many cases, it is also fatal: each day in the United

8. Alison Bass, *Women Far Less Likely to Kill Than Men; No One Sure Why*, The Boston Globe, Feb. 24, 1992. *See also Words From Prison*, *supra* note 7.

9. *Words From Prison*, *supra* note 7.

10. Often mistakenly reduced to its most overt manifestations, intimate partner violence is, more importantly, a pattern of behavior used by one intimate partner to gain or maintain coercive control over the other. In 1984, the Domestic Abuse Intervention Project (also known as the "Duluth Model") developed the aptly-named Power and Control Wheel, a diagram designed to depict the dynamics involved in abusive relationships. Under this model, domestic violence is described as a wheel with power and control at its center, physical and sexual violence on the outer ring, and the range of tactics commonly used by an abusive partner to achieve power and control as the spokes of the wheel. The violence depicted in the outer ring reinforces the more insidious, ongoing methods found in the ring, allowing the abuser to instill fear and take control of his partner's life. Together, the three rings make up a larger system of abuse that entraps the victimized partner in the abusive relationship. For a visual representation of the Power and Control Wheel, see *Power and Control Wheel*, National Center on Domestic and Sexual Violence, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf (last visited July 12, 2022). To be sure, the complexities of intimate partner violence cannot be summarized completely in a single tool. Nonetheless, the wheel provides a useful lens to understand the dynamics commonly involved in abusive relationships. In particular, it correctly recenters domestic violence around coercive control, as opposed to mere physical violence.

11. Given that women comprise the overwhelming number of victims/survivors of intimate partner violence, this Article focuses only on the problems confronting women. *See* Callie Marie Rennison, *Intimate Partner Violence, 1993–2001*, U.S. Department of Justice, Feb. 2003.

12. National Center for Injury Prevention and Control, *National Intimate Partner and Sexual Violence Survey (NISVS): General Population Survey Raw Data* (2015). *See also Fast Facts: Preventing Intimate Partner Violence*, Centers for Disease Control and Prevention, https://www.cdc.gov/violenceprevention/pdf/ipv/IPV-factsheet_2022.pdf [https://perma.cc/85FE-2L5N] (last visited November 8, 2021).

States, about three women are killed by a current or former intimate partner.[13] Notwithstanding strategic decisions by the domestic violence movement to portray this problem as one that affects all communities seemingly equally,[14] certain categories are victimized at disproportionately higher rates. Indisputably, women remain the primary targets of intimate partner violence[15] over men, especially

13. *When Men Murder Women: An Analysis of 2019 Homicide Data*, Violence Policy Center (Sept. 2021), https://www.vpc.org/studies/wmmw2021.pdf [https://perma.cc/L6SA-A4K3]. Additionally, one in two female murder victims are killed by an intimate partner. Allison Ertl et al., *Surveillance for Violent Deaths—National Violent Death Reporting System, 32 States, 2016*, 68 Surveillance Summaries 9 (CDC) (Oct. 4, 2019), https://www.cdc.gov/mmwr/volumes/68/ss/ss6809a1.htm [https://perma.cc/SAX3-SZ3C].

14. Rinku Sen, *Between a Rock & a Hard Place: Domestic Violence in Communities of Color*, 2 Colorlines 1, Spring 1999. ("In the early 1970s, the original leaders of the battered women's movement made a conscious, strategic decision to insist that battering was universal, took place in all communities, and in all classes."); Courtney K. Cross, *Reentering Survivors: Invisible at the Intersection of the Criminal Legal System and the Domestic Violence Movement*, 31 Berkeley J. Gender L. & Just. 60, 92–93 (2016) ("Another aspect of the shift in battered women's advocacy was the decision to depict domestic violence as a phenomenon that affects women of all social classes equally rather than acknowledging the links between poverty, race, and domestic violence. Some advocates took this position because they worried that associating domestic violence with poor women and women of color would make it nearly impossible for the movement to gain political traction or funding . . . . Consistent with the choice to depict domestic violence as monolithic across classes and races, mainstream domestic violence advocates also gave in to political pressures to portray domestic violence as being gender-neutral as opposed to being perpetrated primarily against women."); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 Yale J.L. and Feminism 75, 87–88 (2008) [hereinafter *When Is a Battered Woman*] ("Attempting to universalize the experience of being battered, advocates for battered women argued that battering was a society-wide problem. . . In the 1970s, the leaders of the battered women's movement made a 'conscious, strategic decision' to universalize the experience of being battered in order to get the issue of domestic violence on the national agenda.").

15. The U.S. Department of Justice estimates that women account for 85 to 90 percent of reported domestic violence victims. Rennison, *supra* note 11.

women of color[16] and poor or low income[17] women.[18] Of course, vulnerability is further heightened when these categories intersect.[19]

Similar biases—against women in general and against marginalized women more specifically—are observed in prosecution and sentencing patterns among survivors. Contrary to popular

16. According to a study by Institute for Women's Policy Research, 51.7 percent of Native American, 51.3 percent of multiracial women, and 41.2 percent of Black women have experienced physical violence by an intimate partner during their lifetimes, compared to 30.5 percent of white women. Asha DuMonthier et al., *The Status of Black Women in the United States*, Institute for Women's Policy Research (2017), https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf [https://perma.cc/E3JY-BUT7]. *See also Domestic Violence & the Black Community*, National Coalition Against Domestic Violence, https://assets.speakcdn.com/assets/2497/dv_in_the_black_community.pdf [https://perma.cc/HKT7–2DDN] (last visited July 12, 2022); *Domestic Violence Against American Indian and Alaska Native Women*, National Coalition Against Domestic Violence, https://assets.speakcdn.com/assets/2497/american_indian_and_alaskan_native_women__dv.pdf [https://perma.cc/VJW8-CNPA] (last visited July 12, 2022).

17. Women receiving welfare are twice as likely to report having experienced intimate partner abuse than women in the general population. Eleanor Lyon, *Welfare, Poverty, and Abused Women: New Research and its Implications*, National Resource Center on Domestic Violence (2000), https://vawnet.org/sites/default/files/materials/files/2016–09/BCS10_POV.pdf [https://perma.cc/97AN-K8HK]. *See also* Demetrios Kyriacou et al., *Risk Factors for Injury to Women from Domestic Violence*, 341(25) New Eng. J. Med. 1892 (1999).

18. Lesbian and transgender women are also disproportionately vulnerable to violence. However, IPV perpetrated against these women involves unique features and dynamics that this Article does not address. This Article focuses on IPV perpetrated by men against cisgender women in the context of heterosexual relationships. *See* Neda Said et al., *Punished by Design: The Criminalization of Trans & Queer Incarcerated Survivors*, Survived & Punished (2022), https://survivedandpunished.org/wp-content/uploads/2022/06/PunishedByDesign_FINAL-2.pdf [https://perma.cc/U7Z4-RF4T]; *Domestic Violence in LGBTQIA+ Relationships*, Women's Advocates, https://www.wadvocates.org/find-help/about-domestic-violence/lgbtqiarelationships [https://perma.cc/5NRL-XVNZ] (last visited July 25, 2022); Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People*, The Williams Institute (Nov. 2015), http://williamsinstitute.law.ucla.edu/publications/ipv-sex-abuse-lgbt-people [https://perma.cc/2XBU-LRNM]; Sarah M. Peitzmeier et al., *Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates*, 110 Am. J. Pub. Health 9, 14 (2020).

19. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence: Examining the Intersections of Race, Class, and Gender–An Introduction*, *in* Domestic Violence at The Margins: Readings on Race, Class, Gender, and Culture 1, 3–4 (2005).

misconceptions, female defendants typically receive longer sentences for killing their male partners than male defendants receive for killing their female partners.[20] This is despite the fact that women, in contrast to men, typically use force to defend themselves or their children rather than to exert coercive control over their partners;[21] and despite the fact that female defendants are less likely to have prior criminal records than male defendants. Again, women of color,[22] as well as poor and low-income women,[23] are disproportionately vulnerable to being incarcerated.

These statistics hint at the existence of a domestic abuse-to-prison pipeline that leads women—especially women of color and poor women—to be criminalized and punished by the state for being victims of abuse. This begs the question: does the criminalization of women who kill their abusive intimate partners in the American criminal legal system adequately account for their status as victims of violence themselves? What legal practices and assumptions transform a woman from a partner or wife, a victim of abuse, to a defendant, guilty of murder? This Article takes up these questions, seeking to demonstrate both how the criminal legal system currently fails to take into consideration victims/survivors'[24]

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20. The average prison sentence of men who kill their female partners is two to six years, compared to fifteen years for women who kill their male partners. One explanation for this may be that spousal homicides committed by women tend to be perceived as being premeditated, whereas spousal homicides committed by men are often seen as the result of an "impulse" or "crimes of passion." *See Words From Prison*, *supra* note 7.

21. Cross, *supra* note 14, at 98. *See* also Nancy Worcester, *Women's Use of Force: Complexities and Challenges of Taking the Issues Seriously*, 8 VIOLENCE AGAINST WOMEN 1390 (2002).

22. Over time, the rate of imprisonment for Black and Latina women has declined (68 percent and 20 percent decrease respectively between 2000–2020) while the rate of imprisonment for white women has increased (12 percent increase between 2000–2020). Nonetheless, as of 2020, the imprisonment rate for Black women remains about 1.7 times the rate of imprisonment for white women. *See Incarcerated Women and Girls, supra* note 3.

23. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2017*, THE PRISON POLICY INITIATIVE (Oct. 19, 2017), https://www.prisonpolicy.org/reports/pie2017women.html [https://perma.cc/B5YQ-HDKJ].

24. Throughout this Article, I use the terms "victim(s)," "survivor(s)," and "victim(s)/survivor(s)" to describe women who experience or have experienced violence at the hands of a male intimate partner. I use the term "survivor-defendant(s)" to describe women who were criminalized for killing an abusive intimate partner. I decline to use the term "battered women"—though it has been used ubiquitously in the literature, caselaw, and hornbook law for many decades—for at least two reasons: it depicts an image of these women as being frail and weakened by the battering (which perpetuates misunderstandings about why they do not leave abusive relationships) and tends to reinforce

unique circumstances, and why this system has no legitimacy in pursuing their criminalization and punishment.

So far, efforts to decarcerate in the United States have largely "centered on releasing non-violent male offenderscriminals, primarily drug users."[25] As some scholars have pointed out, however, "[i]t will be impossible . . . to make a significant dent in the prison population without reconsidering the prosecution and punishment of violent criminals."[26] In addition, so long as female inmates continue to be treated as an afterthought in this conversation, any such efforts will remain counterproductive. Women's incarceration is an essential facet of mass incarceration and must be recognized as such, especially after decades of rapid acceleration. In recent years, the adequacy of the law of self-defense in cases of survivor-defendants has been fiercely called into question in other countries, where specific cases have gone a long way in sensitizing the greater public to the inability of these women to raise the defense under existing legal standards.[27] Comparatively, in the United States—where the scope and impact of incarceration are arguably far greater—the issue has remained remarkably absent from national conversations. In the aftermath of the #MeToo movement and the COVID-19 pandemic, which has brought along with it a shadow outbreak of intimate partner violence,[28] the time is ripe for this issue to be put on the table.

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the misconception that domestic abuse is reduced to physical, overt forms of violence (as opposed to a broader system of power and control).

25. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 Harv. J.L. & Gender 53, 57 (2017) [hereinafter *Should Domestic Violence*].

26. *Id. See also* Marc Mauer & David Cole, Opinion, *How to Lock Up Fewer People*, N.Y. Times (May 23, 2015), http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html [https://perma.cc/D6AY-YWUK]. According to the Justice Policy Institute, people in prison for violent offenses have been the primary driver of the prison population for the last two decades. Recent trends in prison admissions suggest that violent offenses will continue to be the major driver of the prison population moving forward. *Long Prison Terms*, Just. Pol'y Inst., https://justicepolicy.org/long-prison-terms [https://perma.cc/3NXW-52NH] (last visited Jan. 3, 2022).

27. *See e.g.* the cases of Jacqueline Sauvage and Valérie Bacot in France, Sally Challen in the United Kingdom, and Helen Naslund in Canada, which have made national headlines in their respective nations, triggering hundreds of thousands of petition signatures, waves of popular protests, a presidential pardon, sentence reductions, and several legislative bills.

28. One study documented an 8.1 percent increase in reported incidents of domestic violence during the COVID-19 pandemic, while many more incidents are expected to remain unreported. Alex R. Piquero et al., *Domestic Violence During COVID-19: Evidence from a Systemic Review and Meta-Analysis*, Council on Crim. Just., (Feb. 2021), https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Domestic-Violence-During-COVID-19-February-2021.pdf [https://perma.cc/2646-YSR4].

This Article's argument proceeds as follows. Part I examines the capacity of the existing criminal law landscape to accommodate survivor-defendants by applying available defenses and mechanisms to these cases. Part I concludes that none of the current legal doctrines adequately respond to the unique pressures and circumstances that victims/survivors experience. In Part II, the Article questions the moral legitimacy of the state to criminalize and punish survivors for killing their abusive partners. After exploring the numerous ways in which they are entrapped in abusive relationships concurrently by their abusive partners and the state, Part II suggests that battered women cannot be held responsible by the entrapping state for their resulting criminal actions. Part II then further justifies the decriminalization of survivors by invoking the prevailing theories of punishment and establishing that they do not provide a reasonable rationale for incarcerating survivors. In Part III, the Article considers and weighs the effectiveness of several possible alternatives to the existing criminal legal framework, in search for a model that would adequately recognize the systemic conditions that lead victims/survivors to commit such crimes.

I. Accommodation of Victims/Survivors within Available Criminal Defenses

"It was either him or me." That is how many women explain why they resorted to killing their abusive intimate partners.[29] In the majority of cases, survivors who are charged with murder or manslaughter for killing their intimate partners do not deny having

29. *See* e.g., Noah Goldberg, *NYC federal jail warden admits killing husband: 'It was either him or me'*, N.Y. Daily News (Aug. 5, 2021, 12:23 PM) https://www.nydailynews.com/new-york/nyc-crime/ny-antonia-ashford-husband-murder-mdc-brooklyn-warden-20210805-odfm6ouxgfbaln3viulknwda2a-story.html [https://perma.cc/Y2FK-UMUT]; Alan Mauldin, *Gina Thompson: 'It was him or me this time'*, The Moultrie Observer (Dec. 2, 2014), https://www.moultrieobserver.com/news/local_news/gina-thompson-it-was-him-or-me-this-time/article_3e6e12e6–7a95–11e4-b5f9–73c6fa2033ad.html [https://perma.cc/3F33-CFPH] ("'It was either me or him this time,' [defendant] s*aid.* 'I'm sorry it happened, but it's only so much you can take. I had learned to deal with it (abuse), but tonight I really thought he was going to kill me.'"); Elisa Crawford, *Nurse Cleared of Husband's Murder*, The Independent (Sept. 22, 1998, 11:02 PM), https://www.independent.co.uk/news/nurse-cleared-of-husband-s-murder-1199957.html [https://perma.cc/WCN3-C378] ("His eyes were really fierce and I thought he was going to get me. It was either him or me."); David Simon & William F. Zorzi, Jr., *Case Histories Reveal Troubling Questions about Circumstances of the Crimes*, The Baltimore Sun (Mar. 17, 1991) ("In the interview, [defendant] said she believed that there was no way out of a long, abusive relationship but to have her husband killed . . . . 'I felt that it was either him or me.'").

committed the act. Rather, they often claim that the act was committed in self-defense. Given that self-defense is an exculpatory defense for killing, one might expect to see that survivors are generally acquitted—or even that they are not prosecuted from the start. Yet, studies consistently demonstrate that survivors of IPV are ubiquitous in female correctional facilities across the country, especially among violent offenders.[30] These findings suggest that self-defense is not an effective defense for survivor-defendants. Why are claims of self-defense denied to these women? Does the existing criminal legal framework provide any other adequate avenues of defense or relief?

A. *The Self-Defense Doctrine*

It is a widely-recognized principle that a person may use force to protect themselves from harm under appropriate circumstances, even when that behavior would normally constitute a crime under the law.[31] In the United States, the right of self-defense has long been used as an affirmative defense in criminal proceedings,[32] allowing qualified defendants to be acquitted of the charges

30. *See supra* Introduction.

31. The personal right of self-defense, including the conditions of defensive force—necessity, imminence, proportionality, and right intention—is recognized in all major legal systems, and, accordingly, constitutes a binding general principle of international law derived from domestic law. *See* Jan Arno Hessbruegge, Human Rights and Personal Self-Defense in International Law 27–47 (2017). It is further recognized in several of the major international human rights instruments, including the International Covenant on Civil and Political Rights, the European Convention of Human Rights, and the Statute of the International Criminal Court. *See* Human Rights Commission, *General Comment No. 36: Article 6: The Right to Life* ¶¶ 10, 12, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) ("[A]rticle 6 (1) implicitly recognizes that some deprivations of life may be nonarbitrary. For example, the use of lethal force in self-defence . . . would not constitute an arbitrary deprivation of life."); Convention for the Protection of Human Rights and Fundamental Freedoms art. 2.2(a), Sept. 3, 1953, 213 U.N.T.S. 222 ("Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary"); Rome Statute of the International Criminal Court art. 31.1(c) ("The person acts reasonably to defend himself or herself or another person . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.").

32. It is a constitutionally protected right. *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment to the United States Constitution provides an individual the right to possess a firearm and to use it for traditionally lawful purposes, including self-defense within the home); *see also* Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 Tex. Rev. L. & Pol. 399, 400 n.2 (2007) (reporting that 44 of the 50 state constitutions "secure either a right to defend life or a right to bear arms

brought against them. Although the laws governing self-defense vary from state-to-state,[33] three conjunctive elements are required under the common law for a claim of self-defense to be successful: (1) an imminent threat of serious harm, (2) a reasonable belief that the use of force is necessary to meet this threat, and (3) the proportionality of the force employed to meet the threat.[34] To be exculpated from penal responsibility, a defendant accused of homicide must therefore be able to prove that they reasonably believed that using deadly force was necessary to protect themselves from an imminent, unlawful, deadly attack. But how do these elements operate in the context of survivors who are prosecuted for killing their abusive intimate partners?

As a preliminary note, cases of IPV survivors who kill their abusive partners are commonly classified into two broad categories: confrontational cases and nonconfrontational cases. Confrontational cases, as the name suggests, refer to situations in which the victimized kills her abuser during a battering incident, when the abuser is actively attacking her. In contrast, nonconfrontational cases are those where the victimized woman kills her abusive partner during a lull in the pattern of ongoing intimate partner abuse, when the abuser is passive or even asleep. The conventional assumption is that the self-defense doctrine plays out differently depending on the category, specifically that its requisite elements are mostly incompatible with nonconfrontational cases but mostly compatible with confrontational cases. This assumption, however, does not withstand scrutiny.

1. Imminence

According to the self-defense doctrine, a person may only use force lawfully if they are faced with an imminent (or in some jurisdictions, an "immediate") unlawful threat of death or serious

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in defense of self" and concluding therefore that "a constitutional right to self-defense is firmly established in American legal traditions").

33. There are three broad doctrines for the use of deadly force in the United States, although some states have adopted blended models: (i) the *duty-to-retreat* doctrine, which requires the attack victim to retreat from a threatening situation if she can do so with complete safety; (ii) the *castle* doctrine, according to which there is no duty to retreat before using deadly force if the victim is being attacked in her home or yard, and sometimes in her place of work; and (iii) the *stand-your-ground* doctrine, which imposes no duty to retreat from the situation before resorting to deadly force, regardless of where the attack occurs. The vast majority of U.S. states have stand-your-ground laws. *See* David C. Brody & James R. Acker, Criminal Law 139 (3rd ed. 2014).

34. *See* Joshua Dressler, Understanding Criminal Law § 18.01[B] (7th ed. 2015); George E. Dix, Gilbert Law Summaries: Criminal Law xxxiii (18th ed. 2010).

bodily harm.[35] Traditionally, this formulation has been interpreted to require strict temporal proximity between the decedent's threat of harm and the defendant's response: force cannot be used to respond to an already completed threat, nor can it be used to prevent a speculative future threat.[36] The defensive response must occur while the initial attack is unfolding.

As a factual matter, this requirement is not met when a woman kills her abuser in nonconfrontational circumstances, while he is passive. Albeit occurring within the broad context of a pattern of domestic abuse, the killing is not inflicted during an ongoing physical attack by the abuser. Typically, it may take place several hours after the abuser threatened to kill her, or perhaps at a time where she perceives that an attack is impending. As much as the victim of IPV may believe that she is in serious danger, in nonconfrontational cases, she cannot establish that she is responding to an active, objectively imminent threat as the law understands it.

The problem, of course, is that the temporal requirement fails to capture the particular dynamics involved in intimate relationships. Unlike more typical self-defense situations, in which an actor defends themselves against the attack of a random stranger on the street or an intruder in their home, a victim/survivor of IPV knows her abuser on a personal level—and this familiarity significantly enhances her capacity to accurately predict danger. There is ample research to suggest that abused women "tend to become hypersensitive to their abuser's behavior and to the signs that predict a beating";[37] they "learn to read the subtle nuances of [their abuser's] behavior more clearly than can others."[38] This hypervigilance enables them to "recognize the imminence of an attack at a time

35. *See* Wayne R. Lafave, Criminal Law §§ 10.04, 539–41, 544–46 (4th ed. 2003).

36. Force is said to be "imminent" if it occurs "immediately" (State v. Norman, 378 S.E.2d 8, 13 (N.C. 1989)) or "at the moment of [danger]" (Sydnor v. State, 776 A.2d 669, 675 (Md. 2001)); the danger must be "pressing and urgent." (Ha v. State, 892 P.2d 184, 191 (Ala. Ct. App. 1995)). Force is not imminent if an aggressor threatens to harm another person at a later time: "'later' and 'imminent' are opposites." (U.S. v. Haynes, 143 F.3d 1089, 1090 (7th Cir. 1998)). *See* Dressler, *supra* note 34.

37. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 St. Louis Univ. Pub. L. Rev. 155, 181 (2004).

38. Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*, *in* The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act 3, 8 (Malcolm Gordon ed., 1996).

when others without their prior experience would not."[39] From that perspective, the notion that a passive abuser can pose an imminent threat of harm is not as implausible as critics would suggest—even when he is sleeping. Indeed, "[u]nless actually comatose, a sleeping abuser is merely seconds away from being an *awakened* abuser—and research demonstrates that abusers (particularly when intoxicated) tend to sleep lightly, demand that their partners be present when they awaken, and resume the abuse immediately."[40]

Practically speaking, women who kill their abusers in confrontational circumstances meet the condition of strict temporal proximity quite clearly. They should, one might therefore expect, easily satisfy the imminence requirement. Yet, in practice, it is often not as straightforward as it seems. Some years ago, Professor Victoria Nourse sought to test the objectivity of the self-defense doctrine by examining twenty years of "imminence-relevant" trial and appellate opinions.[41] Whereas the common perception among scholars is that imminence is only a legal barrier to self-defense in nonconfrontational cases where there is a significant time lag between threat and response,[42] Nourse instead found that the vast majority of cases in which imminence was at issue involved facts that fit the model of a confrontation.[43] She observed that imminence tended to be determined by "a host of non-empirical normative factors, some explicitly irrelevant to the legal inquiry."[44] For example, courts often use imminence as a proxy for retreat, despite the fact that most jurisdictions do not require the actor to retreat before responding with deadly force.[45] Therefore, even those women who kill in confrontational situations may grapple to meet the requirement, finding their credibility to be questioned by the factfinders.

2. Reasonableness

Under the traditional formulation, a person may use (deadly) force only if they reasonably believe that such force is necessary to defend themselves against the threat in question.[46] This requirement is twofold: the belief must be both *subjectively* reasonable, in that the defendant herself truly believes it, and *objectively* reasonable, in that

39. Kinports, *supra* note 37.

40. Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 Ohio State J. Crim. L. 555, 563 (2007).

41. Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 Univ. Chi. L. Rev. 1235, 1249, 1252–55 (2001).

42. Krause, *supra* note 40, at 560.

43. Nourse, *supra* note 41.

44. Krause, *supra* note 40, at 561.

45. See Nourse, *supra* note 41, at 1268, 1280–91.

46. Dressler, *supra* note 34, at § 18.01[C].

a reasonable person would have similarly so believed. This second prong has been the subject of differing interpretations in practice, leaving many judges and jurors to wonder: who is the objectively "reasonable person" to whom the defendant ought to be compared? Specifically, in cases involving survivor-defendants, is it an "ordinary" person, a woman, or even a victim/survivor of IPV?

When confronted with this question, the California Supreme Court held that, "the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm."[47] In an effort to emphasize the objective nature of the standard, courts have historically resisted attempts to incorporate any of the defendant's special characteristics or life experiences into the standard. This approach wrongly assumes that the reasonable person was (gender) neutral to begin with. Until recently, the hypothetical reasonable person was known almost exclusively as a "reasonable man" in blackletter law, scholarly discourse, and jury instructions.[48] Despite changing the standard's name, however, the law did not change the model underlying it: the purportedly abstract, universal person that the standard invokes remains implicitly based on a (white, middle-class, heterosexual) male norm of behavior.[49]

Put simply, women typically perceive danger differently than men—this could be due to physiological differences; the way that women are socialized to be more wary and fearful; women's awareness of gender violence statistics; or a combination of these factors. For example, a small woman does not apprehend a large male aggressor the same way that another equally large man would, and a woman walking home alone at night does not gauge the man following her the same way that a man would. The contrast is

47. People v. Humphrey, 921 P.2d 1 § II(B) (Cal. 1996).

48. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 22 (1988) ("It was originally believed that the 'reasonable man' standard was gender neutral. 'Man' was used in the generic sense to mean person or human being. But man is not generic except to other men . . . . As our social sensitivity to sexism developed, our legal institutions did the 'gentlemanly' thing and substituted the neutral word 'person' for 'man' . . . . Although [the] law protected itself from allegations of sexism, it did not change its content and character.").

49. *See id.* at 20–25 (discussing the implicit male norm behind the reasonable person standard as applied in tort law); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 Loy. L.A. L. Rev. 435, 436 (1981) ("[T]he mythical reasonable man has always been identified with the male sex"); Kinports, *supra* note 37, at 167 ("[T]he purported neutrality of that unquestioned 'reasonable person' standard masked the gender and race bias underlying it.").

amplified when the woman has a history of being abused by, and intimate knowledge of, the person representing the threat. For example, "[a] reasonable man is not likely to fear death or great bodily injury when a person advances towards him during a verbal altercation. However, a woman who has been repeatedly beaten and once choked into unconsciousness by her husband is likely to fear death or great bodily injury when he advances towards her during a quarrel."[50] This is perhaps even more apparent in non-confrontational contexts: a reasonable man, viewed in the abstract, will not fear death or great bodily injury from someone silently sitting on a couch, but a woman whose partner threatened to kill her and who has learned, over the course of the relationship, to pick up the cues of an impending attack may well reasonably fear that her life is in danger. Put differently, "[i]f the only person who could accurately predict the impending violence is another battered woman—or perhaps *this* battered woman, knowing all she does about *this* abuser—it would appear to be impossible to satisfy an objective standard."[51]

Although the Model Penal Code suggests that factfinders should hold the defendant to the standard of the reasonable person in the defendant's "situation or circumstances,"[52] these terms are, as the Commentary to the Code concedes, ambiguous in this context—"inevitably and designedly so."[53] In practice, the "subjectivization" of the reasonable person standard has only been accepted explicitly in *some* limited contexts (such as police killing cases, in which reasonableness is to be judged, according to the U.S. Supreme Court, by the perspective of a reasonable police officer on the scene rather than a mere reasonable civilian).[54] In general, the law remains largely uneven in this area and confusion around the concept persists. As a result, the standard's application to survivor-defendant cases varies significantly.

Ultimately, the objective reasonable person is a legal fiction that masks a host of biases.[55] When an IPV victim/survivor kills her

50. Donovan & Wildman, *supra* note 49, at 445–46.

51. Krause, *supra* note 40, at 564.

52. Dressler, *supra* note 34, at 207.

53. *Id.* (citing American Law Institute, Comment to § 2.02, 242 ("There is an inevitable ambiguity in 'situation'") and American Law Institute, Comment to § 210.3, 62 ("The word 'situation' is designedly ambiguous")).

54. *See* Tennessee v. Garner, 471 U.S. 1 (1985) and Graham v. Connor, 490 U.S. 386 (1989).

55. Bender, *supra* note 48 ("Not only does 'reasonable person' still mean 'reasonable man'—'reason' and 'reasonableness' are gendered concepts as well. Gender distinctions have often been reinforced by dualistic attributions of reason and rationality to men, emotion and intuition (or instinct) to women.").

abuser, whether in confrontational or nonconfrontational circumstances, her perception of what constitutes a threat requiring the use of force is inevitably and justifiably shaped by factors such as the prior violence she endured at the hands of her abuser, the threats of impending violence she may have received, and the hypervigilance she developed during the relationship. By refusing to consider these characteristics under the guise of "objectivity," the reasonable person standard improperly divorces the law from social reality.

3. Proportionality

Finally, when defending themselves, a person may only employ as much force as is necessary to remove the threat—the amount of force used cannot exceed the level of harm threatened.[56] For example, one may use nondeadly force to repel a nondeadly threat, or nondeadly force against a deadly threat; however, the use of deadly force to repel a nondeadly threat is not permitted.[57]

This requirement of proportionality is often not satisfied when women kill their abusive intimate partners. By the very nature of nonconfrontational cases, the woman commits the act while her abuser is passive. At the time of the killing, the use of force is unilateral, making it inherently disproportionate. But even in confrontational situations, it is not uncommon for the abused woman to use deadly force to respond to what may appear to the outsider like a nondeadly threat. For example, the abused woman may use a knife or gun to protect herself against an abuser who is unarmed, which the doctrine would count as disproportionate. Even if she argues that her unarmed abuser posed a deadly threat to her (for example, he was strangling her or beating her to death), she is likely to face closer scrutiny. Women who do not conform to traditional norms of femininity especially tend to be subject to heightened skepticism; factfinders are more likely to challenge their credibility and question whether they truly needed to employ deadly force to defend themselves.[58]

But the fact that IPV survivors tend to resort to using a weapon in self-defense while their abusers tend to be unarmed needs to be put into context. The proportionality requirement wrongly assumes a scenario in which the two people fighting are of similar size, height, weight, and physical build. In contrast, the woman may well not be on equal physical grounds with her abuser. Moreover, the requirement does not take into account that a man's bare hands

56. *See* Dressler, *supra* note 34, at § 18.01[D]; Paul H. Robinson, Criminal Law Defenses § 132 (rev. ed. 2021).

57. *See* Dressler, *supra* note 34, at *§* 18.01[D]; Robinson, *supra* note 56.

58. *See generally When Is a Battered Woman*, *supra* note 14, at 75.

may be one of the most dangerous weapons that a woman faces: many IPV injuries are incurred as a result of being thrown across the room, hit, punched, kicked, stomped on, or strangled.[59] In this situation, using a gun or a knife is often effectively the only way that the abused woman could successfully defend herself—even if her abuser is unarmed.

4. Implicit Biases in Self-Defense

At first blush, it may appear that confrontational cases are more likely to pass the self-defense test than nonconfrontational cases. Nearly all courts hold that jury instruction on self-defense should not be given in nonconfrontational cases (based on the lack of imminent threat), whereas judges hearing confrontational cases often find that there are sufficient prima facie grounds to support a jury instruction.[60] Nonetheless, it does not follow from this that juries always find the traditional requirements of the self-defense doctrine to be satisfied. As detailed above, these elements pose considerable challenges when applied to IPV survivors, regardless of the circumstances in which they killed. In many cases, the best-case scenario is that the survivor will prevail on an "imperfect self-defense" theory, resulting in her criminal culpability being minimized, but not absolved (for example, reducing a charge from murder to manslaughter).[61]

The best way to understand this incompatibility is perhaps by taking a look at the historical development of the American law of self-defense, which first emerged in the 17th century as the "castle doctrine."[62] Under the doctrine, a man did not have to retreat before fighting back against an intrusion on his home. Since women and nonwhites were excluded from political and economic rights at the time, including property ownership, the right of self-defense was essentially a privilege reserved to white, property-owning men.[63] Eventually, self-defense expanded to include the stand-your-ground laws we know today, but the fact remains that the defense was primarily formulated to address confrontations characterized

59. *See* e.g., Nancy Glass et al., *Non-fatal strangulation is an important risk factor for homicide of women*, 35 J. Emerg. Med. 329 (2008).

60. *See* Dressler, *supra* note 34, at § 18.05[B][2].

61. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. Rev. 211, 240–241 (2002).

62. *See generally* Caroline Light, Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense (2017).

63. Taking this argument further, the law was inherently designed to shield men from liability for violence against women, since women were considered property.

by a *single* violent episode between two *male* individuals who are *strangers* to each other—at least one of them (the defendant) being white. It was not designed to consider the specific threats associated with violence that is *long-term*, occurring between *a man and a woman* who are related to each other on an *intimate* basis—the defendant potentially being a Black, Latina, or Indigenous woman. While self-defense is now widely perceived as a right that is universal to all individuals without regard to race or gender, its historical roots still permeate each element of the modern self-defense test and effectively impedes its application to certain categories of people, including IPV survivors who kill their abusive partners.

In addition to the historical biases that pervade the traditional doctrine, survivors must confront the implicit biases of the legal professionals and jurors before them. As Leigh Goodmark notes, "[s]ocial science research establishes that women are generally perceived as less credible than men (and occasionally, as no more credible than children)."[64] Their claims are viewed with a great deal of suspicion and their credibility is challenged at every turn.[65] Take the recent case of Tracy McCarter, a Black survivor from Manhattan, who was charged with the second-degree murder of her abusive, white husband in 2021. Although she had separated from him due to the abuse, her estranged husband showed up at her building one night, highly intoxicated and frantic, and began attacking her. "[McCarter] maintained that she did not stab her husband . . . but that minutes after he choked her, she held a knife in a defensive posture and he charged,"[66] later dying as a result of the accidental injury. Despite her husband's documented history of abuse against her, the corroborating statements of her neighbors, and the fact that this was a clear confrontational case, McCarter was prosecuted and sent to Rikers Island.[67] While she maintained

64. *When Is a Battered Woman*, *supra* note 14, at 116.

65. *Id.*

66. Jonah E. Bromwich, *Manhattan D.A. Slams Brakes on Prosecution of Woman in Husband's Death*, N.Y. Times (Nov. 18, 2022), https://www.nytimes.com/2022/11/18/nyregion/tracy-mccarter-alvin-bragg.html [https://perma.cc/RB43-MY9B].

67. As of December 2, 2022, all charges against Tracy McCarter have been dropped after the Manhattan district attorney announced he could not allow the case to go forward. Nonetheless, McCarter's ordeal shows the extent to which women, particularly women of color, continuously face challenges to their credibility when claiming self-defense in an IPV case. Despite issuing the dismissal, the judge in fact openly criticized the district attorney for declining to move forward with the case, noting that "[t]he court finds no compelling reason to dismiss the indictment, but for the district attorney's unwillingness to proceed." *See* Jonah E. Bromwich, *Judge Criticizes D.A. for Halting Prosecution*

that she acted in self-defense, prosecutors argued that the evidence provided was "not substantial enough to warrant self-defense and that McCarter was a perpetrator of domestic violence herself."[68]

In addition, when evaluating the requisite elements of self-defense, juries and judges often hold survivors to standards that exceed the actual requirements of the law. Specifically, they tend to view this paradigm as an invitation to ask what steps the woman could have taken to leave the relationship prior to the fatal encounter. It is the perennial question: "why didn't she just leave?" As an initial matter, this question is unwarranted because the defense does not impose a general duty on individuals to avoid potentially violent situations.[69] None of the elements of self-defense actually require the defendant to leave the confrontation, let alone to leave the relationship. Furthermore, this question is fallacious: it reveals a severe lack of understanding of domestic abuse and the circumstances surrounding these relationships. It assumes that the nature of an abusive relationship is similar to that of a healthy one, disregarding the entrapping nature of IPV patterns and the numerous practical difficulties that women face in attempting to leave this cycle (detailed in Part II). In many cases, survivors are stuck in a vicious cycle that they psychologically, socially, financially, and logistically cannot escape. Such implicit biases render the traditional self-defense nearly unattainable for most survivor-defendants.

B. *Battered Woman Syndrome Testimony*

1. Contours and Relevance in the Legal Context

In response to the challenges faced by survivors attempting to prove their reasonableness and claim self-defense, courts began to introduce a type of expert testimony known as "battered woman syndrome" (BWS), based on the eponymous theory coined by psychologist Dr. Lenore Walker in the late 1970s.[70] The earliest case to consider the use of BWS expert witness testimony in a self-defense

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of Woman in Husband's Death, N. Y. Times (Dec. 2, 2022), https://www.nytimes.com/2022/12/02/nyregion/mccarter-case-dismissed-bragg.html [https://perma.cc/J872-ZLMF].

68. Lauren Gill, *Prosecutors Ignored Evidence of her Estranged Husband's Abuse. She Faces 25 Years in Prison for Murder*, The Intercept (May 24, 2021), https://theintercept.com/2021/05/24/manhattan-district-attorney-domestic-violence-tracey-mccarter/ [https://perma.cc/G4WM-6UJX].

69. Except for a few retreat states. *See* Nourse, *supra* note 41, at 1235, 1284–85 (discussing misunderstandings as to this so-called "pre-retreat" rule).

70. *See* Lenore Walker, The Battered Woman (1979) [hereinafter The Battered Woman].

case[71] was *Ibn-Tamas v. United States*.[72] In 1979, pregnant Beverly Ibn-Tamas shot and killed her abusive husband while he attacked her in their Washington D.C. home. She was charged with second-degree murder. On appeal, the court held for the first time that expert testimony relating to BWS was conditionally admissible as a way to assist the jury in assessing the credibility of the defendant's testimony and perception of imminent danger.[73]

In her landmark book, *The Battered Woman*, Walker sought to describe the effects of intimate partner violence on battered women and explain how these women might become psychologically trapped in an abusive relationship, such that killing their abuser might seem a reasonable course of action.[74] She observed that IPV survivors tend to share certain common characteristics and experience a consistent pattern in the violent behavior of their batterers.[75] Specifically, Walker identified a three-stage "cycle of violence" comprising: (1) a "tension-building" phase, which consists of a gradual build-up of subtle abusive behavior as the woman attempts to placate the abuser; (2) the "acute battering incident," in which the abuser unleashes all the tension built up in the previous phase, often leaving the woman severely shaken and injured; and (3) the "loving contrition" stage, a relatively calm phase marked by the abuser's remorse

71. The first BWS case brought to the attention of the public was that of Francine Hughes, but it was somewhat of an outlier in that it was based on a claim of temporary insanity rather than self-defense. Hughes was a Michigan mother of four who, in 1977, set her abusive husband's bed on fire as he lay sleeping. She had endured over twelve years of vicious beatings, death threats, intimidation, and humiliation by him. She was charged with first degree murder but was later acquitted by reason of temporary insanity. *See* Ann Jones, Women Who Kill 281–83 (1980); Faith McNulty, The Burning Bed 186 (1980).

72. Ibn-Tamas v. United States, 407 A.2d 626 (1979).

73. In this particular case, however, the court remanded on the ground that the record was insufficient to show that the expert witness was qualified or that her research methods were accepted by the relevant scientific community. See Rebecca A. Kultgen, *Battered Woman Syndrome: Admissibility of Expert Testimony for the Defense—Smith v. State*, 47 Mo. L. Rev. 835 (1982).

74. The Battered Woman, *supra* note 70.

75. Walker identifies seven key "symptoms" among women living in abusive relationships: intrusive reexperiencing of the trauma events (for example, flashbacks, recurrent dreams or nightmares); arousal symptoms (for example, hypervigilance, irritability, sleep disorders); avoidance behavior (for example, emotional numbing, difficulty remembering, efforts to avoid situations that trigger memories of the event); cognitive difficulties (for example, negativity, attention, concentration); disruption in interpersonal relationships; distorted body image and somatic problems; and sexual dysfunction and intimacy issues. Lenore E. Walker, The Battered Woman Syndrome 103 (1984) [hereinafter Syndrome].

and the survivor's hope that the cycle will finally end.[76] Inevitably, however, the cyclical pattern repeats itself, escalating gradually both in frequency and severity. "Over time, the periods of respite become shorter and the stages of tension and violence escalate—until, for some women, it becomes quite literally 'kill or be killed.'"[77]

To explain why a woman who has experienced this cycle remains in the relationship, Walker posited that survivors suffer from "learned helplessness,"[78] a psychological phenomenon in which repeated exposure to negative outcomes or stressors eventually causes an individual to stop trying to escape from the aversive situation even when opportunities to escape become available.[79] Essentially, as the cycle keeps recurring, the survivor comes to feel

76. The Battered Woman, *supra* note 70, at 31–35. *See also* Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 Victimology 525, 531–32 (1978); Syndrome, *supra* note 75, at 173–77.

77. Krause, *supra* note 40, at 558.

78. More recently, Dr. Lenore Walker has reframed BWS as a subcategory of post-traumatic stress disorder (PTSD), an anxiety disorder "that may result when an individual lives through or witnesses an event in which he or she believes that there is a threat to life or physical integrity and safety and experiences fear, terror, or helplessness." Am. Psych. Ass'n, Dictionary of Psychology, *Posttraumatic Stress Disorder (PTSD)*, https://dictionary.apaorg/posttraumatic-stress-disorder [https://perma.cc/HPP2-US79] (last visited Aug. 23, 2022). Walker argues that BWS and PTSD share common symptoms, specifically: reexperiencing the trauma events intrusively; high levels of arousal and anxiety; high levels of avoidance and numbing of emotions; and cognitive difficulties. Nonetheless, this characterization poses similar challenges as the learned helplessness theory. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1198–99 (1993) ("[D]efining battered woman syndrome as PTSD frames the issue before the finder of fact as solely a 'clinical' phenomena," requiring the battered woman "to meet a specific set of criteria," and therefore risking "the unintended result . . . that the expert witness constructs for the finder of fact an image of pathology.").

79. The learned helplessness theory was first described in 1967 by psychologists J. Bruce Overmier and Martin E. P. Seligman after experiments in which a group of dogs exposed to a series of unavoidable electric shocks later failed to learn to escape these shocks when tested in a different apparatus, whereas dogs exposed to shocks that could be terminated by a response did not show interference with escape learning in another apparatus. *See* J. Bruce Overmier & Martin E. P. Seligman, *Effects of inescapable shock upon subsequent escape and avoidance learning*, 63 J. Comp. Physiol. Psychol. 28 (1967). In the 1970s, Seligman extended the concept from nonhuman animal research to clinical depression in humans and proposed a learned helplessness theory to explain the development of, or vulnerability to, depression. According to this theory, people repeatedly exposed to stressful situations beyond their control develop an inability to make decisions or engage effectively in purposeful behavior. Martin E. P. Seligman, Helplessness: On Depression, Development, and Death (1975).

that there is nothing she can do to control or prevent the beatings from happening again in the future, that the violence is unavoidable and that there is no escape from the relationship. She mistakenly believes that she is helpless to change the situation and fails to comprehend viable alternatives that would be obvious to the average person. Therefore, Walker argued, she simply gives up and stops trying to prevent the abuse: "[i]nstead of actively seeking ways to escape [the] violent relationship[], [she] sink[s] into relative passivity, self-blame, and fatalism born of the randomness of the violence."[80] Eventually, as the cycle reaches its climax, she may resort to killing either herself or her abuser as the only surefire way to free herself.[81]

Notwithstanding common misconceptions, BWS is not a defense recognized by the criminal law.[82] It cannot be used, in and of itself, as either a justification or excuse to prevent conviction for an offense;[83] it does not inherently give rise to an acquittal of the offense charged, whether full or partial.[84] As the Nevada Supreme

80. *When Is a Battered Woman*, *supra* note 14, at 83.

81. Some studies suggest that domestic violence is a factor in up to one-quarter of female suicide attempts and increases suicide risk up to eight-fold compared with the general population. Additionally, 50 percent of battered women who attempt suicide undertake subsequent attempts. *See* Dorothy A. Counts, *Female Suicide and Wife Abuse: A Cross-Cultural Perspective*, 17 Suicide and Life-Threatening Behavior 194 (1987); Christine A. Grant, *Women Who Kill: The Impact of Abuse*, 16 Issues in Mental Health Nursing 315 (1995); Evan Stark & Anne Flitcraft, *Killing the Beast Within: Women Battering and Female Suicidality*, 25 Int'l J. Health Serv. 43 (1995).

82. *See* Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 Wis. Women's L.J. 75 (1996) ("The perception that there is a separate defense called the 'battered women's defense,' or the 'battered woman syndrome defense,' persists."); Kinports, *supra* note 37, at 180 ("Some courts and commentators persist in using the misleading terms 'battered woman's defense' and 'battered woman syndrome defense,' even when they are talking about standard self-defense claims.").

83. There are three broad categories of affirmative defenses in criminal law: (i) *justification* defenses, which consider the circumstances existing at the time that the act was committed (for example, self-defense or law enforcement authority); (ii) *excuse* defenses, which consider the defendant's mental state or beliefs at the time that the act was committed (for example, insanity or duress); and (iii) *nonexculpatory* defenses, which consider certain public policy interests unrelated to the defendant's conduct (for example, statute of limitations or entrapment). To these three general defenses, two categories can be added: failure of proof defenses (where the prosecution is unable to prove all the required elements of the offense) and offense modification defenses (which modify or refine the criminalization decision embodied in the particular offense definition). *See* Robinson, *supra* note 56, at § 21.

84. Even when the required elements of the criminal offense are satisfied (actus reus, mens rea, concurrence and causation), the defendant may seek to raise one or more defenses which, if proven, will result in her acquittal of the

Court once observed, "The defendant asserts that she was suffering from battered woman syndrome at the time of the killing. This, in itself, is not a legal defense."[85] Rather, BWS is currently used in criminal proceedings as a form of "social framework testimony," providing factfinders with "information about the social and psychological context in which contested adjudicative facts occurred."[86] In other words, BWS testimony is offered in criminal cases involving survivors as a way to assist factfinders in their deliberations about the ultimate issues of the case. Most frequently, it is used to help juries determine whether the survivor meets the reasonableness requirement of self-defense.[87] As such, a defendant may seek an expert on BWS—usually a psychologist or psychiatrist—to testify at her trial in an attempt to support her claim that she reasonably believed she was in danger of harm when she used force against her abuser.

2. Problems with Battered Woman Syndrome

Given the statistics on women in prison and their experiences with IPV, it should be safe to say that the courts' use of BWS testimony for the past several decades has not been effective to solve the challenges presented by the traditional self-defense doctrine.[88] Several factors can explain this lack of success.

First, BWS is oversimplistic: it creates a paradigmatic model that does not in fact accurately portray all women who experience IPV, or describe all abusive relationships. Walker's initial conclusions were based on a series of interviews she conducted with a nonrandomized group of predominantly white, middle-class women who had contacted social service agencies; they did not consider that women of color, poor women, and gender nonconforming women may experience IPV differently. Moreover, her research did not analyze differences between women who killed their abusers and those who did not. Yet, from this small, racially homogenous sample of women, she generalized the cycle of violence and learned helplessness theories. She depicted a narrow portrait of the abused

offense charged. Certain defenses, known as "partial defenses," may result in the defendant's conviction of a lesser offense rather than a full acquittal (for example, from murder to voluntary manslaughter). Partial defenses are complete, however, in the sense that the defendant is acquitted of the crime originally charged (for example, murder).

85. Boykins v. Nevada, 995 P. 2d 474 (Nev. 2000).

86. Neil Vidmar & Regina Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 Law Contemp. Probl. 133 (1989).

87. Dressler, *supra* note 34, at § 18.05 [3][b].

88. Evan Stark, Coercive Control: The Entrapment of Women in Personal Life 135 (2007) (stating that all fifty states permit this testimony "at least to some degree").

woman as passive, submissive, weak, frail, scared, dependent, and powerless—someone who never retorts or fights back, at least not until she is in a kill-or-be-killed situation.

Research on IPV victims/survivors has come a long way since Walker's initial theory was published. We know now that abused women are, in fact, not helpless at all.[89] In many cases, they make active efforts to protect themselves and their children; they develop strategies to stay alive and minimize their physical and psychological injuries in the relationship, including adopting coping mechanisms and identifying methods for deescalating battering incidents. Many even take fierce measures to fight back, get away from their abuser, seek the law's protection, or terminate the relationship. Having found no success in these attempts, a woman who experiences IPV may come to the rational conclusion that she is more likely to survive if she stays in the relationship than if she attempts to leave.[90] While this decision may be mistaken as a sign of submission by external parties, it is rather evidence of the abused woman's distinct cleverness, sharp observation skills, and sound survival instinct. By all accounts, most women do not stay passive in the face of intimate partner violence; they continuously show strength and resilience throughout the relationship.

Having created this paradigm, the BWS model rewards women whose actions reinforce outdated traditional gender roles, while penalizing those who do not fit prescribed models of femininity. Given that femininity is largely defined by a white norm, women of color more often than not struggle to have their victimization recognized, particularly since they are more likely to fight back when they are assaulted.[91] To quote Leigh Goodmark: "When is a battered woman no longer a battered woman? When she fights back!"[92] The IPV victim is supposed to be passive, a mere recipient of abuse; if she actively resists the abuse, she cannot be deemed a victim. But this assumption disregards that women of color face significantly more hurdles than white women when attempting to

89. *See* Edward W. Gondolf & Ellen R. Fisher, Battered Women as Survivors: An Alternative To Treating Learned Helplessness (1988) (arguing that, rather than being helpless victims, women continually resist their victimization through help-seeking efforts that are largely unsuccessful because of institutional failures).

90. According to one study, 77 percent of domestic violence-related homicides occur upon separation and there is a 75 percent increase of violence upon separation for at least two years. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089 (2003).

91. *See When Is a Battered Woman*, *supra* note 14, at 75.

92. *Id.*

seek safety. As just one example, Black women are less likely to turn to outside assistance due to their historically negative experiences with the police and social services; they are more likely to have their credibility questioned by judges when seeking protective orders; and they tend to face greater economic hardships if they leave the relationship.[93]

Another problem is that by pathologizing IPV survivors, BWS negates the reasonableness of their perceptions. The characterization of this model as a "syndrome" and the invocation of the learned helplessness theory to explain the behaviors of IPV survivors both feed the narrative that these women suffer from a sickness or mental defect, which impairs their mental capacity. As Anne Coughlin notes, BWS "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities . . . [who] lack[s] the psychological capacity to choose lawful means to extricate themselves from abusive mates."[94] Not only is this factually inaccurate, it is also counterproductive for the purpose of establishing self-defense. For factfinders, someone who suffers from a syndrome, by definition, cannot be deemed to have acted reasonably; thus, a woman suffering from BWS cannot possibly meet the reasonable person standard required in self-defense claims. Indeed, BWS is inherently paradoxical: it seeks to explain why survivors kill—arguably the boldest, most assertive action one might take—by arguing that they are helpless. The use of deadly force to defend oneself is logically the inverse of learned helplessness.

Finally, by placing the focus on the survivor's psychological reaction rather than the context surrounding her crime, BWS minimizes the real issues—namely the lack of protective solutions, supportive resources, and essential services—for women who are trapped in abusive relationships.[95] As Elizabeth Schneider puts it, BWS paints the criminal act as a product of "*her* weakness and *her* problems."[96] Through the learned helplessness theory, the model contends that the "battered woman" is psychologically unable to see that there are viable alternatives to killing her abuser, rather than acknowledging that these alternatives might simply not be

93. *Id.*

94. Anne Coughlin, *Excusing Women*, 82 Cal. L. Rev. 1, 7 (1994).

95. *See* Gondolf & Fisher, *supra* note 89.

96. Elizabeth M. Schneider, Battered Women and Feminist Lawmaking 119 (2000). *See also* Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?* 55 Kansas L. Rev. 269, 306 (2007) [hereinafter *The Punishment*].

available. This approach thus inherently obscures the survivor's needs and their efforts to end the violence.[97]

In short, the BWS model has been more successful in generating confusion among factfinders than clearing up misconceptions about IPV survivors who kill their abusive intimate partners. In any case, its impact is limited by nature: since it does not provide a defense per se, it must instead be raised within the framework of a separate, preliminary defense—usually self-defense. As detailed above, traditional self-defense is inherently ill-fitted to IPV survivors: every element of the test poses challenges for women, not just the reasonableness requirement that BWS is meant to address. Even assuming that BWS provided an accurate portrayal of survivors, those excluded from claiming self-defense on a prima facie basis—usually women who kill in nonconfrontational circumstances—would have no opportunity to present evidence on BWS to begin with. As for those women who are able to claim self-defense and bring in BWS testimony, they still face considerable hurdles in proving all three of the requisite defense elements (imminence, necessity, and proportionality).

C. *Other Avenues of Relief*

The use of other affirmative defenses, such as insanity (an excuse defense) and provocation (a partial defense), has been suggested as another method for dealing with cases involving survivor-defendants, but this approach is arguably misguided. The insanity defense, which is recognized in nearly all U.S. jurisdictions, is defined in the Model Penal Code as follows: a defendant is not responsible for criminal conduct where she, "as a result of mental disease or defect," did not possess "substantial capacity either to appreciate the criminality of [her] conduct or to conform [her] conduct to the requirements of the law."[98] In other words, the defense requires that the defendant's mental condition impaired her mental capacity to such an extent that she did not understand the nature and consequences of what she was doing or did not understand that what she was doing was wrong. This is in direct contrast with a defense of self-defense, in which survivors claim that they acted consciously in response to a reasonable perception of danger. Put bluntly, women who experience intimate partner violence and fight back as a response are not insane. They know what they are doing when they kill their abusers and their response is a logical one given

97. *See generally* Jane Stoever, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483 (2013).

98. Model Penal Code § 4.01(1).

the lack of alternatives they face. In other words, being abused does not make one mentally incapable. As one court acknowledged, "the syndrome is a mixture of both psychological and physiological symptoms but is not a mental disease in the context of insanity."[99] For this reason, insanity is not an adequate defense for IPV survivors.

The common law defense of provocation is raised in cases where the decedent provoked the defendant to act, or as the popular expression goes, when the killing was perpetrated "in a sudden heat of passion."[100] Ironically, however, this defense has historically been utilized mostly in the opposite context—that is, by abusive men who kill their wives or girlfriends—offering excuses for male violence against women and often giving rise to victim-blaming narratives that paint the victimized woman as deserving of her fate.[101] Like self-defense, the elements of the provocation defense are ill-suited to survivor-defendants who kill to escape from a pattern of abuse, as opposed to killing in response to the types of specific triggering incidents that are legally required for a provocation claim to be successful.[102] In contrast, men who kill their intimate partners usually do so "in response to much slighter provocation," such as nagging, taunting, insulting, flirting with another man, flaunting her infidelity, attempting to leave the relationship, or expressing a desire to leave.[103] In these circumstances, abusive men tend to be able to rely on the defense with more ease than abused women.[104] The gen-

99. Bechtel v. Oklahoma, 840 P.2d 1, 7 (Ct. Crim. App. 1992).

100. *See generally* Dressler, *supra* note 34, at § 31.07.

101. *See* Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses)—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence*, 19 SYDNEY L. REV. 336, 337 (1997) (arguing that provocation "operates as a deeply sexed excuse for murder").

102. In order to successfully rely on the defense of provocation, the defendant must prove that: (1) they have acted in a state of passion; (2) the provocation arose from an "adequate" cause; and (3) they did not have a reasonable opportunity to "cool off" between the provoking event and the killing. *See* Robinson, *supra* note 56, at § 106. This third condition effectively creates a requirement of close temporal proximity which is comparable to the imminence condition in self-defense. The adequate cause requirement also operates in a similar fashion as the reasonableness element in self-defense, in that it often leads courts to ask what sort of causes would have led a "reasonable person" to be provoked.

103. Danielle Tyson, *Victoria's New Homicide Laws: Provocative Reforms or More Stories of Women 'asking for it'*, 23 CURRENT ISSUES CRIM. JUST. 203, 208 (2011).

104. *See* Dressler, *supra* note 34, at § 31.07 ("One need only skim the case law and consider the types of provocation generally considered adequate, to see that the doctrine is mostly a "male defense'").

der biases underlying provocation have in fact led some feminist scholars to call for the abolition of the defense altogether.[105]

Due to the clear lack of adequate criminal defenses for survivor-defendants at trial, many have resorted to executive clemency as a post-conviction remedy.[106] But clemency is a laborious, lengthy, and highly uncertain endeavor. The processes, which vary quite significantly from state to state, can be complex to navigate—especially from a prison cell.[107] Without the assistance of legal counsel, candidates may not be able to formulate their applications in a way that meets the specific needs and expectations of this type of mechanism. Only a fraction of the petitions filed actually result in a clemency result and those that do tend to be, at best, in the form of a commutation, which remains far from an ideal outcome.[108] Without a full pardon, these women continue to carry the weight of a

105. Several foreign jurisdictions have already successfully abolished the defense, including New Zealand and the Australian states of Tasmania, Victoria, and Western Australia. *See* Danielle Tyson, *supra* note 103.

106. Clemency may take many forms, including pardon (relief from conviction), commutation (reduction of sentence), parole (conditional release from incarceration), reprieve (postponement of sentence), and remission (release from fines or forfeitures). The phenomenon is so widespread that it has given rise to a number of specialized organizations that campaign for the mass clemency release of criminalized survivors in their respective states. *See* Survived & Punished (New York and California), https://www.survivedandpunishedny.org/mass-commutation-clemency/freethemny [https://perma.cc/R98B-6K6Y] (last visited Oct. 14, 2021); Love & Protect (Illinois), https://loveprotect.org [https://perma.cc/9856–4B96] (last visited Oct. 14, 2021); Michigan Women's Justice & Clemency Project (Michigan), http://websites.umich.edu/~clemency [https://perma.cc/HWR7-E24E] (last visited Oct. 14, 2021).

107. Depending on the state, the Governor may have the sole authority in deciding to grant clemency, or they may be required to receive either a simple majority or unanimous recommendation of clemency from a board or advisory group, or they may have the option to receive a nonbinding recommendation from a board or advisory group.

108. For example, in the first eight years of his governorship (2011–2019) and despite grand promises to improve New York's clemency record, Governor Andrew Cuomo granted only twenty-one commutations out of at least 7,500 petitions for clemency received. Steve Zeidman, co-director of the CUNY Law School's Defenders Clinic Second Look Project, notes: "We filed some going back four or five years that we supplement from time to time. It's not as if there aren't applications. It's just the will to do it." Survived & Punished, *supra* note 106; Reuven Blau, *Gov. Cuomo's Clemency Out of Grasp for Many Behind Bars*, The City, https://www.thecity.nyc/special-report/2019/8/6/21210907/gov-cuomo-s-clemency-out-of-grasp-for-many-behind-bars [https://perma.cc/UN94–5HNJ] (last visited Aug. 6, 2019); Victoria Law, *Governor Hochul's 'Rolling' Clemency Process Has Set Just One Person Free*, Hell Gate (Jul. 25, 2022), https://hellgatenyc.com/governor-hochuls-rolling-clemency-process-has-set-just-one-person-free [https://perma.cc/TA7L-DPJ5].

felony conviction for the rest of their lives, stripping away many of their civil liberties and often making it difficult for them to find employment and housing.[109] Furthermore, the American Bar Association instructs that "executive clemency is, and should remain, for the highly exceptional case where the question is not one of excessiveness based on the ordinary factors affecting sentence, but where intervention of the executive is prompted by unusual public interest."[110] Unfortunately, cases of criminalized survivors are far from exceptional in the U.S. criminal legal system.[111] Even with mass clemency decisions, we cannot and should not rely on state Governors' Offices to resolve tens of thousands of survivor-defendant cases.[112] Put simply, the reactionary mechanism of executive clemency cannot act as a replacement for a well-functioning criminal justice system, nor should survivors have to endure years of ill-founded court proceedings and detention to begin with.

II. The Case for Decriminalizing Victims/Survivors

A. *"Why Didn't She Just Leave?": On the Entrapment of Victims/Survivors*

The existing legal framework does not accommodate survivor-defendants. Traditional criminal defenses (self-defense, insanity, provocation) are ill-fitted to IPV survivors; post-conviction remedies (executive clemency) are insufficient to address the magnitude of the problem; and even ad-hoc trial tools (battered woman syndrome testimony) cause more harm than good, stigmatizing these defendants in the eyes of misled jurors rather than exculpating. Much of the law's inability—or refusal—to accommodate survivors is rooted in a lack of understanding of the causes that lead these women to commit such crimes. It is a basic precept of morality that there is a duty to protect human life whenever possible, meaning that the taking of life should be an act of last resort, inflicted only after the exhaustion of all reasonable nonviolent alternatives. Consider the landmark case of Judy Norman, a North Carolina woman who shot her abusive husband while he was taking a nap in 1985, after enduring two decades of sustained, barbaric

109. *See generally* Cross, *supra* at 15.

110. American Bar Association Standards Relating to Appellate Review of Sentences 23 (1968).

111. See *supra* Introduction.

112. In 1990, Ohio became the first state to allow a mass clemency review of women imprisoned for crimes related to their history as victims of domestic violence when Governor Richard Celeste granted clemency to twenty-five convicted survivors at once.

violence at his hands.[113] Ruling on the matter, the North Carolina Supreme Court noted: "the killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent."[114] This premise often leads factfinders involved in cases of survivor-defendants to ask the question, "why didn't she just leave?"—a reaction that fundamentally disregards the structural entrapment that abused women are subjected to.

1. Structural Barriers to Leaving Abusive Relationships

The reasons women stay in abusive relationships are multiple, complex, and often overlapping. To be sure, some of these reasons may be personal, cultural, or religious, such as the belief that a two-parent household is better for the children, the belief that divorce is wrong or shameful, or even the woman's love for her partner. But in the majority of cases, the primary barriers to leaving an abusive relationship are directly traceable to institutional failures in the state's actions and service delivery across all sectors (health, police and justice, and social services)—starting with Judy Norman.

Far from remaining passive in the face of abuse, Norman multiplied attempts to remedy her situation, up to the very day that she resorted to killing her husband. On the eve of his death, Norman called the sheriff's deputies to her house to report yet another beating, but they left the scene after telling her they would need a warrant in order to arrest her husband.[115] Less than an hour later, they were called back to the house when Norman attempted to commit suicide.[116] She was taken to the hospital where she was revived and spoke to a therapist about filing charges against her husband and having him committed for treatment.[117] The next day, she also went to the mental health center to discuss those options.[118] When Norman confronted her husband with that possibility, he responded that if she tried to have him committed, he would cut her throat.[119] The same day, Norman went to the social services office to seek welfare benefits, but her husband followed her there, interrupted her

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

114. *Id.*

115. Martha R. Mahoney, *Misunderstanding Judy Norman: Theory as Cause and Consequence*, 51 Conn. L. Rev. 422, 691 (June 2019).

116. *Id.*

117. *Id.* at 693.

118. *Id.* at 694.

119. *Id.*

interview, and made her go home with him.[120] There, he proceeded with the abuse, threatening to kill and maim her, slapping her, kicking her, throwing objects at her, burning her with a cigarette, and preventing her from eating food.[121] Later that night, Norman killed her husband,[122] for which she was eventually convicted of voluntary manslaughter.[123] Despite repeatedly seeking the help of the police, the hospital, the mental health center, and the social services office, Norman never received adequate assistance or viable exit options. These obstacles are not unique to her; they are symptomatic of a broader framework of structural injustice.

To start, it must be stressed that many survivors *do* leave or attempt to leave their abusive partners. However, ending the relationship does not necessarily end the abuse. More often than not, in fact, it makes it worse: studies consistently demonstrate that victimized women are most at risk of being severely injured or killed at the time of separation.[124] Indeed, as many as 75 percent of intimate femicides are thought to occur upon separation.[125] Recall Nicole Brown Simpson who, in 1994, was infamously stabbed seven times to death, only a few months after she reported an incident of violence by her abusive ex-husband and subsequently moved out of the home they shared together.[126] As conveyed by the Power and Control Wheel,[127] intimate partner violence extends well beyond the boundaries of physical or psychological acts of violence. Above all, it is about abusers seeking to exert power and control over their partners. Thus, as the victimized woman asserts her autonomy—by trying to report an assault, end the relationship, or leave—the abuser often intensifies the violence in an attempt to regain the control he sees slipping away. Time and time again, the stories of survivors

120. *Id.*

121. *Id.* at 695–96.

122. *Id.* at 697.

123. Transcript of Record at 22, State v. Norman, No. 85-CRS-3890 (N.C. Super. Ct., Rutherford County 1987).

124. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6–7 (1991) (defining "separation assault" as the increased risk of violence when a woman attempts to leave an abusive relationship); SYNDROME, *supra* note 75, at 55 ("The most dangerous point in the domestic violence relationship is at the point of separation.").

125. The Center for Relationship Abuse Awareness, *Barriers to Leaving an Abusive Relationship*, http://stoprelationshipabuse.org/educated/barriers-to-leaving-an-abusive-relationship [https://perma.cc/K32W-2BN3] (last visited Nov. 15, 2021).

126. Lili Anolik, *How O. J. Simpson Killed Popular Culture*, VANITY FAIR (May 7, 2014), https://www.vanityfair.com/style/society/2014/06/oj-simpson-trial-reality-tv-pop-culture [https://perma.cc/C3RX-SYY5].

127. *See supra* note 11.

have corroborated this pattern,[128] while further demonstrating that public services across the sectors fail to meet their needs.[129]

Oftentimes, women who are in situations of abuse are reluctant to seek outside assistance. This hesitancy is traceable in no small part to the fact that, when they do seek help, survivors tend to find either that their efforts are in vain or that they end up being penalized for exercising one of the few options open to them. Many women refrain from calling the police or reporting an incident because they know that they are likely to be disbelieved, disregarded, or discouraged by law enforcement officers.[130] In the United States, men make up over 87 percent of the police force,[131] and it is estimated that family violence is at least two to four times higher in the law enforcement community than in the general population.[132] These statistics reveal a conflict in perspectives and personal contributions to IPV, which runs a serious risk of disempowering survivors and exposing them to resistance when they seek police services.[133] Put simply, if the officer receiving a complaint is an abuser himself or if the complaint is relating to an abusive colleague

128. *See infra* the cases of Marissa Alexander, Jessica Lenahan, and Sharwline Nicholson.

129. *See generally* Kristin A. Kelly, Domestic Violence and the Politics of Privacy 74–77 (2003); Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 Wash. U. J.L. & Pol'y 157, 169–90 (2003) (outlining the difficulties that a "diagnosis of BWS" can entail, including adverse custody decisions, being denied insurance, and welfare and immigration consequences).

130. According to a 2015 report by the ACLU (based on a survey of 900 advocates, attorneys, service providers, and nonprofit workers who support or represent domestic violence and sexual assault victims), 88 percent of respondents report that police sometimes or often do not believe victims or blame victims for the violence. Advocates identified police inaction, hostility, and bias against survivors as key barriers to seeking intervention from the police and justice sectors. Donna Coker et al., *Responses from the Field Sexual Assault, Domestic Violence, and Policing*, American Civil Liberties Union 1 *passim* (2015).

131. Women constitute less than 13 percent of total officers and a much smaller proportion of leadership positions. Rianna P. Starheim, *Women in Policing: Breaking Barriers and Blazing a Path*, U.S. Dep't of Just., Off. of Just. Programs, Nat'l Inst. of Just. 3 (2019).

132. Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, The Atlantic (Sept. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/8GDM-YRAW]. Note that research in this area is scant, and most of the relevant studies date back from the 1990s; however, experts believe that domestic violence by police officers is likely vastly underestimated.

133. *See generally* Mirko Fernandez & Jane Townsley, *The Handbook on Gender-Responsive Police Services for Women and Girls Subject to Violence*, U.N. Women (2021).

of his, he may be more inclined to minimize the incident presented before him, question the credibility of the victim/survivor, or even blame her for the violence itself—this could be due to implicit or explicit biases against women, a refusal to confront his own behavior, the fact that such behavior may seem inherently more excusable to him, or a reluctance to incriminate his peer.

For women of color and other women perceived as transgressing traditional norms of femininity, there are additional threats associated with invoking the legal system. Given the history of negative police encounters these women and their communities have had, they know that by calling the police on their abusers, they are putting themselves at risk of facing harsh conduct or violence from police officers.[134] They are also more likely to find themselves getting arrested along with or in lieu of their abuser, especially if they defended themselves against the attack.[135] Courtney Cross explains: "Mandatory arrest policies direct police to focus primarily on whether the law has been broken and, if so, determine who is the perpetrator and who is the victim and arrest accordingly, rather than investigating the circumstances surrounding the violence. For example, if an officer only sees injuries on an abusive partner, a survivor risks being arrested regardless of whether she

134. Andrea J. Richie, *Law Enforcement Violence Against Women of Color*, in Color of Violence: The Incite! Anthology 138, 143 (INCITE! Women of Color Against Violence ed., 2006) ("Women framed as 'masculine'—including African American women who are routinely 'masculinized' through systemic racial stereotypes—are consistently treated by police as potentially violent, predatory, or noncompliant regardless of their actual conduct or circumstances, no matter how old, young, disabled, small, or ill . . . . Working-class or low-income women are also perceived as more 'masculine' than middle- or upper-class women, and therefore subject to greater violence by law enforcement officers."); Coker et al., *supra* note 130, at 8.

135. *See* Sue Osthoff, *But, Gertrude, I Beg to Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 Violence Against Women 1521, 1533 (2002) ("One of the unintended consequences of intensive arrest policies has been the arrest of large numbers of battered women, especially women of color."); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. Davis L. Rev. 1009, 1043 (2000) ("The percentage of women arrested for domestic violence increases sharply when arrest encouraging policies are adopted."); Susan L. Miller, Victims as Offenders: The Paradox of Women's Violence In Relationships 9 (2005) ("[A]s more stringent arrest policies have been adopted to target domestic violence offenders, the widening net has resulted in more and more women finding themselves arrested. A disproportionate number of battered women are now ensnared in the policies of arrest, despite research that shows that men who batter women account for 95 percent of domestic violence incidents.")

was acting in self-defense."[136] Take the case of Marissa Alexander, a Black woman who, in 2010, fired a warning shot at the wall after her abusive husband attacked her and threatened to kill her in their Florida home.[137] The police were called and Alexander was taken into custody, despite her husband's history of IPV arrests.[138] She was subsequently prosecuted for aggravated assault with a lethal weapon and received a mandatory minimum sentence of twenty years in prison.[139] In many cases, these marginalized women are equally conflicted about turning to social service systems, which they perceive to be hostile, culturally incompetent, intended only for white women, and geographically inaccessible from their neighborhoods.[140]

In the courtroom, women also face an uphill battle in securing a restraining order against their abusers. Because most survivors do not fit the paradigmatic model that courts expect to see—namely that of "a passive, middle-class, white woman cowering in the corner as her enraged husband prepares to beat her again"[141]—they are not seen as victims by the legal system. In the eyes of many judges, women who stand up for themselves or *fight back* against their abusers are simply not credible; women *of color* especially are "suspect, unless they prove otherwise";[142] and *women of color who fight back* are, by definition, the most suspect of all.[143] Even when women are successful in persuading the legal system of their need for protection, the state commonly fails to prevent abusers from returning and repeating the abuse. Studies find that more than half of protective orders "are violated at least once, and many are violated repeatedly."[144] Yet, the police are still much more likely to arrest in a case involving stranger assault than they are to arrest a domestic abuser.[145]

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136. Cross, *supra* at 15.

137. Alexander v. Florida, 121 So.3d 1185 (Fla. Dist. Ct. App. 2013).

138. *Id.*

139. *Id.*

140. *When Is a Battered Woman*, *supra* note 14, at 97.

141. *Id.* at 77.

142. Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African- American Woman and the Battered Woman Syndrome*, 1995 Wis. L. Rev. 1003, 1042 (1995).

143. Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women 96 (Routledge, 1996).

144. Kinports, *supra* note 37, at 159. *See also* Joan Zorza & Nancy K. D. Lemon, *Two-Thirds of Civil Protection Orders Are Never Violated; Better Court and Community Services Increase Success Rates*, in Violence Against Women: Law, Prevention, Protection, Enforcement, Treatment, Health 51–52 (2002).

145. Kinports, *supra* note 37, at 159.

The story of Jessica Lenahan—a Latina and Native American mother of three from Castle Rock, Colorado—provides a tragic case in point.[146] On paper, Lenahan had done all the "right things": in 1999, she filed for divorce from her abusive husband, sought and obtained a permanent restraining order against him, and repeatedly called the police when he abducted their three daughters in violation of the order.[147] Yet, despite her relentless efforts, the Castle Rock police took no action to enforce the court-issued order, refusing to take her seriously.[148] A mere hours later, the bodies of her three deceased daughters were found in the back of her husband's vehicle.[149] The refusal of law enforcement agents to indeed *enforce* the law in cases of intimate partner violence can be traceable to a range of causes, including the lack of police training to deal with them, engrained misogynistic ideas that lead male police officers to see women as simply being "hysterical" or "crazy," and the disproportionately high rates of IPV within the police force itself.[150]

For abused mothers, yet another strong deterrent must be considered. Victims/survivors know that if they report the abuse or try to seek help, they risk placing the family under the scrutiny of child protective services and having their children removed from their care, even when neither they nor their partners abuse the children directly.[151] Consider the case of Sharwline Nicholson, a Black mother of two who, in 1999, decided to break up with her abusive boyfriend.[152] When he later stormed into her Brooklyn apartment and violently assaulted her, Nicholson went to find a trusted neighbor to take care of her kids until she came home from the hospital. But the next morning in the hospital, she received a call from the

146. Castle Rock v. Gonzales, 545 U.S. 748, 751 (2005). *See also*, Jessica Lenahan (Gonzales) v. U.S., Case No. 12.626, Inter-Am. Ct. H.R., Report No. 80/11 (2011).

147. Upon discovering that her husband had kidnapped their children, Jessica Lenahan called the police five times and eventually visited the police station in person. *Castle Rock*, 545 U.S. at 753. *See also*, *Lenahan*, *supra* note 146.

148. *Castle Rock*, 545 U.S. at 753. *See also*, *Jessica Lenahan*, Inter-Am. Ct. H.R.

149. *Castle Rock*, 545 U.S. at 754. *See also*, *Jessica Lenahan*, Inter-Am. Ct. H.R.

150. *See supra* notes 121–24.

151. Nearly 90 percent of survey respondents said that contact with the police sometimes or often resulted in involvement of child protective services, threatening survivors with loss of custody of their children. Other negative consequences named by respondents include initiation of immigration proceedings and loss of housing, employment or welfare benefits. Coker et al., *supra* note 130.

152. Nicholson v. Scoppetta, 344 F.3d 154 (2d Cir. 2003).

Administration for Children's Services (ACS), telling her they had removed her children and placed them in foster care. She was now facing a neglect petition for "engaging and domestic violence," with an order to appear at a family court hearing.[153]

Despite the New York Court of Appeals rejecting the notion that witnessing intimate partner violence is a presumptive ground for neglect or removal,[154] in New York and other states, the child welfare system routinely continues to punish victimized mothers in that manner.[155] While there is no doubt that children who witness intimate partner violence on a parent can suffer serious emotional and developmental difficulties, oftentimes equivalent to those suffered by children who are themselves victims of abuse, there is no evidence to suggest that separating the children from their mothers is beneficial in these cases.[156] This practice is largely attributable to the structure of the child welfare system with its narrowly defined mandate and the commonly used "parent-as-problem" approach to understanding harm and risk to children.[157] It is also yet another reflection of the misogynistic and racist attitudes that prevail regarding intimate partner violence and low-income mothers of color, both within society at large and within state agencies. These misconceptions and stereotypes consistently place the blame on women and hold them almost solely accountable for the risks or potential harms their children face as a result of domestic violence. Instead of receiving adequate support as victims of violence, they are—once again—treated punitively.

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153. The New York Administration for Children's Services effectively ruled that Nicholson was a neglectful parent simply because she had failed to prevent her children from witnessing the violence that her partner perpetrated against her. ACLU of New York, *Nicholson v. Williams (Defending Parental Rights of Mothers Who Are Domestic Violence Victims*), https://www.nyclu.org/en/cases/nicholson-v-williams-defending-parental-rights-mothers-who-are-domestic-violence-victims [https://perma.cc/5N6Y-K3JH] (last visited Dec. 10, 2022) ("ACS claimed that the children were in 'imminent risk if they remained in the care of Ms. Nicholson because she was not, at that time, able to protect herself nor her children because [her partner] had viciously beaten her.'").

154. *Id.*

155. *See* Jaime Perrone, *Failing to Realize Nicholson's Vision: How New York's Child Welfare System Continues to Punish Battered Mothers*, 20 J.L. & Pol'y 641 (2012); Jeanne Kaiser & Caroline M. Foley, *Family Law—The Revictimization of Survivors of Domestic Violence and Their Children: The Heartbreaking Unintended Consequence of Separating Children from Their Abused Parent*, 43 W. New Eng. L. Rev. 167 (2021).

156. Foley, *supra* note 155.

157. Tina Lee, *Child Welfare Practice in Domestic Violence Cases in New York City: Problems for Poor Women of Color*, 3 Women, Gender, and Families of Color 58, 65 (2015).

For most victims/survivors, however, the first barriers to leaving are ultimately pragmatic: Where to go? With what money? While they want the violence to stop, breaking up the relationship—and the resources this relationship brings along—is not a viable option for these women. Intimate partner violence affects socioeconomically deprived women at a disproportionately high rate.[158] Furthermore, survivors tend to be financially dependent on their abusers, often not by choice: according to the National Coalition Against Domestic Violence, 94 to 99 percent of IPV victims experience economic abuse during the relationship, and finances are frequently cited as the biggest barrier to leaving.[159] Economic abuse takes many forms, including restricting a partner's access to money,[160] restricting how she uses her money,[161] and exploiting her financial situation.[162] With no personal resources and little to no social safety nets available in the days or weeks immediately following the separation, many victims/survivors have no viable way of supporting themselves—and potentially their children—outside of the relationship. Meanwhile, access to emergency shelter, transitional housing, and other supportive services (for example, counseling, childcare, transportation, life skills, education, job training) remains grossly insufficient in view of the current demands.[163] In New York City, the problem is so rampant that domestic abuse was the single largest cause of homelessness in 2019, surpassing even evictions.[164] Specialized shelters—specifically designed to pro-

158. *See supra* Introduction.

159. Nat'l Coal. Against Domestic Violence, *Quick Guide: Economic and Financial Abuse* (Apr. 12, 2017), https://ncadv.org/blog/posts/quick-guide-economic-and-financial-abuse [https://perma.cc/4BZS-JFMN].

160. *E.g.*, refusing to let her access a bank account, preventing her from obtaining education, sabotaging her employment, limiting her working hours, seizing her paychecks, refusing to let her claim benefits, taking the children's savings or birthday money, etc.

161. *E.g.*, dictating what she can buy, making her ask for money or providing an allowance, checking her receipts, making her justify every purchase made, insisting that assets such as savings and housing are in his name, or keeping financial information secret, etc.

162. *E.g.*, stealing her money or property, causing damage to her property, refusing to contribute to household costs, spending money needed for household items and bills, insisting that liabilities such as bills, credit cards and loans are in her name, and building up debt in her name.

163. *See* Kinports, *supra* note 37, at 157 (noting that "[a] survey in New York City several years ago found that the city's shelters could accommodate only one-quarter of requests").

164. Julia Marsh, *Half of NYC's Homeless Domestic-Violence Victims Feel Unsafe in Shelters*, The N.Y. Post (Feb. 2, 2020), https://nypost.com/2020/02/02/half-of-nycs-homeless-domestic-violence-victims-feel-unsafe-in-shelters/ [https://perma.cc/V5BK-EG26].

tect IPV survivors and provide dedicated services, such as trauma counseling—are especially lacking: the city only has capacity to house 23 percent of survivors.[165] Instead, most women and their children are "housed in regular shelters with publicly available addresses, making it easier for their abusers to track them down."[166] As a result, as many as 50 percent of women housed in shelters say they feel unsafe "most" or "all of the time."[167]

The structural barriers that women face when attempting to report or leave an abusive relationship are rooted in conditions perpetuated through decades of ineffective laws and policies.[168] Since the 1970s, the national emphasis on a tough-on-crime approach and the embrace of criminalization as a response to social problems have steadily led to the overwhelming concentration of resources on law-related services, in turn diverting resources and attention away from more pressing social problems like poverty, homelessness, unemployment, and mental illness.[169] These priorities were exemplified by the government's decision to prioritize a criminal legal response to intimate partner violence through the Violence Against Women Act (VAWA) in 1994. Upon its original passage, the act provided $1.6 billion of federal funding toward the investigation and prosecution of domestic abuse, at the direct expense of addressing the socioeconomical needs of survivors, such as counseling, shelters, transitional housing, or other nonlegal forms of assistance.[170] As Leigh Goodmark notes, "[g]overnment funding is often a zero sum game; money dedicated to policing, prosecution, and punishment cannot be used to provide other, more welcome types of services and

165. *Id.*

166. *Id.*

167. *Id.*

168. *See Should Domestic Violence*, *supra* note 25, at 55 (2017) ("Since 1994, rates of domestic violence in the United States have fallen—but so has the overall crime rate. From 1994 to 2000, rates of domestic violence and the overall crime rate decreased by the same amount. From 2000 to 2010, rates of domestic violence dropped less than the overall crime rate. The reason for the decline in the overall crime rate is unclear, and is probably the result of a number of forces, including income growth, changes in alcohol consumption, aging population, decreased unemployment, and the number of police on the streets."). *See also* Shannon Catalano, U.S. DEP'T OF JUST., *Intimate Partner Violence*, 1993–2010 (2012); Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, THE ATLANTIC (Feb. 11, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/ [https://perma.cc/7RMP-XSTY].

169. *Should Domestic Violence*, *supra* note 25, at 69–70.

170. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 2 (N.Y. Univ. Press, 2012).

supports for people subjected to abuse."[171] Four VAWA reauthorizations later (most recently in March 2022), it is clear that "women's needs for housing, health care, income, transportation, education, and childcare were submerged in the focus on treating domestic violence as a crime."[172] As a result of these policy decisions, women face a host of practical and institutional obstacles that prevent them from "just leaving the relationship" and can, in turn, push them toward crime.

2. The Responsibility of the State

In the 1989 case *DeShaney v. Winnebago County Department of Social Services*, the U.S. Supreme Court notoriously refused to hold the state legally responsible for private acts of violence.[173] According to the majority ruling in this case, the state has no affirmative constitutional duty to protect the public from violence committed in the private sphere at the hands of non-state actors, such as an abusive father or abusive intimate partner. While the decision itself is disputable at best,[174] *DeShaney* raises even more questions once one takes into consideration the state's role in relation to a victim's own criminal response to such private violence. If the state declines to protect vulnerable individuals from deadly violence inflicted by

171. *Should Domestic Violence*, *supra* note 25, at 74.

172. Kathleen J. Ferraro, Neither Angels Nor Demons: Women, Crime, and Victimization 13 (Ne. Univ. Press, 1st ed., 2006).

173. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the [Due Process] Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

174. Joshua DeShaney was a four-year-old boy from Wisconsin who, in 1984, was beaten so severely by his father that he suffered permanent brain damage and fell into a life-threatening coma, from which he eventually emerged paralyzed and mentally disabled. Despite receiving multiple complaints about the abuse, social services failed to remove Joshua from his father, who had received custody of the boy in a 1980 divorce settlement. Previously, in 1983, the boy had been taken into hospitalization following a report of child abuse. But in a matter of days, he was returned to his father. Time and time again, a department social worker reported suspicion of child abuse. There were bruises, hospitalizations, and days when Joshua was too "sick" to be seen. But the department continued to make agreements with the father, which he repeatedly ignored. Following the permanent injury, Joshua's mother sued the Department of Social Services, arguing that child welfare workers violated Joshua's constitutional rights by failing to rescue him from his abusive father. In 1989, the U.S. Supreme Court issued its decision, finding that the state was not liable for failure to protect from a private actor. Joshua passed away in 2015, at thirty-six years old. *Id.*

private actors—including intimate relatives who hold special power and control over their victims, no less—then how much of the moral responsibility for the ensuing criminal response can be reasonably imputed to the abused person as opposed to the state itself? To what extent is blaming and punishing the abused person for taking the matter into their own hands a legitimate state response when the state explicitly refused to take on that role itself?

When a victim of IPV resorts to killing her abusive intimate partner, the state incurs moral responsibility for the crime in at least two ways: the failure to prevent IPV from occurring in the first place (a priori protection);[175] and the failure to offer appropriate responses to IPV (a posteriori protection). As it stands, the state is both unable and/or unwilling to ensure that violence does not occur within intimate relationships, and unable and/or unwilling to deliver the support and resources necessary for women to escape these abusive situations. The state has effectively entrapped survivors by creating—even if only by omission or negligence—an environment that predictably induces them to commit violent acts of self-defense, as they are left with no other reasonable alternatives. Trapped in a pattern of increasing violence, the survivor indeed faces an impossible dilemma: wait until she dies at the hands of her abuser and become the victim in the criminal case, or kill him while she can and become the defendant in the case.

As one scholar put it, entrapment of this sort raises two distinct moral issues.[176] The first concerns the culpability of the

175. Although this Article has mostly focused on detailing the ways in which the state fails to provide adequate *responses* to domestic violence (thus driving victimized women to engage in criminal behavior as the only escape), the significance of the state's failure to *prevent* domestic violence cannot be understated. While providing adequate services and resources for survivors is essential, only prevention can eliminate the problem completely. This requires addressing the structural causes and risk factors associated with intimate partner violence, including through early education and the implementation of social programs that target economic distress, poverty, substance abuse, and poor mental health. *See* Ctrs. For Disease Control and Prevention, *Risk and Protective Factors*, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/riskprotectivefactors.html [https://perma.cc/63YE-85HG]) (last visited Aug. 23, 2022). For reference, today in the United States, only thirty-nine states require that sex education be taught in their schools at all, and fewer than half of those states specify that the instruction be medically accurate. *See* Planned Parenthood, *Sex Education Laws and State Attacks*, https://www.plannedparenthoodaction.org/issues/sex-education/sex-education-laws-and-state-attacks [https://perma.cc/KY4Y-RS2M] (last visited Aug. 23, 2022).

176. Hochan Kim, *Entrapment, Culpability, and Legitimacy*, 39 L. & Phil. 67 (2020).

entrapped person: "because [entrapment] partially undermines their autonomy, holding entrapped offenders fully responsible for their actions is wrong."[177] Autonomy is commonly held as a necessary condition for culpability and accountability: for people to be held responsible for their actions, they must have autonomously performed those actions. Yet the autonomy of an IPV survivor is impaired significantly through the coercive control exerted over her by her abuser, the numerous systemic barriers that prevent her from leaving the abusive relationship, and the lack of alternative protective options available to her. Put differently, the victim of IPV lacks a predisposition or a genuine intent to commit criminal wrongdoing—she is an otherwise law-abiding citizen who has been pressured into committing a crime due to various forces independent from her.[178] The source of her criminal action is not internal but rather external; it is induced by her abuser's repeated, persistent, and likely continuing violence against her combined with the state's unwillingness to intervene as protection.

At this point, attentive readers may sense a slight tension. If, as argued in response to the flawed BWS theory, survivors are indeed active, rational agents responding to bad situations, then aren't they autonomous? But one important clarification is needed here. Autonomy, I argue, consists of two essential components: first, the mental or cognitive capacities to act based on one's own logical reasoning, desires, and personal inclinations (the agent's reason); and second, the availability of options affording the agent genuine choice from which an agent may use reasoning capacities (the agent's *libre arbitre*). That the IPV victim is a rational agent should be beyond dispute by now: she perceives the threat in front of her, which makes her reasonably fearful for her life, and this fear leads her to commit defensive violence. But she chooses that particular course of action only because there aren't other options available.[179] In other words, her reason is not impaired, but her *libre arbitre* is—the two are not mutually exclusive. It is in that sense that she is entrapped.

177. *Id.* at 86.

178. Note the definition of (legal) entrapment given by Chief Justice Hughes in *Sorrells v. U.S.,* the first landmark entrapment case decided by the U.S. Supreme Court: "It is clear that . . . the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had *no previous disposition* to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by *repeated and persistent solicitation*." (emphasis added) Sorrells v. U.S., 287 U.S. 435, 442 (1932).

179. *See* Burke, *supra* note 61, at 266 (stating that "battered women" are "rational actors choosing among options that are limited by their factual circumstances").

The second moral concern raised by entrapment is related to the legitimacy of the entrapping state to hold the entrapped person accountable for a crime. "Because entrapment undermines its moral standing to condemn the crime and constitutes an abuse of its legal authority, the state lacks the legitimate authority to punish entrapped offenders regardless of their guilt."[180] When women kill their abusers, the state's penal legitimacy is undermined because the state itself is complicit in the crime. Effectively, the state has created the criminal act by failing both to prevent the domestic abuse and then to provide appropriate responses to it. Authors have spoken extensively about the inappropriateness of the state's punishing a person for a crime that it has created.[181] This reasoning extends to the present context.

The state itself has declared the IPV epidemic to be of public interest and yet has continually refused to prioritize and address the underlying causes.[182] For the last forty years, the U.S. government has increasingly poured resources into the criminal legal system.[183] At the same time, it has failed to provide women, families, and communities with social services that would address the stressors of IPV (including poverty, lack of employment, lack of housing, mental illness, and substance abuse) and resources for women seeking to escape abusive relationships (such as financial assistance, shelter, medical and legal advocacy, support groups, etc.).[184] Having left women to deal with the fatal consequences of the social problems it knowingly left unresolved, this same government has then proceeded—with total impunity and perversion—to wield the criminal legal system against these survivors. By punishing the women it

180. Kim, *supra* note 176, at 87.

181. *See generally* Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 MINN. J.L. INEQ. 9, 15 (1985) ("[I]t would be unjust for society to punish a person for committing a crime that would not have occurred but for society's neglect in dealing with the causes of crime.").

182. *Should Domestic Violence*, *supra* note 25, at 70; Christopher D. Maxwell, *Prosecuting Domestic Violence*, 4 CRIMINOLOGY & PUB. POL'Y 527, 527–34 (2005).

183. *Should Domestic Violence*, *supra* note 25, at 54. Historically, intimate partner violence was considered a private family matter not to be interfered with by the state or discussed in a public forum. This changed in 1984 with the publication of a report by the United States Attorney General's Task Force on Domestic Violence, which declared that domestic violence was a criminal problem that required a criminal solution. Since that time, enhancing the criminal legal system's response to intimate partner violence has become the primary focus of law and policy on the matter, with hundreds of millions of dollars being allocated to the system through the Violence Against Women Act. *Id.*

184. *Id.* at 69–70.

deliberately pushed toward crime, the state has thereby abused its legal authority.

Thus, in order to fully capture the extent of the causes that prevent women from simply leaving abusive relationships, it is essential to recognize and understand that these women are entrapped not only by their abusers, but also by the state, its institutions, and its representative agents, including law enforcement, legal professionals, health officials, social workers, and children's services. Furthermore, after entrapping women in interpersonal violence and punishing them for it, the state then proceeds to subject these women to analogous forms of abusive power and control in the prison system.[185] Comparing her experience of abuse at the hands of a partner with her experience of abuse at the hands of the state, Monica Cosby, a formerly incarcerated survivor, updated the Power and Control Wheel to incorporate both intimate partner violence and state violence.[186] According to Cosby, "if there is anybody out here who's never been in prison that can understand what it feels like to be in prison, it's someone who's been stuck in an abusive and violent relationship."[187] She explains how, for example, the emotional abuse tactics used by her partner at home felt no different than those used by correctional officers behind walls: both made her feel bad about herself, infantilized her, called her names, gaslit her, and humiliated her.[188] Cosby similarly analogizes the intimidation and stalking tactics used by abusive partners (such as making their partner feel afraid, damaging her property, and displaying weapons) to those later employed by staff and officials in prison (shaking down her cell, compelling her to strip searches and pat-downs, displaying weapons, and subjecting her to mandatory supervised parole and electronic monitoring).[189] Likewise, while

185. To a lesser extent, this can be true outside of the prison system as well. Even resources geared toward survivors often perpetuate a loss of control. For example, many shelters have strict curfews and rules which do not center agency. Survivor-centered approaches across all essential services (health, police and justice, and social services) are crucial. *See* Melissa Scaia, *Safe Consultations with Survivors of Violence Against Women and Girls*, U.N. Women (2022), https://www.unwomen.org/en/digital-library/publications/2022/12/safe-consultations-with-survivors-of-violence-against-women-and-girls [https://perma.cc/N64M-ZGSY].

186. Angela Y. Davis et al., Abolition. Feminism. Now. 112–13, 174 (Naomi Murakawa, 2022).

187. Diana Colavita et al., *Cuomo's Gender-Based Violence Includes His Failure to Free Imprisoned Survivors*, Truthout (Mar. 19, 2021), https://truthout.org/articles/cuomos-gender-based-violence-includes-his-failure-to-free-imprisoned-survivors [https://perma.cc/6E7A-PMBG].

188. Davis et al., *supra* note 186, at 174.

189. *Id.*

the abuser engages in economic abuse by preventing his partner from working, making her ask for money, or taking her money, this pattern is repeated in prison through exploitative prison labor, extortionate commissary prices, and strict control over spending and giving.[190] Additionally, Cosby draws comparisons between abusers and the state in regards to other common forms of abusive tactics such as isolation, withholding privileges, using children, and minimizing, denying, and blaming abuse.[191] This is, of course, in addition to the overt physical and sexual violence that is rampant across women's prisons.[192] Put bluntly, the state does not just reinforce and enable the entrapment of women in abusive relationships, but also replicates the violence they experience therein through the criminal legal system.

B. *Application of the Moral Rationales for Punishment*

We've seen that the punishment of survivors who kill abusive partners is morally objectionable in practice. But are there good theoretical justifications for punishing these actions? Incarceration is the primary form of punishment employed in the United States for survivors who kill their abusive partners. It is also one of the most severe forms of lawful punishment available in our legal system, depriving the incarcerated individual of her fundamental right to liberty.[193] Traditionally, this form of state punishment has been justified under two dominant schools: retributivism and utilitarianism.[194] This Part evaluates how these approaches apply to survivors

190. *Id.*

191. *Id.*

192. For a recent example, *see* the U.S. Department of Justice's April 13, 2020 report finding that the Edna Mahan Correctional Facility for Women in Clinton, New Jersey, violated the Eighth Amendment of the U.S. Constitution for failing to protect prisoners from systemic sexual abuse by the facility's staff. Following this report, over thirty prison employees were dismissed and New Jersey Governor Phil Murphy announced plans to shut down the facility. *Investigation of the Edna Mahan Correctional Facility for Women*, U.S. DEP'T OF JUST. (Apr. 2020), https://www.justice.gov/opa/press-release/file/1268391/download [https://perma.cc/P4VV-4BCY].

193. This is along with the collateral consequences of a criminal conviction, such as disenfranchisement, ineligibility for certain public funds, difficulties related to child custody rights, consequences related to immigration status, etc.

194. One popular way to characterize this distinction is by referring to retributive accounts as backward-looking (justifying punishment on the basis of the previous, voluntary commission of a crime) and utilitarian accounts as forward-looking (justifying punishment on the basis of the future social benefit it will provide). Utilitarian theories of punishment include, inter alia, incapacitation, deterrence, individual and general deterrence, and rehabilitation—all of which I will be discussing below. *See* Mark A. Michael, *Utilitarianism and Retributivism: What's the Difference?* 29 AM. PHIL. Q. 173,

in order to determine whether society has a moral rationale for inflicting punishment upon them.

1. Retribution

Under the traditional retributive view, punishment is justified only when it is deserved and to the extent that it is deserved. It is deserved when the wrongdoer is morally blameworthy, meaning when she freely chooses to violate society's rules. While retributive theorists differ among themselves about the best way to defend this *just deserts* philosophy, the central idea is to use punishment as a means to restore balance. As Herbert Morris famously explained, social life is regulated by a set of rules which forbid harmful conduct.[195] These rules impose a burden on each member of the community who must exercise self-restraint, but they simultaneously provide a benefit in the form of protection from interference by other persons.[196] Thus, society is based upon the equal sharing of the benefits and burdens among its members. When someone voluntarily renounces her burden by committing a crime, she acquires an unfair advantage over law-abiding members and disturbs the moral equilibrium of society. Punishment is justified under this theory because it allows the offender to repay the debt she owes to society, restores the rightful equilibrium, and rights the wrong caused by her action.

In cases involving survivor-defendants, however, the retributive view struggles to provide a moral basis for punishment. As developed above, when a victim/survivor kills her abusive intimate partner, this action is not a free and voluntary exercise of her will; it is not an indication of her predisposition to commit crime. Rather, her criminal response is induced by a number of external forces that, at least partially, undermine her *libre arbitre*. Since her autonomy has been impaired in this way, she should not be held (fully) morally accountable for the crime, and she does not (fully) deserve punishment.[197] On that view, punishment should, at minimum, be reduced. But more importantly, self-defense is typically not considered morally wrong at all in punishment theory. Rather, it is morally justified. There is no wrong done to others if a person defends herself from their aggression. By defending herself,

173–82 (1992).

195. Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

196. *Id.*

197. *See* Hochan Kim, *Entrapment, Culpability, and Legitimacy*, 39 L. & PHIL. 67 (2020) (acknowledging that entrapment does not *fully* undermine autonomy, meaning that the recommended legal outcome is a reduced sentence on this rationale rather than the waiving of any punishment altogether).

albeit with force, she merely prevents precisely the other's attempt at unjust benefit-taking. Therefore, if we accept the notion that survivors kill as the only viable way to defend themselves against abusive partners, then retribution can no longer be used as a rationale to punish them. In other words, if we rightly recognize that survivors who kill are merely acting in self-defense, then they do not deserve to be punished at all.

Moreover, the idea of restoring a moral balance is further undermined once one accounts for the continual abuse the survivor endured at the hands of her abuser prior to his death, which in many cases went unpunished. If unjustified violence generates moral debts, then this pattern of abusive violence places the abuser—and arguably also the state, which is complicit in this violence—in moral debt to *her*. On the retributive view, then, it may be that by killing her abuser, the victim/survivor merely reclaims the benefits already enjoyed by other members of the community which she had lost in the abusive relationship, namely, the right to dignity, the right to bodily integrity, and the right to be free from violence.[198] She does not acquire an unfair advantage over the rest of society or disturb the social balance. On the contrary, she "restore[s] herself to the state in which members of her community routinely [live], free from fear and abuse."[199]

Another problem with the retributive rationale is that it ignores the disproportionate harm that the incarceration of survivors causes more broadly, for a range of manifestly undeserving actors. As former U.S. Attorney General Loretta Lynch observed, "when we incarcerate a woman we often are truly incarcerating a family, in terms of the far-reaching effect on her children, her community, and her entire family network."[200] Nearly 60 percent of women in prison and 80 percent of women in jail are mothers.[201] Of those incarcerated mothers, a large proportion are primary caregivers or single parents, solely responsible for their young children.[202] As a result, these children are more likely to experience

198. *The Punishment*, *supra* note 96, at 299.

199. *Id.*

200. *Attorney General Loretta E. Lynch Delivers Remarks at the White House Women and the Criminal Justice System Convening*, U.S. Dep't of Just. (Mar. 30, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-women-and-criminal-justice [https://perma.cc/W6G2-F7UP].

201. Wendy Sawyer & Wanda Bertram, *Prisons and jails will separate millions of mothers from their children in 2022*, Prison Pol'y Initiative (May 4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day [https://perma.cc/SEH8–2YDV].

202. *Id.* Of course, in many cases, the decedent is also the father of the

residential and economic instability,[203] to face difficulty meeting their basic needs,[204] and to end up in foster care.[205] Furthermore, prison facilities for women tend to be located in remote areas, further from their homes than prisons for men.[206] In fact, most incarcerated mothers are imprisoned more than 100 miles from their families.[207] This makes it especially difficult for these families to retain ties during detention, often inflicting irreparable damage.[208] Among other things, children affected by parental incarceration have been shown to suffer increased mental health problems; lower educational achievement; problems with behavior, attention deficits, speech and language, learning disabilities; difficulties getting enough sleep and maintaining a healthy diet; and an increased likelihood of future incarceration.[209] In short, the incarceration of

survivor-defendant's children, rendering her a de facto single parent. Given today's high rates of blended families, however, that is not always true. The decedent may well be the father of only one or some of the children, or he may be unrelated to all of the children.

203. *See generally*, Susan D. Phillips et al., *Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks*, 5 Criminology & Pub. Pol'y 677, 677–702 (2006).

204. *See generally*, Amanda Geller et al., *Parental Incarceration and Child Wellbeing: Implications for Urban Families*, 90 Soc. Sci. Q. 1186, 1186–1202 (2009).

205. *See generally*, Danielle H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 Family Relations 440, 440–53 (2007).

206. Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 Wm. & Mary J. Women & L. 161, 178 (2012).

207. *Id. See also* Karen Casey-Acevedo & Tim Bakken, *Visiting Women in Prison: Who Visits and Who Cares?*, 34 J. Offender Rehabilitation 67, 67 (2008) (finding that over 60 percent of incarcerated women who were mothers did not receive any visits from their children); Bernadette Rabuy and Daniel Kopf, *Separation by Bars and Miles: Visitation in state prisons*, Prison Pol'y Initiative (Oct. 20, 2015), https://www.prisonpolicy.org/reports/prisonvisits.html [https://perma.cc/C52E-389J].

208. Kennedy, *supra* note 206, at 178 ("This adds to the high cost of staying in touch by making it more expensive and time consuming to visit a female prisoner. In addition, prison and jail facilities are designed with security as a primary goal and do not typically provide convenient and family-friendly visiting areas. Telephone contact is maintained through collect calls at exorbitant rates, and visiting is often made so difficult, expensive, and time consuming that many families cannot afford to do so often."). *See also* Ruth T. Zaplin & Joyce Dougherty, *Programs That Work: Mothers*, in Female Offenders: Critical Perspectives and Effective Interventions 331, 333 (2008) ("What can make the burdens of motherhood even worse for these females is the fact that most of them have very limited contact with their children while they are institutionalized.").

209. Sawyer & Bertram, *supra* note 201. *Prisons and jails will separate millions of mothers from their children in 2022*, Prison Pol'y Initiative (May

survivors punishes more than just the women themselves; entire families suffer the effects long after the sentence expires. From this viewpoint, it is hard to see how their punishment restores any sort of moral equilibrium in society—especially when survivors kill not only to defend themselves but also their children from abusers.

Finally, the retributive justification is further undermined by the particularly significant role that "retribution bias" plays in cases involving survivor-defendants. Put simply, due to prevailing race, class, and gender biases, some survivors are more likely to be deemed "deserving" of punishment by the criminal legal system than other offenders, even as they commit equivalent acts. The numbers speak for themselves: women who kill their abusive male partners are incarcerated for longer than abusive men are for killing their female partners;[210] and among IPV survivors, those who are nonwhite, low income, and/or gender nonconforming are disproportionately impacted by criminalization and incarceration.[211] As detailed earlier, women are subject to unfair societal standards that expect them to remain quiet and submissive even in the face of deadly violence. Therefore, when they transgress these norms, they are automatically deemed more deserving of punishment than their male counterparts, whom society already expects to be violent. Moreover, research has demonstrated that Americans tend to associate the concepts of payback and retribution with Black people, while the concepts of mercy and leniency are generally associated with white people.[212] Thus, it is not surprising that white women are more often treated as victims and referred to social services than women of color, who are more likely processed by the criminal legal system and labeled as offenders.[213] If characteristics such as race, class, or gender identity inform punishment rate, then moral blameworthiness becomes a secondary measure and thus, the retributivist lens fails to support punishing victims/survivors who

4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day [https://perma.cc/SEH8–2YDV].

210. *See supra* note 21.

211. *See supra* notes 22–23.

212. *See generally* Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. Davis L. Rev. 839, 839–91 (2019).

213. *See* Coker et al., *supra* note 130, at 19–20; Mary E. Gilfus, *Women's Experiences of Abuse as a Risk Factor for Incarceration*, VAWnet Applied Research Forum (Dec. 2002), https://vawnet.org/sites/default/files/assets/files/2017–08/AR_Incarceration.pdf [https://perma.cc/J437-NPYU]. *See also* Janice Joseph, *Woman Battering: A Comparative Analysis of Black and White Women*, in Out of Darkness: Contemporary Perspectives on Family Violence 161–69 (Glenda Kaufman Kantor & Jana L. Jasinski, 1997).

kill. These discrepancies challenge the notion that these women are deserving of punishment.

2. Incapacitation

Now consider the utilitarian goals of punishment, which broadly rest on the idea that punishment is justified only if it serves the purpose of preventing future wrongdoing. To this end, perhaps the most immediate practical effect of punishment is incapacitation. According to this theory, punishment is justified on the basis that, by removing the offender from society for a period of time, it prevents her from repeating her criminal behavior and protects the public from danger.

Does this rationale apply to survivor-defendants? The claim that crime will be reduced by imprisonment assumes that the defendant's criminal behavior originates in a general propensity to crime, rather than resulting from specific triggers. Incapacitation may be appropriately applied, for example, to repeat violent offenders who direct their criminal acts toward strangers. However, it serves little purpose in the case of an individual who commits a single offense against an intimate partner in response to abuse. Victims/survivors who violently respond to their abusers are not cold-blooded serial murderers with an uncontrollable killing urge; they are women who typically have endured years of chronic violence and have reached a point where the abuse has become so severe that they believe they will be killed if they do not kill their abusers first. They resort to force only to defend themselves in a very particular context. In most cases, these women are first-time offenders who have no prior history of violence.[214] Moreover, research consistently shows that female offenders generally have low rates of recidivism and pose little risk, especially compared to men.[215] Therefore, there is no legitimate reason to believe that survivors would commit similar crimes against individuals other than their abusers, and it is doubtful that they would recidivate should they remain in the community after the incident. Put differently, there are no forward-looking benefits to removing them from society since they do not pose a threat to public safety, broadly.

In addition, there may well be significant social costs to the incapacitation of victims/survivors: children may be deprived of

214. *Id.* at 283.

215. *See generally* Patricia Van Voorhis, *On Behalf of Women Offenders: Women's Place in the Science of Evidence-Based Practice*, 11 Criminology & Pub. Pol'y 111 (2012); Patricia Van Voorhis et al., *Achieving Accurate Pictures of Risk and Identifying Gender Responsive Needs: Two New Assessments for Women Offenders*, Nat'l Inst. of Corrections 1 (2008).

their mother and potentially thrown into the dysfunctional foster care system,[216] the community will bear the cost of their incarceration, and they will be unable to contribute to the economy. It represents both a waste of existing resources and a future shortfall, given that returning women and their impacted relatives face more difficulties participating in the labor market and being accepted back into the cultural and social spheres of their communities.[217]

3. Deterrence

Another common utilitarian justification for punishment is individual and general deterrence. According to this approach, punishing an individual for a crime is justified both to deter that offender from future misconduct and to deter other members of society from offending in the same way by upholding the credibility of the punitive threat attached to the offense.

Neither of these functions are served by punishing survivor-defendants. First and foremost, victims/survivors do not need to be deterred from killing because they do not want to commit these crimes. At the risk of being repetitive, survivors kill not because they have a predisposition to kill others, but because they have no other options for their own self-defense. As observed by Sue Osthoff, the director of the National Clearinghouse for the Defense of Battered Women and a lawyer who has represented hundreds of criminalized survivors, "I've met only one woman who *wanted* to

216. *See* the letter of 13-year-old Nevaeh Savannah Lemons, describing the impact of her incarcerated mother's absence to California Governor Gavin Newsom. Since 2012, Lemons' mother, Tomiekia Johnson, has been held behind bars for killing her abusive husband during a confrontation. Lemons tells: "My life is like a trauma. I had social services come to my house and pull me out of school. They played board games with me and asked me questions. I felt like I was surrounded by people that wanted me to turn against my mother on their behalf. I didn't want to go for it even when I was very little. I went up to the children's courtroom and to this day I can remember how it looks and how it feels to go up there every time. No one in my life told me what was going on because I was too young . . . . I used to cry myself to sleep because she was never home for me to crawl up in her bed at night and just hug her. I don't know what it feels like to have my mom be right there next to me. To hold me down when I need it. To give me that pep talk before I go on the basketball court and win games. Nobody is there to tell me they love me just so they can see a smile on my face . . . . I dearly ask of you, Governor Newsom, to support her clemency so she can have her freedom back, and so she can come home and I can know what having a mother right next to me feels like." *Tomiekia Johnson's daughter writes to Governor Newsom calling for Tomiekia's clemency*, Survived & Punished (Nov. 24, 2020), https://survivedandpunished.org/2020/11/24/tomiekia-johnsons-daughter-writes-to-governor-newsom-calling-for-tomiekias-clemency [https://perma.cc/4YFC-4M8D].

217. *See generally* Cross, *supra* note 14.

kill her husband. Battered women don't want to do it. And they *won't* do it if they don't absolutely have to."[218] They resort to criminal behavior only because they believe they must either kill or be killed. Most survivors who kill their intimate partners had never been in legal trouble prior to the fatal incident, and studies consistently find that they are unlikely to kill again afterward.[219] Once the victim/survivor has killed her abuser, the person who was threatening her is, by definition, no longer able to incite a criminal response from her. It is highly unlikely that she would commit crimes against other members of society given that her violent behavior is inherently connected to the abuse she suffered at the hands of her abuser.

In addition, it is doubtful that other similarly situated victimized women would be deterred from killing their partners by knowing that one was punished before them. This assumption presupposes that potential wrongdoers are "calculators who, before committing crimes, evaluate how much they stand to gain or lose and the chances of apprehension."[220] It also assumes that the offender has the time and access to resources to make such a calculation.[221] But survivors commit crimes out of fear for their lives and a lack of viable alternatives. When a woman is about to kill her abuser, her rational faculties are fully devoted to devising a response to the deadly threat that she perceives in front of her. In that moment of intense fear and desperation, it is unlikely that she will stop to think about the possible penal consequences of her action. Even if she does consider these consequences, she is likely to conclude that prison is a less onerous fate than being killed at the hands of her abusive partner. As Judy Norman told the court when asked why she killed her husband: "Because I was scared of him and . . . I was scared [that the next day] it was going to be worse than he had ever been. I just couldn't take it no more. There ain't no way [crying], even if it means going to prison. It's better than living in that. That's worse hell than anything [crying]."[222]

Moreover, if the goal is ultimately to prevent future crime, pursuing the punishment of victims/survivors is surely less likely to provide an effective solution than addressing the conditions that create these sorts of crimes in the first place. Of course, the same could be said of other social problems that the system currently criminalizes, such as poverty and substance abuse. But the claim is

218. *See* JONES, *supra* note 71, at 346–47.

219. *The Punishment*, *supra* note 96.

220. Delgado, *supra* note 181, at 71.

221. *The Punishment*, *supra* note 96, at 301.

222. Transcript at 142, State v. Norman, 89 N.C. App. 384 (1988) (No. 85 CRS 3890)

perhaps especially compelling with respect to the law's inability to deter survivors, who are under the direct threat of being killed or seriously injured by another person, whether or not that violence is imminent.

4. Rehabilitation

Finally, some theorists contend that punishment is justifiable on the basis that it can achieve rehabilitation of the offender, by training her so that she is made capable of returning to society and functioning as a mainstream, law-abiding member of the community.[223] Under this account, punishment is used as a means to cure the offender of her morally flawed personality and to reform her into becoming a good citizen. While the phrase "battered woman syndrome" may have created the false impression that victims/survivors suffer from an impairing condition that must be cured before they can safely resume their places in society, we have now debunked this misconception: as explained earlier in this Article, the condition of being battered does not, in and of itself, constitute a mental illness or moral defect. When victims/survivors kill, that is a normal response to an abnormally difficult and threatening situation; they do not need to be fixed.

Even assuming that victims/survivors require rehabilitation, incarceration is not efficient to achieve this. On the contrary, it is well known that prison often reinforces trauma, particularly in the context of correctional facilities for women. As Monica Cosby's *Intimate Partner Violence and State Violence Power and Control Wheel* demonstrates, "survivors of gender violence—particularly those who are Black, queer, trans, Indigenous, poor, or nonbinary—are often also victims of state violence."[224] The same violence that permeates abusive relationships outside of prison—in all of its forms, including sexual, physical, verbal, and psychological—is recreated by the state inside prison walls, often at the hands of male correctional officers. It is difficult to envision how replicating the same violence that pushed a woman toward crime could simultaneously "rehabilitate" her into being a law-abiding citizen.

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223. Note that while rehabilitation has a similar effect to deterrence (namely, the offender stops committing crimes), the motive is different. Under the deterrence model, the offender refrains from recidivism because she is *afraid* of being punished again; under the rehabilitation model, the reason she does not recidivate is because she does not *want* to.

224. Angela Y. Davis et al., *Why Policing and Prisons Can't End Gender Violence*, Boston Review (Jan. 24, 2022), https://www.bostonreview.net/articles/why-policing-and-prisons-cant-end-gender-violence/ [https://perma.cc/9YL8–3V46].

The rehabilitation rationale Is even more questionable considering the significant challenges that "reentering survivors" encounter after coming home from incarceration.[225] It is well known that the impact of criminalization on convicted individuals extends far beyond the expiration of their sentences. For one, the collateral consequences incurred from having a criminal conviction have become so far-reaching and interrelated that they make the prospect of successful reentry an improbable one at best.[226] Reentering citizens typically face federal and state restrictions ranging from ineligibility for public housing, welfare benefits, various forms of employment and occupational licenses, driver's licenses, student loans, voting rights, and parenting.[227] Due to rampant discrimination by landlords and employers in the private sector, access to private housing and employment is often equally limited.[228] In most cases, returning citizens must also comply with various community supervision requirements[229] that significantly interfere with their day-to-day lives,[230] and often conflict directly with the limitations placed on them by these collateral consequences.[231] For exam-

225. Cross, *supra* note 14.

226. For a general account of the United States' reliance on and expansion of collateral consequences over the last decades, *see* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457 (2010). For a comment on the intersectionality of collateral consequences as they impact reentry, *see* Geneva Brown, *The Wind Cries Mary-The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, 24 St. John's J. Legal Comment. 625, 633 (2010) ("Without a job, it is impossible to provide for oneself and one's family. Without a driver's license, it is harder to find a job. Without affordable housing or food stamps or federal monies to participate in alcohol or drug treatment, it is harder to lead a stable, productive life. Without the right to vote, the ability to adopt or raise foster children, or access to a college loan, it is harder to become a fully engaged citizen in the mainstream of society.").

227. *See generally* Pinard, *supra* note 226.

228. *See* Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451, 451–80 (finding that more than 70 percent of employers report conducting criminal background checks on job applicants).

229. Community supervision includes probation, parole, and supervised release.

230. Cross, *supra* note 14, at 78–82 ("Complying with supervision often entails multiple obligations over the course of a week, or even a day. Not only does a woman on community supervision typically have to obtain a stable home address, meet with her supervision officer (potentially multiple times a week), take a drug test (potentially multiple times a week), seek employment, and fulfill community service obligations, but she may also have to attend mental health counseling, vocational skills training, and substance abuse treatment.").

231. *Id.* ("The overlapping rules and requirements of multiple systems of state control may first force a woman to prioritize compliance with one set over

ple, they may be required to maintain a stable home address, meet with a supervision officer multiple times a week, seek employment, fulfill community service obligations, and attend treatment or training programs.

In addition to these already debilitating conditions, it has been argued that reentering women face even more obstacles compared to other reentering citizens.[232] To start, women's experiences of reentry are influenced by the experiences they had inside prison, characterized by the fact that they grapple with carceral systems, practices, and policies designed primarily for men. For example, because facilities for women are located further away from their communities than men's, they have more difficulty retaining ties with their children and support systems throughout incarceration, making them more vulnerable to isolation upon release.[233] Female jails and prisons also offer less rehabilitative services and programming than men's facilities, including educational programs, vocational training, job opportunities, and reentry programs.[234] As a result, women are less equipped to reenter the job market and make a living for themselves.[235] Moreover, the combination of untreated trauma (due to the lack of treatment services for substance abuse and mental health in women's prison) and reinforced trauma (due to rampant prison violence) often sets reentered survivors up for continuous struggles and harmful coping mechanisms post-incarceration. Finally, another important consideration is that reentering survivors are more likely to be ostracized due to prevailing societal norms and stigmas that IPV survivors are meek, weak, passive, and dependent.[236] Women involved in the legal system—especially those incarcerated for violent offenses—tend to be seen as less than women for having transgressed these gender expectations.[237] As a result, they face rejection by their communi-

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another and then punish her for not being able to comply across the board.").

232. *See generally* Beth E. Richie, *Challenges Incarcerated Women Face as They Return to Their Communities: Findings from Life History Interviews*, 47 Crime & Delinq. 368 (2001); Cross, *supra* note 14.

233. *See* Casey-Acevedo & Bakken, *supra* note 208 (finding that over 60 percent of incarcerated women who were mothers did not receive any visits from their children). *See* also Rabuy & Kopf, *supra* note 208.

234. Cross, *supra* note 14, at 73.

235. Further, many survivors suffered socioeconomically or were economically dependent upon abusive partners prior to incarceration, which means they will be at level zero when they reenter.

236. Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 Wash. U. J.L. & Pol'y 39, 47 (2009).

237. Cross, *supra* note 14, at 105.

ties, exclusion from assistance, and increased interference by law enforcement.

To recap, many women return to their homes far worse off than when they entered prison. Rather than achieving rehabilitation, incarceration and the various ramifications attached to it further hinder their chances of successfully reintegrating into their communities and families after confinement. Disempowered, isolated, and struggling to find stability in all aspects of life, they are more vulnerable to getting caught in abusive relationships again.[238] Yet, in a cruel twist of fate, reentering survivors are simultaneously rejected by the domestic violence movement: "because [their] criminal histories place them outside of the traditional conception of a 'real' victim of domestic violence, many domestic violence agencies deem them ineligible for services and assistance."[239] Instead, a woman who is seen as "less likely to cause trouble, less likely to have retaliated against her abusive partner, and more likely to want to end her relationship with the abusive partner" is preferred and given priority access to programming.[240]

5. Conclusion

The criminal punishment of victimized women who kill is not justifiable under any of the moral theories that the criminal legal system has traditionally relied upon. If—like utilitarian theorists suggest—punishment is appropriate only when it results in the greatest benefit for the largest number of people, then the incarceration of victims/survivors is not only illegitimate, it is completely counterproductive. Incarceration actively causes harm, not just to victims/survivors, but also to their children, families, communities, and the society at large. In return, this punishment provides little to zero benefit. Incarcerating the women who kill does not address

238. *Id.* at 84 ("Studies provide a strong indication that many reentering women will continue to experience higher rates of domestic violence than women with no criminal histories."). This probability is further heightened by the fact that reentering survivors are less likely to seek help from the police due to their past experiences. *Id.* at 85 ("Women . . . who have had negative experiences with law enforcement are desirable targets of violence because their abusive partners know they are unlikely to seek help from the police.").

239. *Id.* at 60. There are also a number of practical obstacles: "For instance, many domestic violence programs insist that the program's address remain confidential, which is problematic because those on community supervision are often required to give their addresses to their supervision officers who may visit unannounced. Moreover, many domestic violence programs are intentionally isolated to keep participants safe, yet this isolation (sometimes combined with program requirements that participants stay on the premises) may not allow women to fulfill the requirements of their supervision." *Id.* at 92.

240. *Id.* at 91.

any of the actual causes that lead them to commit these acts: it does not dismantle the numerous structural barriers they face when attempting to leave abusive relationships, nor does it treat the endemic disease of domestic violence in the United States. Therefore, it fails to prevent any similar future crimes from occurring, as forty years of unsuccessfully pursuing this strategy have proven.

Those who prefer the retributive rationale, believing that the punishment of offenders is merely justified in retribution for the harm they have inflicted on others, should also question the legitimacy of incarcerating survivors. When women are incarcerated for killing their abusive intimate partner, this punishment is not inflicted with an eye toward their own status as entrapped victims of abuse. It is imposed without taking account of their diminished autonomy and the role that the entrapping state and the abuser played in creating this crime. Moreover, it is imposed without considering the unpunished harm they have suffered as a victim of abuse, for which they have not received redress. Put simply, victims/survivors are not morally deserving of punishment; they are merely acting to defend themselves.

By all accounts, the punishment of women who kill is neither necessary, nor beneficial, nor legitimate. Beyond that, their criminalization is inappropriate because their criminal acts are justified:[241] these crimes are committed as a last-resort response to an objectively dangerous situation from which there is no other way out. They constitute, in that sense, the canonical case of self-defense. It is urgent that the criminal legal framework be reformed in order to take account of the context in which these crimes take place, including the violence that these women endured, their inability to separate from their batterers, and the lack of resources or solutions offered to them.[242] Given these circumstances, victims/survivors who kill are not guilty of moral wrongdoing for their acts and they should be exonerated from criminal responsibility.

III. Alternatives to the Existing Criminal Legal Framework

For nearly forty years, the state has routinely and increasingly criminalized and punished women who kill their abusive intimate partners, despite the negative consequences and moral illegitimacy of such treatment. Having failed to provide adequate defenses for victims/survivors through its existing framework, the criminal legal

241. As opposed to being excusable.

242. Amy Lou Busch, Finding Their Voices: Listening to Battered Women Who've Killed 53, 97 (1999).

system must urgently consider alternatives that would allow it to properly recognize the context in which victimized women resort to crime. Several options are possible: creating a mitigating circumstance for women who kill in response to intimate partner violence, to allow for reduced sentences; establishing a new criminal defense specifically for victims/survivors, to allow for their acquittal; or even revising the standards of traditional self-defense to be inclusive of women, including those who are most vulnerable to intimate partner violence. Some of these alternatives have already been applied with varying degrees of success in several domestic and foreign jurisdictions.

A. *Reduced Sentences and Resentencing*

One proposed model of reform is the implementation of reduced sentences for survivors convicted of homicide and resentencing for those women already convicted under prior laws. Arguably the most straightforward and easily applicable proposal, it would also address, at least in part, the lack of moral rationale for the punishment of victims/survivors. Over the recent years, some U.S. jurisdictions have already adopted it. In 2016, the Illinois legislature signed the pioneering Senate Bill 209, which amended the state's existing Unified Code of Corrections to permit the resentencing of certain incarcerated survivors whose experience of domestic violence contributed to their conviction.[243] In 2019, New York followed suit, enacting a similar piece of legislation known as the Domestic Violence Survivors Justice Act (DVSJA).[244] In addition to offering currently incarcerated survivors the possibility to apply for resentencing relief, the DVSJA also sets forth alternative sentences—such as suspended sentences, probation, fines, restitution, and community service—for survivor-defendants who meet statutory criteria.

Despite promising intentions, however, these laws have mostly failed to provide effective avenues for release for incarcerated survivors. While neither reform includes a tracking mechanism—meaning that there is no official data available on how many survivors have petitioned for resentencing and how many have been successful—experts report that both bills have had little to no reach in practice. According to the Women's Justice Institute in

243. S.B. 209, 99th General Assemb. (Ill. 2015). https://www.ilga.gov/legislation/billstatus.asp?DocNum=0209&GAID=13&GA=99&DocTypeID=SB&LegID=84169&SessionID=88&SpecSess= [https://perma.cc/TS29-GZNY].

244. Domestic Violence Survivors Justice Act, N.Y. Crim. Proc. Law § 440.47 (McKinney 2019); N.Y. Penal Law § 60.12 (McKinney 2019).

Chicago, the Illinois law has been successfully used only twice in its first five years of existence, including only one retroactive case, despite giving rise to at least forty petitions.[245] In New York, data suggests that the DVSJA has helped about twenty women since it went into effect, but hundreds more are known to be working with lawyers on resentencing applications.[246]

Much of the Illinois reform's failure to deliver results can be attributed to an arbitrary and excessively narrow interpretation initially made by prosecutors in Chicago's Cook County. These prosecutors argued that the resentencing relief was only available to women who were convicted within two years of when they filed their petitions.[247] This meant that women sentenced before 2014 were automatically barred from consideration for resentencing. As observed by local advocates, the so-called rule was especially inapt given that "many already in prison may be serving a harsher sentence than they would if sentenced today" due to society's evolving understanding of domestic violence.[248] The Cook County State's Attorney's Office eventually reversed course and recognized that the two-year limit was not correct, but many judges remain reluctant to allow retroactive petitions to this day. Another major restraint is the requirement that the evidence of domestic violence be new to the case. In other words, under this law, only women who had not already raised their experience of domestic violence at the time that they were originally sentenced may be considered for resentencing.[249] This, again, ignores the fact that evidence presented at a previous hearing—that is, in many cases, years or even decades ago, long before the more recent cultural development of

245. Jean Lee, *Abuse survivors can get shorter sentences in 2 states, but courts are saying no*, The 19th (July 9, 2021, 11:43 AM), https://19thnews.org/2021/07/domestic-violence-survivors-reduced-sentences-in-2-states [https://perma.cc/5NEU-KQMC].

246. *Id.*

247. Olivia Stovicek, *If Illinois defendants never told jury of their own abuse, now a second chance*, Injustice Watch (Feb. 27, 2019), https://www.injusticewatch.org/news/2019/if-illinois-defendants-never-told-jury-of-their-own-abuse-now-a-second-chance [https://perma.cc/84JF-X9CY].

248. *Id. See* also Emily Werth, ACLU Illinois, *Making Sure the Law Listens to Domestic Abuse Survivors in Illinois* (Apr. 22, 2021), https://www.aclu-il.org/en/news/making-sure-law-listens-domestic-abuse-survivors-illinois [https://perma.cc/CKH4–78BA].

249. *See* S.B. 209, *supra* note 243, especially "(3) no evidence of domestic violence against the movant was presented at the movant's sentencing hearing; (4) the movant was unaware of the mitigating nature of the evidence of the domestic violence at the time of sentencing and could not have learned of its significance sooner through diligence."

understandings around domestic violence and its lasting effects—would have likely been disregarded or misunderstood.

Though broader in scope, the DVSJA also contains a number of limiting eligibility criteria, including restrictions relating to the sentence (only sentences of at least eight years may be eligible) and offense level (women convicted of first-degree murder are excluded).[250] In response to pushback from prosecutors who argued that the law would overwhelm the courts with requests for resentencing, lawmakers further designed a multi-step application process involving, among other things, an initial screening and the submission of various pieces of evidence, making it significantly more challenging for women to access relief.[251] Moreover, advocates and defense attorneys have observed a persistent unwillingness of many courts to deliver relief, even when women meet the threshold requirements.[252] Take the recent case of Nicole "Nikki" Addimando, a young mother who shot and killed her partner while he sat on their couch in 2017, after five years of vicious abuse.[253] In 2020, she was convicted of murder and sentenced to nineteen-years-to-life in a New York state prison. Despite ample documentation and expert testimony corroborating her claims of intimate partner violence, a judge concluded that Addimando did not qualify for a reduced sentence under the DVSJA because she "had various opportunities to leave."[254] Writing in an amicus brief filed in support of Addimando's appeal, a group of fourteen New York legislators warned that "if the trial court's decision not to apply the DVSJA is upheld, the DVSJA will be rendered effectively meaningless."[255] Indeed,

250. Domestic Violence Survivors Justice Act, *supra* note 244.

251. *See* Tamara Kamis & Emma Rose, *The Domestic Violence Survivors Justice Act Gets a Slow Start*, N.Y. Focus (May 7, 2021). https://www.nysfocus.com/2021/05/07/domestic-violence-survivors-justice-act-gets-a-slow-start/ [https://perma.cc/RCU8-WCB4].

252. *Id.*

253. *People v. Addimando*, 197 A.D.3d 106 (N.Y. App. Div. 2021).

254. Aena Khan, *Judge denies use of DVSJA in Poughkeepsie murder trial*, The Miscellany News (Feb. 13, 2020), https://miscellanynews.org/2020/02/13/news/addimando-sentenced-nineteen-to-life [https://perma.cc/6DNN-7QJZ]. *See* also Kamis & Rose, *supra* note 251. While Nicole Addimando's conviction was upheld on appeal, the appellate court did find that the trial court had erred in declining to apply the DVSJA to Addimando's case, misinterpreting the legislative intent of the law and the circumstances of the case. In a decision issued on July 14, 2021, her sentence was thus reduced from nineteen years-to-life to 7.5 years, including time served. She will be eligible for release in 2024.

255. Victoria Law, *New York Lawmakers Fear Court May Render Domestic Violence Survivor Law "Meaningless"*, The Appeal (Sept. 3, 2020), https://theappeal.org/new-york-lawmakers-fear-court-may-render-domestic-violence-survivor-law-meaningless [https://perma.cc/D5EF-LRBB].

the very purpose of the legislation was to provide an alternative response for criminalized women who find themselves unable to raise traditional criminal defenses precisely because of these outdated ideas about domestic violence and discredited theories in which survivors are faulted for not leaving their abusers.

While Illinois and New York's reforms are a welcome step toward the recognition of survivor-defendants within their respective criminal legal systems, these efforts remain greatly insufficient. By focusing on providing a posteriori relief through resentencing as opposed to tackling the problem from the outset, these laws merely operate as a superficial band-aid fix, leaving survivors to endure many years of undue prosecution, incarceration, and legal battles to argue their cases, as well as a lifetime of physical, psychological, and material repercussions. They fail to address the preexisting biases about women that prevail both in the law and in individual and collective prejudices. Thus, these solutions fail to hold the state accountable for its responsibility in these criminal acts. Any effective response must involve a substantive reform of the law of self-defense and provide genuine relief for survivors prior to conviction. To be sure, these resentencing reforms could have provided pragmatic relief as a temporary measure pending a more comprehensive reform, but the numerous limitations attached to them have rendered even this narrow goal apparently unachievable.

B. *Anticipatory Self-Defense*

To truly address gender biases in the criminal law, it will be necessary for the criminal legal system to deliver new avenues of defense for survivor-defendants. So far, the main doctrine in consideration by legal thinkers is a form of "anticipatory self-defense" that would replace the current standard of strict temporal proximity with a more relaxed imminence requirement, better-suited to IPV survivors.[256]

In *State v. Norman*, the court rejected this proposal, arguing that a relaxed imminence requirement would "tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands."[257] As a result, "homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem."[258] Once again, this argument ignores

256. *See* Dressler, *supra* note 34, at 203.
257. State v. Norman, 378 S.E.2d 8, 15 (1989).
258. *Id.*

the practical realities that survivors face in attempting to leave these relationships. It also glibly ignores the ways in which the problem is with prevailing social systems rather than individual women: if homicidal self-help is the easiest, most effective solution to the widespread problem of domestic violence, that surely says more about the state's failure to ensure viable alternatives than it does about the victim/survivor's so-called culpability. Women should not bear the double cost—facing domestic violence alongside looming fears of prosecution for killing in self-preservation—of the state's own incompetence, neglect, and refusal to deliver solutions.

Nonetheless, the *Norman* court does touch upon one legitimate concern, which is the speculativeness inherent to the inevitability standard, or the heightened risk of error in predicting the future deadly or serious bodily harm. As we move away from imminence and toward something less temporally proximate, accuracy in perceiving threat lessens. As Joshua Dressler points out, however, "in some sense, all self-defense cases involve preemptive strikes."[259] Even with the traditional imminence requirement, there is a certain level of preemption, as the victim generally does not know with absolute certainty that they would have in fact died were it not for the act of self-defense. Moreover, the traditional self-defense doctrine has only ever required a reasonable belief in the imminence of the threat, not actual imminence. Therefore, the issue is not so much to determine whether anticipation is acceptable in self-defense, but rather, to determine exactly how prematurely or anticipatorily the perceived aggression may be preempted.[260]

One answer to this question can be found in the recent literature on the relationship between imminence and necessity. A growing body of scholarship argues that the imminence requirement is "nothing more than an imperfect proxy to provide assurance that the defensive force is necessary to avoid the harm."[261] Paul Robinson further describes imminence as a "restriction" of the necessity requirement, noting that "it reflects a presumption that unless the danger of harm is proximate, action is not yet necessary." In reality, necessity can exist without imminence, just as imminence can exist without necessity.[262] Thus, according to these scholars, in a conflict between imminence and necessity—such as when a woman kills in nonconfrontational circumstances—necessity must prevail.[263] If

259. Dressler, *supra* note 34, at 203.

260. *Id.*

261. Burke, *supra* note 61, at 271.

262. *See* Dressler, *supra* note 34, at 203.

263. Richard A. Rosen, *On Self-defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. Rev. 371, 380–81 (1993).

it is necessary for a person to use deadly force before a threat is imminent, she should be justified in doing so.

On this view, the standard of "imminent threat of harm" should be replaced with "inevitable future harm." As an illustration of how this would work in practice, one analogy often used involves a hostage or kidnapping situation.[264] One could argue that the victim of IPV is similarly situated to the hostage "who is being slowly poisoned over a period of time, or who has been told to expect to die later in the week, and who suddenly has a window of opportunity to attack her kidnapper and save her life."[265] In both of these situations, while death or serious bodily harm may not be immediate, the victim certainly knows—or at least reasonably believes—that such an outcome is inevitable unless she takes action by using force against her batterer or her abductor. In both cases, the use of force is necessary to prevent death, even though the threat of death is not imminent. And yet, while self-defense law has traditionally allowed the hostage to use deadly force at any time possible to escape, the IPV victim is refused the same treatment due to the popular and mistaken notion that she has chosen not to leave her abuser. These misconceptions ignore the fact that victims of IPV are effectively hostages to their abusers, unable to leave for reasons having to do with both the nature of domestic violence and the state's failure to deliver adequate support and resources. Therefore, they ought to be treated analogously to hostages by the law.

Critics have contended that to revise the criminal legal framework in a way that accommodates survivors would amount to issuing women around the country a "license to kill" their intimate partners, resulting in a rise in the number of homicides committed upon men.[266] But these fears are unfounded. Women who do experience abuse are not going to be more prone to killing, or quicker

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264. *See* Bechtel v. State, 840 P.2d 1, 12 (Okla. Crim. App. 1992) (analogizing the victim/survivor's situation to "the classic hostage situation"); Kinports, *supra* note 37, at 182 (comparing the victim/survivor's plight to that of a kidnapping victim seeking a "window of opportunity" to escape or kill her kidnapper).

265. *Id.*

266. A columnist writing an opinion about the case of Dixie Shanahan once commented: "Open a loophole for one woman to kill an abusive spouse and pretty soon you've got dozens of dead husbands." David Yepsen, Op-Ed., *Let Shanahan Case Run Course*, Des Moines Register (May 16, 2004). In *State v. Hawthorne*, a prosecutor further argued that this license to kill would extend beyond just abusive partners: "You'll open the door to allow any woman to kill a man she doesn't like, and get away with it! . . . It will be open season on killing men . . . !" Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 5, 33 (1989).

to do so, simply because they know they will not be punished for it. As Leigh Goodmark notes, "[j]ust as battered women are unlikely to be deterred from killing their abusive partners by the punishment that other women who kill receive, they are equally unlikely to kill their partners because other women are acquitted."[267] Again, the idea that women who experience IPV want to kill—or that they do so out of vengeance rather than necessity—is a sexist fallacy that has been consistently rebutted by experts. "Battered women kill in very specific circumstances and for very specific reasons;"[268] "[t]hey kill when their individual assessments of their own situations make them believe that they have no other choice but to kill or be killed."[269] There is no legitimate reason to believe that these behavioral patterns would change following legal reform. To think otherwise is to falsely assume that most of these women are looking for an opportunity to kill rather than an opportunity to end the pattern of abuse. It also ignores the lifelong psychological consequences, trauma, and social stigma that many of these women carry as a result of having killed another person, particularly a person they knew intimately and perhaps dated, married, or even had children with. Ultimately, the effect of providing an adequate defense for survivors who defend themselves is not that it provides them a license to kill; rather, it is about challenging the status quo in which abusive men effectively have a free license to continually abuse, control, and indeed kill the women they share intimate relationships with.

Other skeptics argue that such a defense could create an opportunity for women to mask illegal motives, such as anger, malice, or retaliation.[270] They claim that it would make it difficult for courts to distinguish true claims of self-defense from actions with ulterior motives, allowing undeserving defendants to use the defense successfully.[271] But this criticism wrongly assumes that we simply cannot identify genuine acts of self-defense, or that courts cannot differentiate between a woman who was abused and a woman who was not. In reality, expert witnesses can help determine

267. *Punishment*, *supra* note 96, at 318.

268. *Id.*

269. *Id.*

270. George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 21 (1988) ("Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband. The man may even be asleep when the wife finally reacts.").

271. *See* Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. Chi. L. Rev. 1749, 1758 (2004).

whether a woman killed as a last-resort solution or because she possessed the mens rea to commit a crime.

Though the anticipatory self-defense approach does have greater appeal than mere ex post facto resentencing, it is susceptible to a major weakness: it focuses on the imminence requirement as the only obstacle for IPV survivors seeking to raise self-defense. As this Article has argued, every requisite element of the defense poses a challenge for survivors, both those who kill during a confrontation and those who kill in nonconfrontational situations. The reasonableness and proportionality requirements equally remain as legal barriers for many survivors who defend themselves against their abusers. An effective solution will thus need to recognize the biases of self-defense as a whole.

C. *A Comprehensive Reformulation: Australia's Example*

Some foreign jurisdictions have already adopted new statutory defenses for survivors of IPV, Australia being a clear trailblazer in this regard.[272] In 2010, the state of Queensland enacted the Criminal Code (Abusive Domestic Relationship and Another Matter) Amendment Act 2010, establishing a separate criminal defense for domestic violence survivors who kill their abusers.[273] The defense applies if the defendant "believes that it is necessary for [her] preservation from death or grievous bodily harm to do the act" and she has "reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case."[274] There is no express imminence requirement, and the statute specifically clarifies that the defense may apply even where the defensive response appears disproportionate to a particular act of domestic violence.[275] Admittedly, one important caveat to this defense is that it is only partial: it merely reduces a defendant's murder charge to manslaughter. Therefore, it retains some level of criminal liability and cannot result in a complete acquittal. Nonetheless, the creation of a special defense with gender-responsive criteria marks notable progress for survivor-defendants.

In an even more radical move, however, the jurisdictions of Victoria and Western Australia opted to reform their primary

272. *See* Angelica Guz & Marilyn McMahon, *Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia*, 13 Flinders L.J. 79, 79–124 (2011) (providing a comprehensive account of the self-defense reforms across Australian states).

273. *See Criminal Code Amendment Act 2010*,(Qld), s 304B (Austl.).

274. *Id.*

275. *Id.* at 304B(4).

self-defense laws altogether,[276] rather than create a special defense for IPV survivors.[277] In 2005, the Victorian government led the way by implementing a package of sweeping reforms through the landmark Crimes (Homicide) Act 2005, which included a repeal of the controversial provocation defense and an amendment of the state's self-defense law, previously governed by common law.[278] Stressing the intended goal behind the reform, Victoria's then-Attorney General described these new provisions as "removing entrenched bias and misogynist assumptions from the law to make sure that women who kill while genuinely believing it is the only way to protect themselves or their children are not condemned as murderers."[279]

To successfully claim self-defense under this new statute, the defendant must establish that she held a subjective belief that the actions taken in self-defense were necessary,[280] and that this belief was based on reasonable grounds.[281] The Act expressly provides that the defense may be raised in cases involving domestic violence even if the defendant was responding to a harm that was not immediate, and even if her response involved the use of force in excess of the force involved in the harm or threatened harm.[282] By doing so, the reform addresses the problems raised in relation to each element of the traditional self-defense framework, namely imminence

276. In this case, therefore, there is a pathway toward complete acquittal.

277. *See Crimes Act 1958* (Vic) s 332M (Austl.); and *Criminal Code Act 1913* (WA) s 248(4)(a). *See also* Kerstin Braun, *"Till Death Us Do Part": Homicide Defenses for Women in Abusive Relationships—Similar Problems—Different Responses in Germany and Australia*, 23 Violence Against Women 1177, 1177–1204 (2016). Western Australia's 2008 reform provides that the defense of self-defense may apply when "the person believes the act is necessary to defend [herself] from a harmful act, including a harmful act that is not imminent." *Criminal Code Act 1913* s 248(4)(a).

278. *See* Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349–50 (Robert Hulls, Attorney-General) (Austl.). Following recommendations to recognize excessive self-defense as a partial defense to murder, the reform also introduced a new offense of "defensive homicide," designed to apply to situations where "a killing occurs in the context of family violence" and where the accused person genuinely held the subjective belief that the actions taken in self-defense were necessary, but that belief was ultimately unreasonable (Sections 9AC and 9AD). However, the defense was later abolished through a second reform enacted in 2014.

279. *Id.* at 1844.

280. *Crimes (Homicide) Act 2005* (Vic), s 9AC.

281. *Id* . at 9AE.

282. *Id.* at 9AH(1) ("[I]n circumstances where family violence is alleged a person may believe . . . that his or her conduct is necessary . . . [even if] he or she is responding to a harm that is not immediate . . . [or] his or her response involves the use of force in excess of the force involved in the harm or threatened harm.").

(replaced by necessity), reasonableness (subjectivized), and proportionality (essentially discarded).

The statute goes yet a step further by introducing new evidence laws in relation to self-defense, expressly allowing relationship and social context evidence to be admitted in domestic violence cases.[283] The provision also sets out a range of types of evidence that may be relevant to explain how family violence might have led the defendant to believe that their fatal response was necessary and reasonable. These include: evidence of the relationship history between the abuser and the defendant; the cumulative effect (including psychological effect) of that violence both on the defendant and, more generally, on people who have been in abusive relationships; the social, cultural, economic factors that impact on the defendant and, more generally, on people who have been in abusive relationships; and the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser.[284] These statutory amendments address the evidentiary hurdles previously faced by survivor-defendants by "[permitting] introduction of evidence of circumstances widely known to be important in understanding family violence dynamics, but traditionally not seen as legally 'relevant' to the moment of killing."[285] Rather than relying on preconceived notions of what a woman victimized by IPV is supposed to be, or even what a reasonable person should be, this approach allows for flexibility and provides the victim/survivor with an opportunity to introduce all the evidence, perspective, and context that she holds, as the one and only person who may have been in a position to perceive and predict the necessity of her defensive action.

While the rather small number of homicide trials in Victoria—especially compared to the U.S.—provides relatively little empirical data regarding the impact of the reforms,[286] Australian legal scholars

283. *Id.* at 9AH(3).

284. *Id.*

285. Bronwyn Naylor & Danielle Tyson, *Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question*, 6 Int. J. Crime, Jus. Soc. Democracy 72, 72–87 (2017).

286. In 2020, homicides occurred in Victoria at a rate of 3 offenses per 100,000 inhabitants. *See* Crime Statistics Agency, Recorded Offences https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2 [https://perma.cc/55V3–48AM] (last visited April 22, 2023). At the same time, in the United States, the homicide rate was 7.5 per 100,000 inhabitants. *See* National Vital Statistics System – Mortality Data (2020) via CDC WONDER, Centers for Disease Control, https://wonder.cdc.gov/controller/datarequest/D158;jsessionid=293C45CA3B299E69EF3C1141FE2D [https://perma.cc/7RQP-8CGD] (last visited Apr. 22, 2023).

appear to be cautiously optimistic. In some cases, the amendments were said to have had a direct effect on the exercise of prosecutorial discretion and decisions not to proceed to trial based on a "lack of reasonable prospect that the jury would convict."[287] Reacting to the prosecution's decision to dismiss her murder charges, one woman's defense attorney noted that "recent changes to the Crimes Act made self-defense in family violence cases acceptable under law."[288] Scholars have also noted the positive educational effect of the increased use of context evidence, observing that "judges in post-reform cases can be seen to have adopted the gendered critique of power and control within intimate relations."[289] Nonetheless, commentators unanimously emphasize the continued need for comprehensive, specialized training within the legal profession to combat common myths about domestic violence. To be truly effective, law reform must undoubtedly be coupled with a broader change of culture, not just among members of the general community but also—and perhaps most urgently—within the criminal legal system itself, including police, prosecuting and defense counsel, judges, expert witnesses, and other legal professionals.[290]

At minimum, the Victorian reforms "usefully direct and constrain ways of incorporating understandings of family violence in homicide trials," "make it possible for current evidence-based knowledge of family violence to become part of the plea hearing or trial decision-making for female defendants," and represent "important symbolic statements about the significance of family violence and its role in homicides in intimate relations."[291] They provide noteworthy evidence of the viability of a gender-responsive approach to self-defense law.

Conclusion

There is something instinctively unjust and disconcerting about punishing survivors of IPV for killing their abusive intimate partners after years of chronic domestic violence. How could a partner or wife, a victim of abuse, suddenly turn into a defendant,

287. Tyson, *supra* note 103, at 211. *See* also Kellie Toole, *Self-Defence and the Reasonable Woman: Equality before the New Victorian Law* 36 Melb. U. L. Rev. 250 (2012).

288. Tyson, *supra* note 103, at 212.

289. Naylor & Tyson, *supra* note 285, at 82.

290. *See* Tyson, *supra* note 103; Danielle Tyson et al., *Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia* 23 Violence Against Women 559, 559–83 (2017).

291. *Id.*

guilty of murder? For the most part, the answer is that they are confronted with an archaic, male-oriented criminal legal system, one that was built by men and for men. From the nature of the prevailing criminal defenses' requisite elements to the design of prison infrastructures, no part of the system was constructed with regard to the various needs and circumstances that are specific to women. As a result, survivors are disproportionately criminalized, punished, incarcerated, and abused, all for performing the most justified act of all: defending themselves against life-threatening violence.

Most importantly, the existing criminal legal system fails to account for the state's own complicity and responsibility in inducing these criminal acts, ignoring the illegitimacy of state punishment of survivors. At every stage of the victim/survivor's plight, the state fails her: by failing to prevent domestic violence, to address its social stressors and risk factors, and to educate the public toward structural change; by failing to provide viable exit options and resources for women once they are trapped in an abusive relationship; by failing to deliver avenues of criminal defense for women once they resort to defending themselves; and by replicating the same patterns of control, power, and violence once they are behind bars. The state must now take accountability for its failings, its abuse of authority, and the harm it produces.

In recent years, a number of countries have brought the issue of the criminalization of survivors who kill to the forefront of the public debate, resulting in several bills and legal reforms—some of which show considerable promise. In comparison, the United States has remained relatively indifferent, despite the fact that the problem here is arguably magnified by the general tough-on-crime mantra that leads offenders—including and perhaps especially women—to be incarcerated at much higher rates and for much longer than in foreign jurisdictions. The destructive impact of these policies is colossal, extending not just to survivors themselves, but also to their children, families, communities, and society as a whole. The time is long overdue for the criminal legal system to prioritize the issue of the criminalization of IPV survivors and to take appropriate measures, starting with recognizing the biases of self-defense and providing an adequate criminal defense for all victims/survivors who must resort to killing their abusive intimate partners.