

South African Criminal Law and Battered Women Who Kill: Discussion Document 1

by

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Executive Summary

In South Africa, and pretty much universally, the criminal justice system denies most battered women who kill their abusive partners access to existing legal defences to murder. One of the main reasons for this is the historical exclusion of women's perspectives from these defences.

The Centre for the Study of Violence and Reconciliation (CSVr) views this document as a research tool to begin discussions on how to reform criminal defences to accommodate such women. It examines comparative law and the legal literature on these defences. Hopefully, through looking at the trial and error of other jurisdictions, it will provide the basis for discussion on how best to bring about the necessary reforms of South Africa's criminal justice system.

This discussion document serves as both a resource on the academic and comparative law treatment of the issues surrounding battered women who kill their abusive spouses and as a basis for debate on how South African law could address these issues. It is intended to stimulate meaningful discussion but does not purport to contain a fully exhaustive analysis of foreign law.

The recommendations it presents imagine an ideal scenario as far as legal treatment for these women is concerned.

There are five general components to this discussion document. The first introduces the issues surrounding battered women who kill, including the assumptions the document makes. The second focuses on criminal defences to murder, while the third considers post-conviction relief options for these women. An examination of the evidentiary issues raised

by these cases is detailed in the fourth component. The fifth concludes the discussion document with a description of recommendations for appropriate legal defences.

Component 1 Introduction: Chapter 1

[Chapter 1](#) introduces the issues surrounding battered women who kill their abusive partners. It describes the assumptions this document makes when examining the legal defences and in reaching its conclusions. It also offers a brief explanation of the different situations in which battered women kill. To provide battered women with the broadest access to legal defences, the document focuses on battered women who kill their abusers in non-confrontational situations, such as when the abuser is sleeping or watching television. This chapter concludes with an explanation of the two categories of criminal defences – justification and excuse defences.

Component 2 Criminal Defences: Chapters 2 - 10

Component 2 examines justification and excuse defences for battered women who kill their abusive partners. Justification defences acquit defendants who can show that under the circumstances their behaviour is not illegal. Chapters 2- 4 discuss the first justification defence – and perhaps the most relevant of the legal defences to murder – self-defence. Proponents of increasing battered women's access to legal defences commonly focus their attention on opening self-defence to these women. Many feel that self-defence most accurately reflects the situation in which these women kill. For this reason, much litigation and legal literature centres on this defence and is therefore the focus of this document.

[Chapter 2](#) explains self-defence and the elements necessary to prove it. It examines the difficulties battered women who kill their abusers face trying to prove each element. It concludes with a description of the advantages and disadvantages for battered women relying on this defence. [Chapter 3](#) looks at the reforms necessary to make the defence accessible to battered women. It describes and weighs up each reform suggestion. [Chapter 4](#) concludes the discussion of self-defence by describing whether and how battered women who kill their abusers have been able to use self-defence in other common law countries.

[Chapter 5](#) describes the theory behind the necessity defence, its elements and how it would need to be reformed to accommodate battered women who kill, and its pros and cons.

[Chapter 6](#) examines purely theoretical defences recommended in legal literature for battered women. The first is the Battered Woman's Syndrome defence (BWS defence). This is based on the psychological theory of Battered Woman's Syndrome, which was formulated to describe battered women's psychological response to abuse. The chapter describes and assesses how a defence based on the theory would work.

The second half of Chapter 6 discusses a theoretical defence titled the victim's defence. This employs another psychological theory – the coercive control theory. How would a defence based on this theory work? What are its strengths and weaknesses? The chapter concludes with a brief description of comparative experiences with a victim's defence.

[Chapter 7](#) describes possible excuse defences for battered women who kill their abusive partners. These reduce the charge and sentence of a defendant whose criminal conduct,

while still illegal, could be legally understood – at least in part. The chapter discusses the elements, advantages and disadvantages of the putative self-defence, ending with a description of comparative experiences.

Of the excuse defences, comparative law and legal literature focus most heavily on the use of the provocation defence for battered women. [Chapter 8](#) describes this theory, its application, and suggests reforms for overcoming the difficulties it poses.

[Chapter 9](#) examines the diminished capacity defence and the insanity defence.

The last of the excuse defences are purely theoretical. [Chapter 10](#) considers the warranted excuse defence and the excuse versions of the BWS defence and the victim's defence. The warranted excuse defence is similar to a provocation defence except that it requires the provoking act itself to be illegal. As with all the other defences, the chapter discusses theory of the defence, its elements, pros and cons and application.

Component 3 Post-Conviction Relief: Chapter 11

[Chapter 11](#) discusses post-conviction relief options for battered women who kill their partners. The first section describes and weighs up the option of statutorily creating factors a court should use to mitigate sentences of battered women who respond to their abusers' violence. The second section questions whether clemency is an option for battered women.

Component 4 Evidentiary Issues: Chapter 12

Component 4 describes one of the most important of the issues facing battered women who kill. [Chapter 12](#) deals with the evidentiary issues that result from efforts of battered women and their advocates to use criminal defences. The chapter describes the need for evidence on:

1. The history of abuse between the battered woman and the deceased;
2. The history of the deceased's violence against others;
3. Expert testimony on the social context and effects of battering on abused women; and
4. Prior acts of violence by others against the battered woman. Under each type of evidence, this document describes the purposes of the evidence and the difficulty women may encounter when attempting to admit such evidence. It also contains a description of the comparative experiences with these evidentiary issues.

Component 5 Recommendations: Chapter 13

The discussion document concludes in [Chapter 13](#) with a description of its recommendations for legal defences for battered women who kill their abusers. These are based on ideal legal treatment. After further research, CSVV hopes to make recommendations specific for South Africa.

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Chapter 1: Introduction

At present, South African law inadequately protects women abused by their partners. Despite existing legislation, researchers report that in practice the criminal law system fails to protect victims of domestic violence effectively. When women respond to their abusers with violence, they experience difficulty accessing available legal defences.

Through an examination of comparative law and a literature review on the subject, the CSVR hoped to identify all possible legal defences for battered women who kill their abusive spouses, including those presently available and those proposed by reformers.¹ For discussion purposes, it hoped to identify those defences that would provide the greatest legal protection for these women, without either stereotyping battered women, holding these women to a lower standard of accountability or providing batterers with new defences for killing their partners.² This document will describe the findings of the research and make recommendations for legal reform to better protect battered women who kill their abusers.

CSVr expressly recognises that women are not the only victims of domestic violence. All suggestions are intended to benefit victims of such violence regardless of gender or whether there is a romantic or familial relationship with the batterer.

1.1 Assumptions

The document makes several assumptions that need to be addressed directly.

1. Battered women are those women who face a pattern of physical and/or psychological abuse at the hands of their intimate partner.
2. The State inadequately protects battered women. Researchers report that South African women face enormous hurdles in accessing domestic violence legislation, beginning with unsympathetic, and often hostile, police when reporting an incident of violence.³ State prosecutors treat domestic violence allegations less seriously than other criminal complaints.⁴ Further, the State fails to provide adequate shelter and aid to battered women seeking to leave their abusive partners.⁵
3. Women do not leave their batterers for a variety of reasons. These include economic and emotional dependence. Many feel compelled to stay for the sake of their children. Some are too afraid of how their abusive partners will react. Others lack self-esteem or suffer from the battered woman's syndrome, which makes it difficult for them to leave.⁶
4. Separation from a batterer is full of risks. Research shows that often batterers respond violently to partners who try to leave them. Many batterers who kill their partners do so when their partners try to leave.
5. Where there is a pattern of violence, the threat of violence does not stop merely because the abuser is not able to batter his partner at that moment. The threat of violence will continue as long as any relationship between the abuser and his victim continues.
6. As a result of the inadequacy of state protection for abused women and the many dangers women face in separating from their abusers, many of the women who kill their abusers have no reasonably safe alternative to that course of action.
7. Women's experiences are inadequately represented in the development and application of criminal law and defences. Once battered women react violently against their abusers, criminal law fails to provide these women with appropriate defences that recognise or appreciate their experiences with domestic violence.⁷
8. Male homicide typically involves one man killing another, where both parties are strangers.⁸ The current legal defences to murder reflect this kind of relationship. For example, self-defence developed according to the "barroom brawl" scenario – when two strangers of roughly equal size get into a fight. As will be argued below, the legal elements of a defence for self-defence reflect that scenario.⁹ By comparison, women are much more likely to kill their intimate partners, often after being abused by the deceased.¹⁰ The parties to the killing are not strangers, but have had a relationship for some length of time, and typically are not of equal size. The responses of women to a threat to their lives will be based on both of these characteristics, neither of which is reflected in the legal elements for self-defence. As a result, battered women who kill their abusers face large hurdles to using this defence.¹¹

9. The goal of this research and discussion is to locate the most appropriate protection for battered women who kill their abusive partners out of fear for their lives. These legal defences are vital until state responses to domestic violence make them unnecessary. This document assumes that at least some of these women deserve an acquittal for their actions, while others deserve mitigation of charges and sentences.
10. Admission of expert testimony on the social context and effects of domestic violence and of testimony on the history of the abusive relationship are necessary to provide battered women with a fair trial.¹² A woman's actions can be judged fairly only if they are understood in the light of her experiences with the deceased and how those experiences shaped her perceptions.¹³ Without this testimony, battered women have difficulty fitting their experiences into the narrow elements of traditional defences.
11. The best choice of defences for these women will be ones that do not stereotype battered women, hold women to a lower standard of accountability than other criminal defendants or provide the batterer with new defences for killing his partner.

1.2 Situations in which Battered Women Kill

The circumstances of women who kill their abusive partners can be categorised into four different types of situations.¹⁴ While the description below will attempt to clearly differentiate between the situations, in practice the lines between them are blurred.

1. **Objective Imminence Cases:** These cases involve women who kill their abusive partners in the midst of an attack. An example of this is a woman who stabs her husband while he is beating her. This is categorised as a confrontational situation.
2. **Putative Imminence Cases:** These cases arise when the woman believes her partner is about to kill her, but objectively it is ambiguous whether that was his intention. Typically, the woman kills her abuser when it is unclear whether the abuser intended to continue an attack. For example, a woman who has just been beaten by her partner leaves the house to remove herself from the confrontation. A minute or so later, her partner walks outside towards her. Because of the recent attack, and perhaps from prior experience with her partner, the woman believes her partner is going to attack her again and shoots him. In this document, this situation is treated as a case in which the woman killed during a confrontation.
3. **Objective No Access to an Alternative:** These cases arise when objectively it appears that the abuser would have attacked his partner had she not acted, although the abuser was not necessarily able to harm her at the moment she acted. These are the women who through a pattern of abuse or through words have been threatened with severe harm, but who will be severely abused or killed if they try to leave or call for help. Instead of killing during an actual confrontation, they wait until the abuser is sleeping, watching TV or is otherwise unaware of their movements. This is when they feel sufficiently confident to protect themselves from another attack.

An example of this is a woman who has tried to leave her abusive husband on

several occasions, but is dragged violently back to the relationship each time. Another example is the woman who has gone to the police, only to be beaten when the police failed to arrest the abuser or he was released from custody. Objectively, there is no escape from the inevitable abuse. The woman then kills her husband by shooting him while he is sleeping. This situation will be referred to as killing in a non-confrontational situation or as pre-emptive self-defence.

- 4. Putative No Access to an Alternative:** These cases involve women who do not realise they have a genuine alternative to killing their batterer to escape his abuse. These are women who are either unaware of alternatives or will not take advantage of alternatives. There are also cases where the woman waits to act until her abusive partner is unaware or unable to stop her from killing him. For example, consider a woman who is unaware that a battered woman's shelter would take her in and protect her, or more commonly, the woman who for cultural, familial or economic reasons, or all of these combined, feels she cannot leave her husband. This last situation is a non-confrontational situation and is also an example of pre-emptive self-defence.

The degree to which women in each of these situations can access legal defences for killing their abusers will be discussed within each defence.

1.3 Potential Defences

Chapters 2-10 consider legal defences, and the theories behind them, for battered women who kill their abusive partners. It includes both presently available defences and those that have gained support in legal literature but have not yet been adopted. For already existing defences, this document will describe any problems battered women encounter accessing these defences, and potential reforms of the defences to better accommodate these women.

To ensure the broadest protection for abused women who kill their batterers, the analysis will focus on the treatment of women who kill in non-confrontational or pre-emptive self-defence situations – situations 3 and 4 above. These women encounter the most difficulties accessing criminal defences.

1.3.1 *Justification versus Excuse Defences*

Justification defences are those defences that recognise that the defendant's otherwise unlawful act should not be punished because under the circumstances, there was no other choice but to take that action. Because of circumstances, the unlawful act is no longer unlawful.¹⁵ The defendant's choice of action is deemed both rational and reasonable. A successful justification defence will result in an acquittal.

By contrast, excuse defences are intended to recognise human frailty. Under these defences, the act remains wrong and unlawful, but society is willing to understand, and therefore excuse or partially excuse, the behaviour in particular circumstances.¹⁶ An excuse defence could be used when a defendant is deprived of the capacity for self-control or choice, or where a defendant is unable to understand that her actions are illegal.¹⁷ Because the defendant was deprived of capacity, the defendant is treated as less blameworthy.¹⁸

These defences focus on the defendant's state of mind and/or the voluntariness of the criminal act, rather than on the wrongfulness of the act.¹⁹ Partial excuses result in a lesser charge or lesser sentence for conviction. Full excuses may result in acquittal or in a conviction with no punishment. Most commonly, the excuse defences reduce a murder charge to manslaughter or voluntary/culpable homicide.

The differences between these types of defences and their advantages and disadvantages will become clear through the analysis below of the separate defences.

Chapter 2: Self-Defence

This discussion document examines four possible justification defences for battered women who kill their abusers. Two of these defences already exist – self-defence and the necessity defence. Two are purely theoretical but are recommended for these women in academic literature: Battered Woman's Syndrome (BWS) defence and a victim's defence.

Self-defence involves situations in which a victim is forced to use violence against an assailant who was threatening physical harm. Ordinarily, a victim has alternatives for defending herself against an attack and is expected to make use of those choices, including by calling the police or leaving the confrontation. Where the victim has only two choices – to defend herself or to allow the assailant to harm her – society and the legal system recognise the victim's right to protect herself.²⁰ Because she has no choice but to respond to her assailant violently, her action must be justified and she cannot be punished.

One way of looking at self-defence is to consider it a judgment of who should bear the risks of harm from the confrontation.²¹ Should the victim bear the risk of harm if she does not respond to apparent aggression with an otherwise unlawful act? Or, should the assailant bear the risk that the victim will respond to the threat with physical force? Society and the law have decided that the assailant should bear the risk that the victim will respond violently to a threat of physical harm.²² Self-defence law limits how much risk the alleged assailant should bear through legal safeguards that require the victim to respond with the same amount of force with which she is being threatened.

There are several rationales for allocating risk in this fashion. The utilitarian rationales are that: if someone must be harmed, better the assailant than the innocent victim; and, forcing the assailant to bear the risk of harm will deter assailants from future threats.²³ Retributive rationales include that the assailant forfeits her own physical security when she attempts to take away the physical security of another and that ultimately, a person has the right to defend her personal security from attack.²⁴ Regardless of the rationale, a successful claim for self-defence results in an acquittal.

2.1 Elements of Self-Defence

The elements of self-defence are:

- (1) the defendant must have been responding to an unlawful attack
- (2) that a reasonable person would believe
- (3) would result in physical harm or in the case of lethal self-defence, in grave physical harm or death; and,

(4) The attack must not have been completed at the time the victim defended herself.

Further requirements for a defence of self-defence are that:

(5) The amount of force used in defending against the attack must be proportional with the amount of threatened force; (6) the defendant must not have provoked the attack and (7) the defendant must retreat where safe, unless in her own home.²⁵

2.1.1 Unlawful Act

To meet the first element of self-defence, a defendant must show that she physically assaulted or killed another person in response to an unlawful attack by that person. The strictest interpretation of this element requires evidence of an apparent, overt act against the woman at the time she acted.

In objective imminence cases, this element is easy to meet as the battered woman assaults or kills her abusive partner in the middle of a conflict. Women in the other three categories, however, have great difficulty in meeting this element. For women in the putative imminence cases, it is arguable whether they are responding to an overt act, as any break in the time between the confrontation and her actions could be interpreted to mean the confrontation was over. For women in the no-access to alternative cases, there is typically no immediately apparent overt act to which she is responding, particularly if the deceased was sleeping or watching television at the time he was killed. As a result, these women may not be able to access this defence.²⁶ This element is tied closely to the concept that the attack must not have been completed at the time the defendant defended herself.

Evidence of patterns of past abuse allows many battered women to jump this first hurdle to a self-defence claim. Chapter 4 explains how several American jurisdictions, Canada and Australia allow an abused woman to claim self-defence against her batterer upon evidence of an overt act or threat prior to the time she acted (rather than at the moment of threat). These decisions infer from the history and pattern of violence that the abuser would probably have battered the woman as soon as he woke up or finished watching TV.²⁷

The theory behind this judicial treatment is that the threat of violence just prior to a lull does not end even if the abuser cannot immediately follow through on the threat. Consider a man who consistently beats his partner when he wakes with a hangover. Each beating gets progressively worse. The man comes home drunk again. His wife kills him after he passes out. The courts infer from the pattern and history of abuse that in all probability the man would have beaten his wife as soon as he woke up. In a sense, coming home drunk is the overt act.

Even in these jurisdictions, without a showing of escalation of violence or an actual threat of violence prior to the time the woman acted, cumulative battering by itself is insufficient to qualify as an unlawful attack for purposes of this element of the defence.²⁸ Primarily, cumulative battering alone fails to explain why the defensive force was necessary at the time she acted.

2.1.2 Death or Serious Bodily Harm

To justify killing another in self-defence, a defendant must show she was protecting against

an unlawful act likely to cause death or serious bodily harm. Battered women who kill in all but objective imminence cases have difficulty meeting this standard where there is little evidence that in the past the deceased had caused serious bodily harm to the defendant. Some courts ask whether the deceased had ever seriously injured the abused woman, and, if not, why this time would have been any different. For courts that follow this line of thinking, women are not allowed to guess right the first time. Instead, the history of abuse limits their choice of responses.

For example, in the North Carolina case *State v. Norman*, 324 NC 253 (Supreme Court, NC 1989), despite evidence that the deceased severely abused the defendant and had forced her into prostitution, the Court wrote:

Such predictions of future assaults to justify the defendant's use of deadly force in this case would be entirely speculative, because there was no evidence that her husband had ever inflicted any harm upon her that approached life-threatening injury, even during the 'reign of terror.' It is far from clear in the defendant's poignant evidence that any abuse by the decedent had ever involved the degree of physical threat required to justify the defendant in using deadly force, even when those threats were imminent. The use of deadly force in self-defence to prevent harm other than death or great bodily harm is excessive as a matter of law.²⁹

Other courts treat this element as part of the overt act requirement, finding that there can be no threat of serious bodily harm or death while the deceased was sleeping or watching TV.

This element excludes lethal responses to low, but persistent levels of physical abuse and/or severe psychological abuse.

2.1.3 Imminence

The imminence element requires that the defendant must be responding to an unlawful act that has not yet been completed. This element ultimately serves as the objective basis for determining the necessity of lethal self-defence as it is used to prove that there were no other options to stop the attack than using deadly force.³⁰ Only when law enforcement cannot help, such as where there is no opportunity to call the police, can a person justify taking matters of physical security into his/her own hands.³¹

Imminence can also be viewed as a limitation on when a defensive act might be considered necessary.³² Imminence ensures that a defendant does not claim self-defence when in fact her act was intended as retribution for a prior confrontation or when law enforcement could provide protection instead.³³

For all but the battered women who kill their abusers during a confrontation, this element serves as a major barrier to a self-defence claim.³⁴ Under the strictest interpretation of this element, once a confrontation is over, the threat of harm is no longer imminent. Or, once the abusive partner goes to sleep or begins watching TV, any threat he made previously ends. Any time-lapse after a confrontation or after the deceased made his threat is interpreted as an end to the danger. For this reason, battered women cannot argue self-

defence in the no access to alternative situations and the putative imminence cases.

This interpretation does not recognise that a woman may continue to be threatened even after a confrontation concludes.³⁵ It also assumes that while an abuser is resting, a woman can safely escape an inevitable, but not yet immediate, attack.³⁶ Any action by the woman after the confrontation ends is considered retaliation for the previous abuse, not an act of defence.³⁷

Battered women who kill their abusers in non-confrontational situations have to prove a history of past abuse, the effects of that abuse on the woman and other social context evidence. More and more jurisdictions are taking a flexible approach to this requirement, recognising that an attack may be inevitable, based on the pattern of violence, and inescapable, based on expert testimony on the inadequacies of law enforcement and the history of abuse. These jurisdictions acknowledge the difficulties abused women face in leaving their relationships and the inability of the State to provide real alternatives to women to protect them from the batterer.³⁸

No decision has been located in which a defendant who hired a third party to kill her abusive spouse met the imminence requirement.

2.1.4 Reasonableness

The fourth element of self-defence is a reasonableness requirement. A defendant must reasonably believe she is protecting herself from imminent grave physical harm or death. This element asks the court to determine the reasonableness of the defendant's beliefs as to each element of self-defence. The reasonableness requirement is intended as a safeguard for an assailant's physical security – only when the defendant's beliefs are reasonable should the assailant be expected to bear the risk that the defendant will respond as she did to her perception of an unlawful attack.³⁹

At least one academic has described the reasonableness standard as a proxy to determine whether there were any other alternatives to responding to the unlawful act other than with physical force.⁴⁰ If the defendant had other available alternatives and could have avoided violating the physical security of her assailant while protecting her own, her actions would become less reasonable and less justifiable.

In practice, different courts use different standards of reasonableness by which to judge a defendant's actions, each allocating a different proportion of the risk to the abuser. The standard of reasonableness can determine whether evidence of past abuse by the deceased against the defendant and expert evidence of the social context and effects of that abuse is relevant to her claim of self-defence.⁴¹

Objective Standard

There are four general standards of reasonableness. The first is the objective standard. This tests both the reasonableness of the defendant's perceptions of the situation and of her response.⁴² Under the objective standard, the reasonableness will be judged against how a generic person in the community unfamiliar with the circumstances of the relationship

would have reacted to the attack.⁴³ Contextual evidence is irrelevant in purely objective standards.

Battered women who kill in non-confrontational situations cannot meet this standard without the admission of social context evidence and the history of abuse. The objective person with no context of the past abuse will not perceive an attack from a man sleeping in his bed, which means the defendant fails the first part of the test.

Even to the extent an objectively reasonable person would perceive a threat from the pattern of abuse, the same person would respond differently without contextual evidence. Without an explanation of the difficulties women have in leaving a battering relationship or accessing help from law enforcement, an objectively reasonable person would have left the house while the deceased was sleeping. The defendant then would fail the second aspect of the reasonableness test. Very few jurisdictions follow this standard.⁴⁴

According to its proponents, the main advantage of an objective approach to reasonableness is that it places the risk of harm and mistake on both parties to the confrontation equally. Each person is expected to consider the security rights of the other before acting.⁴⁵ Also, the requirement ensures that the defendant's fear is based on facts that objectively warrant this type of defensive action.⁴⁶ It forces people to take responsibility for their idiosyncrasies where they play a large role in determining the defendant's behaviour.⁴⁷

Moreover, an objective reasonableness standard ensures that a consistent approach to reasonableness is applied to all self-defence cases, independent of any subjective beliefs or individual characteristics of the defendant. Each defendant's action is measured against the same standard and is, therefore, treated equally to other defendants.⁴⁸ Finally, proponents argue that this standard best accommodates community views on which unlawful behaviors should be justified.⁴⁹

Criticisms of the objective standard focus on the harsh results of its application, which exclude social context evidence and the history of violence.⁵⁰ A purely objective requirement deems the relationship between the defendant and deceased irrelevant. Instead, it focuses the inquiry on the actual event in which the deceased was killed to determine whether the defendant had a reasonable fear of imminent death or serious bodily harm.⁵¹

Critics of the objective standard argue that without social context and history of abuse evidence, a court cannot understand why a woman would feel that she was in imminent danger of harm from a passive or sleeping batterer and why, in abusive relationships, that fear was reasonable.⁵² Per se these women are excluded from self-defence. Critics go on to say that the standard does not consider the inherent inequality of power between the batterer and his victim that could lead a victim to respond violently to abuse when the batterer is resting.

Critics also argue an objective standard interpreted to exclude evidence on the pattern of abuse places a larger risk of harm on the victim of abuse than on the batterer. The standard ignores that through familiarity with the pattern of abuse, women recognise the threats of grave harm that are not otherwise apparent to an unfamiliar, objective observer.⁵³ Without

such familiarity, the objective person is unlikely to recognise the threat to her.⁵⁴ Thus, under an objective standard, the abused woman is forced to endanger her life and bear a greater risk of harm than the abuser.

Accordingly, critics argue that proponents of the objective standard fail to explain why the woman should bear more of the risk of harm simply because an "objective" person cannot see the threat that is so obvious to her. They argue that an objective reasonableness standard ignores the social reality of the lives of battered women.

A final criticism is that an objective reasonableness standard is inherently gender-biased in favour of men. First, criminal law has always been based on male experiences, leaving little room for the accommodation of women's different experiences. Second, because of stereotypes of men and women, which treat men as "objective and analytical" and women as "subjective and emotional", the reasonable person is interpreted as a reasonable man.⁵⁵

At least one American court has stated that a battered woman who kills in a non-confrontational situation can meet an objective reasonableness standard with the aid of social context evidence. The Supreme Court of South Carolina in *Robinson v. State*, 417 SE2d 88 (Supreme Court, SC 1992) wrote: "Where torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness."⁵⁶

Subjective Standard

The purely subjective reasonableness standard looks at reasonableness from the perspective of the defendant. The test requires proving the defendant's response was a reasonable response to her perceptions. Its only requirement is that the defendant actually believed that lethal self-defence was necessary.⁵⁷ If the woman believed she would be killed, having responded by killing her abuser is reasonable. If the woman thought her husband was about to punch her, killing him would not be reasonable. In this purest form, how another person would have reacted to the circumstances is completely irrelevant.⁵⁸ The theory behind this standard is that where a woman honestly believed she needed to use lethal self-defence, she should not be punished for misjudging the situation.

The main advantage of this standard is that it would provide the widest protection for battered women who kill their abusive spouses in all situations, but particularly in non-confrontational situations. The woman's subjective feeling that her abusive partner was threatening her with serious harm as part of an on-going threat is enough to pass the reasonableness test. This standard opens up criminal law to the experiences of women and all defendants.⁵⁹

Criticisms focus on the injustice to the deceased and the softening of criminal law. First, a purely subjective standard allows the fears and anger of one person to determine the limits to the personal security of other people. There would be no real security for any person if beliefs alone justified a violent reaction to a perceived threat, no matter how unreasonable the perception.⁵⁹

Such fears and anger could justify femicide, gay killing and race-related killing.⁶⁰ For

example, stereotypes of minorities as violent could justify a white man's killing black teenagers approaching him for money because he sincerely believed black teenagers were dangerous – as was successfully argued by Bernard Goets in New York City.⁶¹

Additionally, such a standard would take the bite out of criminal law, as anyone could claim a genuine belief that justified unlawful action. Under this standard, battered women would be able to kill their abusers freely and for revenge, rather than self-defence.⁶² It would relieve criminals of individual responsibility.⁶³ Finally, critics say, it would result in vague and inconsistent verdicts, as no two people would be held to the same standard.⁶⁴

Only a few American and Australian jurisdictions follow this standard.⁶⁵ Based on the North Dakota decision in *North Dakota v. Leidholm*, 334 NW2d 811 (1983), some courts first ask whether the circumstances surrounding the defendant's actions are sufficient to create an actual belief in the need for self-defence before accepting that she had an honest belief.

Mixed Objective-Subjective Standard: Option 1

The remaining two reasonableness standards are a hybrid of the objective and subjective standards. Each incorporates an aspect of both standards. In the first of the two mixed objective-subjective standards, reasonableness is determined through two components. The first requires the defendant, actually and honestly, to believe deadly self-defence was necessary – this is the purely subjective component.⁶⁶ The next component inquires whether a reasonable person who knows what the defendant knows and sees what the defendant sees would have had that same belief that lethal force was necessary.⁶⁷ Stated differently, the defendant's reasonableness is judged from the circumstances, as she believed them to be.

The theory behind this standard is that while a defendant's actions need to be measured for objective reasonableness to provide the best protection for both parties to a conflict, it is only fair if the actions are judged in the context in which they arose.

The main advantage of the first mixed objective-subjective standard is that it necessarily requires evidence of the past relationship between the defendant and the deceased and will likely allow for expert testimony to describe how that relationship affected the defendant's actions and beliefs.⁶⁸ This opens self-defence law to battered women who kill in non-confrontational situations.

Another advantage is that the objective component can remove the risk that racist or other such prejudiced people will be able to rely on stereotypes to justify otherwise irrational conduct.⁶⁹ Being allowed to judge the defendant's perceptions, even while considering them from her point of view, corrects the flaw in the subjective standard that allows beliefs with no basis in fact to justify killing someone.

At least one critic disagrees that this standard corrects the major flaw in the subjective standard. Kevin Heller has argued that the court cannot determine the correctness of the defendant's perception if reasonableness depends on the circumstances, as the defendant perceived them to be; that this standard is no different from a purely subjective standard.

Heller considered the situation of a woman walking down the street who shoots a man walking towards her because she believes he is going to kill her. She has no objective basis for this belief. In the circumstances, she honestly perceived a death threat from the deceased. Based on that, a court has no choice but to judge her response, based on her own perceptions, as reasonable.⁷⁰ The only way to find her action unreasonable is to measure the reasonableness of her perceptions.⁷¹

Another potential disadvantage includes that courts will be forced to apply an inconsistent standard of reasonableness.

Canada, Australia and most states in the United States have adopted this standard.⁷²

Mixed Objective–Subjective Standard: Option 2: The Particularising Standard

The second of the two mixed objective-subjective standards varies from the objective standard in that it allows you to consider reasonableness in the light of certain pertinent characteristics, such as gender, race or disability. This particularising standard asks whether a person with the particular characteristic "would have both perceived the situation as the defendant perceived it and would have reacted to that perception by committing the defendant's self-defensive act."⁷³ Examples of this type of standard are the reasonable woman standard and the reasonable battered woman standard.⁷⁴

The characteristics chosen for the particularising reasonableness standard are non-universal characteristics that are believed to affect perceptions in ways "morally and causally relevant" to the defendant's actions.⁷⁵ This standard neither allows all of the defendant's characteristics to be considered nor explicitly accepts all of the defendant's perceptions as correct. Some characteristics are not worthy of special consideration because society expects a person to be able to control their responses that result from such characteristics.⁷⁶ For example, society expects a racist to control her racist feelings, but may not expect a battered woman to control the psychological harm from the abuse.

Proponents argue that the main advantage to this particularised standard is that it properly balances the objective and subjective considerations in judging the defendant's behaviour. This standard would keep an objective element of reasonableness by testing some but not all perceptions against an objective standard. It would also recognise that some characteristics deserve special consideration, otherwise an unfamiliar, objective person could not understand the defendant's perceptions or reactions.

The most common criticisms of this standard focus on how acceptable characteristics for consideration are chosen. Underlying this criticism is the idea that if a uniform standard to determine which characteristics are legally relevant to reasonableness cannot be found, this approach should be eliminated. There seems to be no explanation for why courts legally recognise some characteristics but not others under this standard.⁷⁷ Particularly, critics argue that this standard (where it has been used) does not account for why politically unpopular characteristics, such as someone raised as racist, are not considered when it can affect a person's actions and beliefs just as much as abuse affects a battered woman's actions and beliefs.⁷⁸

Overlapping this criticism are the questions about why the behaviour of someone with a particular characteristic that makes self-control more difficult should be justified.⁷⁹ Shouldn't everyone be held to the same standard of self-control?⁸⁰ To the extent that a person's characteristics make it difficult to act as an ordinary person would act, then the behaviour should not be justified, rather it should be excused under one of the defences described in Chapters 7-10.⁸¹

Another set of criticism targets the effect of legally recognising some characteristics for this particularising standard. The first criticism is that people with these recognised characteristics are harmed rather than helped by such a standard.⁸² The generalised expectations for a person with that characteristic can form a stereotype ultimately harmful to all people with that characteristic.⁸³ Courts, if they narrowly apply the standard, could exclude people who do not match the formulation of a reasonable person with a specific characteristic.⁸⁴ Subjective considerations can result in lowering the expectations for self-control, which will ultimately lessen societal protection from physical harm.⁸⁵

Finally, under a slippery slope theory, a particularised standard can increase the use of a cultural defence to justify inappropriate behaviour.⁸⁶ A defendant could argue that from her cultural perspective, she was compelled to defend her honour. Feminists generally disapprove of a cultural defence because often it is used to justify violence against women.

Two American states have adopted a "reasonable battered woman" standard, another a "reasonable battered victim" standard.⁸⁷

2.1.5 Proportionality

Although not always expressed in statutes as an element of self-defence, a proportionality requirement is read into almost all self-defence claims. This element asks whether the defendant's response to the unlawful act was proportional to the threat against her.⁸⁸ Only with the threat of serious bodily harm or death can a defendant use lethal self-defence. This is an 'eye-for-an-eye' requirement. Where the threat is less serious, courts treat a deadly response as unjustified. Some jurisdictions suspend this element when the attack occurs in the defendant's home.⁸⁹

Proportionality can serve as yet another barrier to battered women's self-defence claims. Battered women who kill their abusive spouses in all situations may have difficulty proving proportionality when the defendant used a weapon in response to a threat from an unarmed abuser or acted when her abuser was relaxing or sleeping.⁹⁰ Unless viewed from her perspective, which is based on size, relative power in the relationship, and women's conditioning to avoid physical violence, she will have difficulty proving this element.

Increasingly, however, courts are willing to recognise these factors when determining proportionality and accept that women can use weapons to defend against unarmed batterers.⁹¹

2.1.6 Defendant Did Not Provoke the Attack

All the jurisdictions examined in this document require that the defendant must not have provoked the attack so that the defendant's own behaviour did not create the need for self-defence. In all but the objective imminence situations, prosecutors can use any time lapse between the deceased's last attack and the defendant's response to prove the defendant was the aggressor. They argue that the unlawful act against which she was allegedly defending was over or had not yet begun.

Under a narrow interpretation of this element, unless the woman was responding to an immediate attack, she must be considered the aggressor. Without social context evidence or an acceptance that in domestic violence cases a threat of harm is continuing, battered women who kill their abusive partners other than in the middle of a confrontation may not be able to prove this element.

Canada, Australia, and jurisdictions in the United States that allow battered women who kill in non-confrontational situations to argue self-defence implicitly accept that where there is a pattern of abuse to which the battered women was responding, she was not the aggressor despite any time lapse.

2.1.7 Duty to Retreat

Some jurisdictions require a defendant to retreat from a confrontation when retreat can be made safely. Almost all jurisdictions waive this requirement when a person is attacked in his or her own home. This duty of retreat serves as an element of necessity and imminence – if an alternative to defensive force exists, such as retreat – an attack is neither imminent nor necessary.⁹²

Despite the almost universal acceptance that no one should be required to retreat from her own home, courts read a more general duty of retreat into cases in which battered women kill their abusive partners. The duty of retreat is not from the immediate attack. Instead, courts ask why the woman did not leave the relationship prior to the incident in which she felt compelled to kill her abusive partner.⁹³

This special duty assumes that women can leave their battering partner safely and at any time. Studies show this particular duty of retreat does not exist in other self-defence cases, only in battered women and domestic violence cases.⁹⁴ As one academic put it, "We do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with abuse why she did not leave the relationship."⁹⁵

Where expert testimony of the effects of abuse on battered women is admissible, it is typically used to explain why the woman did not leave her partner at any time prior to the time she killed him.⁹⁶ Although some battered women have been successful in overcoming this requirement, the question remains why battered women are treated differently from other defendants arguing self-defence.

2.2 Self-Defence as an Option for Battered Women who Kill

There are numerous advantages and disadvantages to promoting self-defence as an optimal defence for battered women who kill abusive partners. The primary argument is that self-defence provides a justification for the rational behaviour of women who cannot escape their abusers and who find their lives threatened. Proponents of this defence argue that it best reflects the realities of battered women's experiences and accepts that the batterer should be forced to bear the risk that his actions will lead to his own death. Ultimately, the State should not be allowed to punish a woman where it has failed to protect her.⁹⁷

The disadvantages fall into two categories. The first category is founded on the practical problems of applying self-defence law. As described above, battered women generally have difficulty accessing self-defence. Critics of this defence argue that presently it is based on the paradigm of an encounter between two men of roughly equal physical size and strength who are in the midst of a confrontation.⁹⁸ Unless self-defence law is altered to accept another paradigm that would include women's experiences with violence, this defence will remain inaccessible.⁹⁹ To make the defence more accessible, particularly for battered women who kill in non-confrontational situations, the limits of self-defence would need to be stretched, perhaps too far for the purposes for which it was developed.

The second category of disadvantages is based on philosophical arguments. Some academics raise the question of whether utilising self-defence for battered women who kill in non-confrontational situations would force the State to condone actions that are undesirable – taking the law into one's own hands. They argue that self-defence was not intended to sanction vigilantism and revenge, but to recognise that when the State cannot respond quickly enough, a person has the right to defend herself against an unwarranted attack.¹⁰⁰

Further, allowing all battered women to access this defence would alter the balance of the risk of harm between the woman and her abuser, which would deny the abuser equal protection of his life and would erode criminal deterrence goals.¹⁰¹ These philosophical criticisms assume that the woman can safely escape from a battering relationship.

Critics of using self-defence for battered women who kill in non-confrontational situations suggest instead two other appropriate responses to battered women's experiences. The first is to enhance state mechanisms to better protect these women.¹⁰² The second is to allow these women to apply for clemency, a post-conviction form of relief described below, which would reflect that the State does not condone the woman's actions, but based on principles of justice, these women should not be punished.¹⁰³

Chapter 3: Reform of Self-Defence

Academic literature has recommended a variety of reforms to make the law of self-defence more accessible to battered women who kill their abusive spouses, particularly in non-confrontational situations. This section analyses reform suggestions, looking at the theory behind the reform, the advantages and disadvantages of the reform, and whether any foreign jurisdictions have adopted it.

3.1 Unlawful Act

3.1.1 Recognise that a pattern of abuse may be sufficient to prove an unlawful act

Reformers recommend that a pattern of abuse should be used as evidence that the deceased was threatening an unlawful act against the defendant at the time she acted in self-defence. A battered woman could use the pattern of abuse to explain what made her believe that at the particular moment she acted, she was protecting against an imminent unlawful attack. The woman's knowledge of the meaning of her batterer's words, gestures and/or behaviour, knowledge gained from her experiences with the batterer, would explain how she was able to accurately predict his violence.

As one academic described, a "woman may be aware of pre-assault symbols, such as heavy drinking, that would not signify imminent danger to outsiders."¹⁰⁴ For example, a woman who has been abused every morning when the deceased wakes with a hangover can use this pattern to prove that she feared an unlawful attack the night that her husband came home drunk and passed out on the couch. The pattern would show that in all probability, she was being threatened with abuse by her soon to be hung-over husband.

An advantage of this reform is that it would allow women who kill their abusers in non-confrontational situations to access self-defence more easily, as it is one of the many hurdles to be jumped. Secondly, it would recognise the reality of domestic violence situations, particularly the patterns in domestic violence. Otherwise, to ignore the context of the defensive action would be to ignore the experiences of battered women, perpetuating the gender bias in self-defence law.

Critics of this reform say it would allow pre-emptive self-defence before it is actually clear that an attack will happen, that it punishes past behaviour rather than defends against future harm. This criticism is nearly identical to the ones of the imminence reforms in [3.3](#) below. The element missing in a requirement of an apparent unlawful act is the proof that the attack would and could be implemented at the time the defendant responded in self-defence.

This reform was adopted by two American states by statute and by many courts under the common law. These statutes allow a defendant to introduce evidence of domestic violence by the victim against the defendant in a self-defence claim even when there is no evidence of an apparent, unlawful act against the defendant.¹⁰⁵ Presumably, this pattern of abuse will be used to prove the deceased's unlawful act.

3.2 Death or Serious Bodily Harm

3.2.1 Include severe psychological harm and loss of autonomy in definitions of serious bodily harm or death

The theory behind this reform is that physical abuse is not the only kind of abuse against which women should have the right to protect themselves. Psychological harm and loss of autonomy can lead to a psychological or spiritual death, protection against which should be no different than against bodily harm or death.¹⁰⁶

According to its proponents, the standard a woman would need to meet to justify self-defence against psychological harm or loss of autonomy is that the harm be "so serious that it would significantly limit the meaning and value of her physical existence."¹⁰⁷ A victim's psychological well-being could outweigh the batterer's interest in remaining alive, in part because the weight of the batterer's life has been discounted or partially waived by his own culpability.¹⁰⁸

This reform arises from autonomy rights, as psychological abuse removes a woman's self-esteem and ability to direct her own choices and future.¹⁰⁹ It recognises that the right to life is not the right to mere physical existence; instead it is the right to enjoy the benefits of life.¹¹⁰ Proponents argue that in reality, this change serves as a better protection for one's physical life.

Women who kill in non-confrontational situations have a better chance of proving the probability that the threatened unlawful act will result in serious harm if psychological harm is included in its definition.¹¹¹ Furthermore, deterring battered women from acting in these circumstances is irrelevant. As Ewing describes:

On the one hand, if she kills the batterer, she will undoubtedly be arrested, probably convicted of a serious crime, and quite possibly sentenced to a lengthy period of incarceration. On the other hand, given the nature of battering relationships, if she does not kill the batterer, she will most certainly continue to be exposed to severe physical, psychological, or sexual abuse, often far more devastating than the stigma of criminal conviction and the trauma of imprisonment, however lengthy. In many cases, especially those which fall under the proposed doctrine of psychological self-defence, it would seem clear that the benefits of killing the batterer not only outweigh the costs but effectively render unnecessary any careful assessment of such costs.¹¹²

The primary criticism of accepting lethal self-defence against psychological harm is that it requires balancing the life of the batterer against his victim, although everyone has the same right to life.¹¹³ Secondly, taking a physical life because of psychological harm is unreasonably disproportionate and cannot be justified.¹¹⁴ Law protects physical well-being more strongly as the interest in physical existence outweighs any other interests.¹¹⁵ Furthermore, this standard would be exceedingly difficult to implement fairly and would lead to spurious claims of self-defence.¹¹⁶ Critics also argue the reform would result in an increase in resort to lethal self-defence.¹¹⁷

In Australia, a New South Wales statute allows a person to defend against deprivation of liberty.¹¹⁸ Unfortunately, the author was unable to locate a definition of loss of liberty for purposes of the statute.

3.2.2 Loosen the requirement of death or serious physical harm to include domestic violence

Another reform option for the requirement that the threatened unlawful act be one of serious harm or death is to include domestic violence in the definition of serious harm. Women who face lower levels of persistent violence can have the same difficulty escaping

an abusive relationship as do women who face more violent or deadly abuse. Just as often there is no state or family support for a woman to safely leave her abuser. These women are likely to face increasing abuse to keep them in their relationships. Essentially, they have no alternative to the abuse but to continue to take it, kill themselves, or kill their abusers for which they would face a sentence for murder, or if lucky, culpable/voluntary homicide or manslaughter.¹¹⁹ In reality, these women have no meaningful choices to better their lives.

In the United States, Arkansas statutorily allows a person to take defensive action to protect against "the continuation of a pattern of domestic violence."¹²⁰

3.3 Imminence

3.3.1 *Recognise that a pattern of abuse may be sufficient to prove imminence*

The first recommendation to reform the imminence requirement is that lawmakers widen the time frame within its definition by recognising that the danger in battering relationships does not stop even while the batterer is temporarily incapacitated. Rather, the violence forms part of a pattern that will inevitably continue. Under this reform, evidence of a pattern of abuse would be used to prove imminence, without which an objective, unfamiliar observer could not see the danger to the battered woman.¹²¹ As the dissent in *Norman* described of pre-emptive self-defence, "For the battered wife, if there is no escape, if there is no window of relief or momentary sense of safety, then the next attack, which could be the fatal one, is imminent."¹²²

In essence, the court's inquiry would not be on the imminence of the deceased's overt, unlawful act, but on the imminence of the necessity of the woman's response. By refocusing the inquiry, instead of forcing the woman to wait until the deceased is ready to harm her, she could act when it becomes obvious to her that the attack is both likely to happen and inescapable.¹²³

Proponents argue that this reform would begin to incorporate women's experiences with domestic violence into criminal law and would reflect the reality of battering relationships. Battered women would be able to access a justification defence that most closely reflects their situation – battered women would no longer be denied their right to self-defence.¹²⁴ This reform would limit the expansion of self-defence to cases in which a defendant can prove a pattern of abuse.¹²⁵

The critics of this reform claim it will result in an "open-season on men" as more women will kill their partners and use this newly reformed self-defence law to justify what is otherwise not justifiable.¹²⁶ They argue it would sanction vigilantism and revenge and create a disincentive for women to lawfully remove themselves from the relationship.¹²⁷ As Fletcher argues: "Those who defend the use of violence rarely admit that their purpose is retaliation for past wrong;" thus the pattern of past violence is actually the motive for the woman's action, not a predictor of imminent harm.¹²⁸ These criticisms assume that a woman responding in non-confrontational situations could never be acting in self-defence because of a time-lapse between when a woman acts and the alleged imminent attack. Stated differently, they suggest that a woman can always escape domestic violence.

Another criticism of a reform that would allow a past pattern of abuse to prove imminence is that it would change the balance of the risk of harm, unfairly favouring the life of the battered woman over her abuser's.¹²⁹ The more temporally narrow interpretation of imminence reflects that in fact the batterer's life is as important as his victim's is, even though his behaviour is contemptible.¹³⁰ In a decision later overruled, the California Court of Appeals wrote the following about imminence problems for women who kill in non-confrontational situations:

While we recognise that applying such a [strict imminence] rule in cases such as this one is difficult because of our sympathy for the plight of a battered woman and disgust for the batterer, it is fundamental to our concept of law that there be no discrimination between sinner and saint solely on moral grounds. Any less exacting definition of imminence fails to protect every person's right to live.¹³¹

Two US states have enacted statutes reflecting this reform. Kentucky allows "belief that danger is imminent" to be "inferred from a past pattern of repeated serious abuse."¹³² Utah allows courts to consider the deceased's prior acts and the patterns of abuse when determining imminence.¹³³

3.3.2 Replace the imminence requirement with a necessity requirement

Another suggested reform is to replace imminence with a necessity requirement; or in the alternative, where the test for imminence cannot otherwise be met, allow a defendant to prove the necessity of the defensive action by showing the inevitability of the attack and the inability of the defendant to escape it.¹³⁴ Under either suggestion, imminence would be one factor in the determination of necessity of the lethal action. Like the above reform, the court would evaluate imminence based on when a defensive response becomes necessary.¹³⁵ Essentially, this would cover situations where "defensive force may be immediately necessary ... although the harm is not yet imminent."¹³⁶ This standard assumes that where a situation is kill or be killed because the attack is both inevitable and inescapable, to ask a battered woman to wait to defend herself until she is actually being attacked deprives her of her right to self-defence.¹³⁷

Proponents of this reform cite the case of Judy Norman. In the *Norman* case,¹³⁸ Judy's husband battered her over a period of 20 years and forced her into prostitution to earn money for the household. Judy had tried to leave her husband. Each time she was dragged back and severely beaten. Judy also went to the police. Each complaint resulted in further abuse.

A few days before his death, Judy's husband's beatings increased in severity. Judy felt more and more desperate. She called the police who went to her home and told her that the only way they could arrest her husband was if she came to the police station to fill out a complaint. Judy told them she could not because she was afraid of what would happen if her husband found out. The police left. Judy went to the welfare office hoping to collect welfare money to enable her to leave her husband. Her husband screamed at her in the welfare office and physically dragged her back home. The welfare office employees did

nothing to help Judy. The next day, after the third day of physical and psychological abuse, Judy Norman killed her husband in his sleep.

This case easily meets the standards of proof of inevitability of the husband's next period of severe abuse. He had been beating her daily for several days prior to his death and the level of violence was escalating. Judy Norman could prove that she could not escape. Each time she had tried she was dragged back to the relationship and beaten further. The police and welfare officials were unwilling to help her.

Judy Norman was convicted of voluntary manslaughter and sentenced to several years in jail. The governor of North Carolina granted her clemency after she spent two months in prison.¹³⁹

Proponents of changing the imminence requirement to necessity of the defensive action argue that it would better reflect the goal of self-defence law, which is to allow people to defend themselves when it becomes necessary. If imminence is a translator for necessity, where necessity can be proved even absent imminence, a claim for self-defence should succeed.¹⁴⁰ As one academic argued:

Limiting necessity to the temporal element ignores the problem of absent alternatives. If there really is no escape, or if the accused reasonably perceives that there is none, and it is only a matter of time until the abuser will kill, then insisting on a temporal necessity seems rather beside the point of survival.¹⁴¹

In the United States, the Supreme Court of New Mexico agreed with this proposition in the case *State v. Gallegos*, 104 New Mexico 247 (Court of Appeals, NM 1986) (disapproved of on other grounds). The court justified recognising battered women's claims of self-defence in non-confrontational situations stating:

Incidents of domestic violence tend to follow predictable patterns. Recurring stimuli, such as drunkenness or jealousy, reliably incite brutal rages. Remarks or gestures, which are merely offensive or perhaps even meaningless to the general public, may be understood by the abused individual as an affirmation of impending physical abuse. To require the battered person to await a blatant, deadly assault before she can act in defence of herself would not only ignore unpleasant reality, but would amount to sentencing her to 'murder by installment.'¹⁴²

As seen in the above quote, this reform to a necessity standard would work hand in hand with a reform of the unlawful act requirement to allow a pattern of abuse to explain the existence of an unlawful act.

Proponents of this reform argue that while imminence has served as a practical limit to self-defence claims, the exclusion of a significant group of claims that meet the underlying goal of self-defence requires a change in self-defence law.¹⁴³ This necessity standard would recognise that men's social conditioning and physical ability to fight enables spontaneous responses, which are often not feasible for women. It also would recognise that short-term solutions, such as leaving the house immediately or calling the police, would do nothing to

stop the violence against women in the long term.

Proponents further argue that in practice this reform would have little effect on most cases of self-defence because showing the attack was inevitable and inescapable is a difficult standard to meet and would apply in limited circumstances only.¹⁴⁴ As a result, the risk the defence will be abused by other criminal defendants is low. Furthermore, it would be beneficial to avoid pushing the boundaries of imminence to fit battered women's claims of self-defence, as that could lead to more abuse than allowing certain defendants to claim inevitability.¹⁴⁵ Finally, this change in self-defence law would force the State to take more responsibility for protecting these women.

Critics of this proposed reform argue that imminence best protects the doctrine of self-defence from abuse. First, imminence is the only way in which to prove necessity of the action; otherwise the attack is purely speculative.¹⁴⁶ Typically in criminal law, past patterns of violence are not admissible to prove future acts of violence, and should not be used to do such in these cases.¹⁴⁷ Also, imminence reflects the values of pacifism and individual responsibility by requiring a person to wait to defend herself until actually threatened with an attack.¹⁴⁸

Secondly, imminence reflects the belief that every human life is valuable, even that of a batterer.¹⁴⁹ By replacing imminence with necessity, a batterer would be deprived of equal protection for his life, as revenge and supposition would justify killing him.¹⁵⁰ An imminence requirement ensures the defendant's motive was not anything other than protecting his/her life; removing the requirement opens up the likelihood that other motives would be involved.¹⁵¹

Critics also argue that determining when defensive action becomes necessary without considering whether an attack was imminent would be a difficult task. A court looking at necessity then would be able to rely only on the subjective beliefs of the defendant, rather than the objective facts, to determine whether the defendant acted in self-defence.¹⁵² This change would be tantamount to reviving the death penalty, with fewer legal safeguards.¹⁵³ It would also encourage lawlessness and vigilantism; as the Norman majority suggested: "Homicidal self-help would then become a lawful solution and perhaps the easiest and most effective solution."¹⁵⁴

Many critics do not believe that a battered woman could prove that escape is nearly impossible. Instead, they assume that a woman never has to kill in a non-confrontational setting because she can always leave her abuser or could have in the past.¹⁵⁵ Richard Rosen described this belief as follows:

[Even] if flight carries an unacceptable risk of death at the time of the killing (or even for an appreciable period of time beforehand), there well may be some period of time when the woman could leave without risk of serious injury or death and should perceive that remaining in the relationship would be dangerous. Should not the law require that she leave at this point rather than allow her to kill at some later time?¹⁵⁶

Other criticisms include that changing this standard would condone killing someone in his sleep, something the State should never condone; necessity without imminence stretches the doctrine of self-defence too far.¹⁵⁷ Moreover, critics claim that this reform will lead to too much subjectivity in criminal law, allowing many to improperly appropriate the defence.

One academic, Veinsredideris, pointed out that prison inmates would be able to use this reform and make the same claims of self-defence as battered women, since prisons are notoriously dangerous and most inmates cannot escape the danger.¹⁵⁸ While Veinsredideris does not argue that this expansion is inherently wrong, he fears that groups of inmates will be able to argue self-defence even if that was not their motive.¹⁵⁹ Veinsredideris, however, differentiates prisoners from battered women, arguing that battered women are less likely to be motivated by the thought they would be able to get away with murder than prisoners.¹⁶⁰ Therefore this change is unlikely to result in battered women's abusing the criminal justice system.

More difficult for proponents of this reform to defend is that a necessity standard requires the defendant to explain why she could not safely end the abusive relationship.¹⁶¹ A woman would be forced to make these explanations to justify why she could not escape the impending abuse. This could require asking whether the woman ever made any attempts in the past to leave her abuser. The only way to prove that she could not end the relationship safely is to show that she was beaten and dragged back previously. In a sense, this standard could force women to exhaust all of their options before responding in self-defence. It would also allow courts to judge their reasons for staying in the relationship before reaching a decision on their defence.¹⁶²

Finally, Donald Downs argues that changing the imminence standard is unnecessary. "With testimony about the defendant's fears of the batterer, the dangers attendant to separation, and the battered woman's ability to 'read her batterer,'" a battered woman who kills in a non-confrontational situation can meet the imminence requirement.¹⁶³

Experiences in the United States highlight the importance of careful drafting when changing the standard from imminence to necessity. Several states in the United States reformed their self-defence statutes by replacing imminence with an "immediately necessary" requirement. Research shows that the immediate element has often been treated as a stricter temporal requirement than imminence. As the Kansas Supreme Court explained: "The word 'immediate' places undue emphasis on the deceased's immediate conduct and obliterates the build-up of terror and fear the deceased systematically injected into the relationship over a long period of time."¹⁶⁴

One American study showed that battered women in these jurisdictions faced more hurdles to the admission of social context evidence to explain why the woman's response in a non-confrontational situation was immediately necessary.¹⁶⁵ For example, the study found that immediately necessary jurisdictions were more likely to limit instructions to the jury explaining the significance of past patterns of violence and expert testimony to determining the reasonableness of the woman's belief that her action was immediately necessary.¹⁶⁶

A standard of necessity, rather than imminence, raises other issues including:

1. Could a woman meet this requirement where the necessity developed from a "learned helplessness", where her self-esteem was lowered and her perspective on available alternatives decreased because of the abuse by the batterer?
2. Could a woman meet this requirement if she felt she could not leave her abuser because it was unacceptable in her culture or she would have no family support?

3.4 Reasonableness

3.4.1 Create a reasonableness standard based on the circumstances of the defendant

This reform recommends the adoption of the first of the two mixed objective-subjective reasonableness standards. Both the theory underlying this standard and its advantages and disadvantages are discussed in section [2.1.4\(3\)](#).

3.4.2 Create a reasonable woman standard

Some reformers suggest changing the reasonableness standard to a reasonable woman standard that would allow courts to consider women's circumstances and socialisation when judging her behaviour.¹⁶⁷ The theory behind this reform is that any standard not particularised for women will inherently measure the reasonableness of a woman's beliefs and actions against that of a man's.¹⁶⁸ Unless the standard adopts women's perspectives, their experiences will remain excluded from the analysis of reasonableness.

The general advantages and disadvantages of Option 2 of the mixed objective-subjective standard, in which only certain of the defendant's non-universal characteristics should be considered in determining reasonableness, have been discussed in the elements section of self-defence in section [2.1.4\(4\)](#). This section, rather, will focus on the benefits and problems specific to a reasonable woman standard.

The main advantage to the reasonable woman standard is that it would correct the gender bias inherent in the reasonableness standard as it is presently applied and would force courts to consider women's experiences.¹⁶⁹ Social context evidence would be admissible to explain what a reasonable woman would perceive and how she would respond in similar circumstances.

Critics argue that a reasonable woman standard would treat men and women differently, giving women the benefit of a more lenient standard, in violation of the concept of equality. This standard could create or emphasise stereotypes. People may perceive the difference in standards for men and women as evidence that women are unreasonable.¹⁷⁰ It could perpetuate the view of women as victims.

Moreover, this standard could be applied based on stereotypes of women, including that women are unreasonable, more emotional and passive. Stereotypes deprive atypical women of a fair trial.¹⁷¹ The standard also suggests that men would not suffer the same harm from domestic violence that a reasonable woman would suffer.¹⁷² Finally, some of these critics

argue that the goal of any reform of a reasonableness standard is to discover a standard that can be applied equally and fairly to both genders, not perpetuate gender differences.¹⁷³

In the United States, the Supreme Court of Washington adopted a reasonable woman standard in *State v. Wanrow*, 559 P.2d 548 (1977), focusing its decision on the fact that much of women's socialisation resulted from the history of sex discrimination in the United States. The Court wrote:

The respondent was entitled to have the jury consider her action in the light of her own perceptions of the situation, including those perceptions that were the product of our nation's 'long and unfortunate history of sex discrimination.' Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defence instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules that are applicable to male defendants.¹⁷⁴

The concurring opinions of two Supreme Court of Canada judges in the decision of *R v. Mallot*, [1998] 1 SCR 123 (Supreme Court, Canada) similarly supported the idea that a woman's behaviour should be judged against how other women would behave in those circumstances. Relying on a precedent from *Lavallee v. Queen*, 55 CCC3d 97 (Supreme Court, Canada 1990), these judges wrote:

[The] majority of the Court in *Lavallee* also implicitly accepted that women's experiences and perspectives might be different from the experiences and perspectives of men. It accepted that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and both are relevant to the legal inquiry More important, a majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self defence.¹⁷⁵

3.4.3 Create a reasonable battered woman standard

Similar to the above reform, proponents argue that not only should gender be considered when determining the reasonableness of the battered woman who kills her abusive partner, but that her status as a victim of abuse also requires consideration.¹⁷⁶ The only way to ensure a battered woman is treated fairly at trial is to measure her reasonableness against how a similarly situated battered woman would behave.

Typically, this standard has been treated by academics as a standard based on the battered women's syndrome, although nothing necessitates treating it that way. Focusing on battered women's syndrome as part of a reasonableness standard will be discussed fully in section [6.1](#) below on a Battered Women's Syndrome defence.

The primary advantage of this standard for abused women who kill their battering partner is that social context evidence, particularly expert testimony on the effects of abuse on

women, would be admissible in claims of self-defence. This would increase battered women's access to the defence.

The disadvantages of this recommendation are nearly identical to those listed under the reasonable woman standard. The risk that a reasonable battered woman standard would result in stereotyping may be even greater once status of being a victim of abuse is included in the standard. Women who do not fit the stereotype of a battered woman would not be able to access self-defence.¹⁷⁷

An additional criticism particular to a reasonable battered woman standard is that it is an oxymoron to expect expert testimony on the psychological effects of battering. How can a woman whose psychology has been altered from that of a generic person or other women be characterised as reasonable?¹⁷⁸ Interestingly, one academic responded to this question by arguing:

The battered woman is not a reasonably prudent person. Her characteristics and personality have been severely affected by the abuse that she has endured. She should not be punished for being the victim of that abuse considering her acts only in the light of a reasonable person, when through no fault of her own she does not qualify as one, is in essence condemning her for her suffering.¹⁷⁹

Presently, one American state recognises a reasonable battered person standard, while others recognise a reasonable battered woman standard.¹⁸⁰ Holly Maguigan's study found that courts applying a reasonable battered woman standard often excluded women who did not fit within the stereotype of a battered woman.¹⁸¹

3.4.4 Provide a list of factors to aid in determining reasonableness

Another reform option for the reasonableness standard is to eliminate a specific requirement that reasonableness be viewed from a particular, narrow perspective and widen the factors a court may consider relevant to any reasonableness determination where domestic violence is an issue.¹⁸² Creating a list of factors statutorily would ensure that these factors will be considered and would allow for social context evidence to be admitted in cases where battered women kill their abusive partners.¹⁸³ The Canadian Association of Elisabeth Fry Societies recommended the following factors for consideration:

- the nature, duration and history of the relationship between the defender and the adversary, including prior acts of violence or threats on the part of the adversary, whether directed to the defendant or others;
- any past abuse suffered by the defender;
- the age, race, sex, and physical characteristics of the defender and the adversary;
- the nature and imminence of the force used or threatened by the adversary;
- the means available to the defender to respond to the assault, including the defender's mental and physical abilities and the existence of options other than the use of force; and
- any other relevant factors.¹⁸⁴

The disadvantage of this list of factors focuses on different treatment for victims of abuse than for all other people who claim self-defence. Critics argue that non-victims would face a harsher test of reasonableness than domestic violence victims would, unfairly benefiting one category. If a statute does not provide guidance on using this list, courts could weigh certain factors as more important or relevant to the determination of reasonableness, particularly the imminence factor.

3.5 Proportionality

3.5.1 Remove the proportionality requirement and replace it with a reasonableness of response standard

Another reform option is to replace the requirement that the defendant's response be proportional to the threat from the deceased, an 'eye for an eye' standard, with a requirement that the response be reasonable.¹⁸⁵ Only when a response grossly deviates from what a reasonable person would do, should a court conclude that the defensive response was disproportionate to the threat the battered woman faced.¹⁸⁶ The idea is that it may be particularly difficult for battered women to judge accurately the level of threat they face.¹⁸⁷ It may also be difficult for battered women, or women who are smaller or feel weaker than their attacker, to determine when they have acted sufficiently to defend against the threat.

Proponents of this reform argue that a proportionality requirement could unfairly limit a victim from responding effectively to an unlawful attack. Courts could refuse to find proportionality when a defendant uses a weapon against an unarmed attacker. Based on past experience with their abuser, some women reasonably believe that using a weapon against their unarmed attacker is the only way to stop from being overpowered.¹⁸⁸ Eliminating a proportionality requirement would allow courts to consider the effects of cumulative battering when determining the reasonableness of the level of response and it would recognise the difference in size, strength and socialisation between men and women as well as a woman's disempowerment at the hands of her abuser.¹⁸⁹ Moreover, it would eliminate the possibility that under an 'eye-for-an-eye' standard, a court might rule that defending with lethal force against a crime such as sexual abuse, or other crimes against women, is not proportionate.¹⁹⁰

Problems with this change surface from the concept that both the attacker and the defendant should bear the risk of harm equally. Critics argue that this reform forces the deceased to bear an unfair share of the burden.

The rationale for the reform is problematic when combined with some of the earlier reforms. Advocates would argue on the one hand that a battered woman has a superior ability to predict an attack by her abuser and on the other, is unable, because of the constant abuse, to accurately predict the amount of force necessary to stop her abuser. A woman would have difficulty claiming both that she can predict the violence and its severity better than the generic reasonable person can while at the same time claiming that her predictions are skewed because of fear or psychological trauma.

Perhaps a better foundation for this reform is to argue that an 'eye for an eye' approach is inappropriate in self-defence cases because it is not always clear how much force is

necessary to repel an attack until after the defendant has acted in self-defence. Furthermore, one could question whether both parties should carry an equal share of the risk when one of the parties is responsible solely for its creation.¹⁹¹

3.6 Defendant did not Provoke the Attack

3.6.1 Recognise that abuse or threat of abuse may continue even while a batterer is unable to carry it out at the moment

Reformers suggest that the best way to avoid courts labeling battered women who kill abusive partners as the initial aggressor in non-confrontational situations is to recognise the continuing nature of the danger in domestic violence situations. This reform is identical to the first reform proposed in section [3.3.1](#) under the unlawful act requirement, which fully describes the advantages and disadvantages of this approach.

3.7 Duty to Retreat

3.7.1 Eliminate any duty to retreat

For jurisdictions that require a person to retreat before acting in self-defence, reformers recommend that the duty be erased particularly when the attack occurs in the home. At a minimum, people should be allowed to defend themselves in their homes, as the home is a person's sanctuary.¹⁹² No one has the right to invade that sanctuary, which a duty to retreat would grant an attacker.

Given that most jurisdictions have eliminated the duty to retreat from one's home, reformers focus their efforts on eliminating the implicit duty to retreat from the relationship. Removing this would eliminate courts' requirements for battered women to explain why they did not leave their abusive partners before the violence escalated into a life-threatening situation – a burden that is not placed on men or other women who act in self-defence. As Ripstein described:

We may suppose that someone who foolishly went to a dangerous bar should have left as soon as he got a sense of the place, but his claim to self-defence depends on his alternatives once the incident began, not on his past wisdom or foolishness. In the same way, testimony about battering relationships serve to show that staying in the relationship does not vitiate the claim to later have no choice but to kill or be killed.¹⁹³

Proponents of this reform argue that the battered woman should similarly be judged solely on whether her action in fact was self-defence.¹⁹⁴ To keep this implicit duty in place, they argue, suggests women are responsible for creating the situation that led to their defensive action.¹⁹⁵

This reform also recognises that retreat may be extremely dangerous and that the battered woman may have nowhere to go.¹⁹⁶ As Downs described, "It is hardly realistic to expect a woman to dash out of her home during an attack and never return, nor is it realistic to assume that she could later return with safety."¹⁹⁷ Finally, if there is no duty to retreat, a

battered woman who kills in a non-confrontational situation could prove more easily that the pattern of abuse would inevitably continue and at the moment is inescapable.

One possible criticism of this reform is that it would allow women to kill their partners when an alternative was available. This criticism does not justify why any other defendant can act in self-defence rather than retreat from his/her home, but not battered women defendants.

3.8 Self-Defence as a Justification

3.8.1 Self-defence should be made an excuse in order to alter particular elements to accommodate battered women who kill in non- confrontational situations

A final reform recommends that self-defence be made a full excuse for killing a person.¹⁹⁸ As described above, an excuse treats a defendant as less blameworthy while continuing to treat the defendant's act as unlawful. As an excuse, self-defence would not condone murdering someone in his sleep or while he was watching TV. Instead, it would send the message that while the woman's actions were wrong; circumstances were such that she should not be punished for her actions. Government and courts could give greater latitude to reforming self-defence if they knew the message they were sending was that the act itself was wrong, but the actor was not blameworthy.

This reform, however, ignores that most battered women and many other members of society do not agree that killing one's abuser in a non-confrontational situation is inherently wrong. It ignores the reality of battered women's lives and experiences and perpetuates negative stereotypes of battered women.

Chapter 4: Comparative Experiences with Self-Defence

This next section will describe how foreign jurisdictions treat battered women who kill their abusive partners under local self-defence law. As with the discussion of potential defences, this research focuses on battered women who killed during non-confrontational situations. The aim is to highlight the issues, problems and arguments described above in hopes of providing even more context for future discussions on how the South African criminal justice system should treat battered women who kill their abusers.

The comparative sections within the chapters on defences and evidence issues will examine whether there are any statutes in place to aid battered women in meeting the elements of a particular defence. It will explain whether these women have been able to access any of the defences, any problems with doing so; and whether there are any trends in the law of the country. Unfortunately, this analysis is limited to the treatment of battered women who kill their abusive partners in Canada, Australia, England, New Zealand and the United States. These countries have the most publicly accessible information on this topic and have legal systems similar to South Africa's.

4.1 Canada

Canadian law provides battered women who kill their abusers in non- confrontational cases with the opportunity for a fair trial, through expert testimony and testimony on a pattern of

abuse, as well as with the opportunity to argue justification defences. For this reason, Canada should be influential in a discussion for reform in South Africa.

4.1.1 Statutory Law

Canada's federal statute on self-defence does not include an imminence requirement. While in the past courts read an imminence requirement into the defence anyway, recent Canadian case law explicitly removed it from the defence.

Section 34 of the Criminal Code reads:

(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the attack is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) He believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.¹⁹⁹

4.1.2 Case Law

Canadian case law explicitly allows battered women who kill in non-confrontational situations to claim self-defence. The Supreme Court of Canada, the highest court in Canada's federal system, ruled in *Lavallee v. Queen*, 55 CCC3d 97 (1990) that battered women could access this defence even without proof of a confrontation. The defendant shot her boyfriend in the back of the head as he was leaving the bedroom after threatening to kill her when their guests left their house. The defendant and deceased had a substantial history of physical abuse.

The majority of the Court, through its opinion written by Justice Wilson, identified two elements of self-defence that posed great difficulties for battered women who kill their abusers in non-confrontational situations. Wilson focused on the problems these women encounter in proving they reasonably feared an imminent attack and that they reasonably responded to the perceived attack with lethal force. She seemed to fight the belief that imminence is the only way to determine whether a battered woman had any other available alternatives, as well as the belief that only through an imminent attack could a battered woman determine the amount of force necessary to repel the attack.

In countering these beliefs, Wilson first noted that the self-defence statute does not contain an imminence requirement, although one had always been read into the defence.²⁰⁰ While recognising that an imminence requirement aids in determining necessity, she concluded

that the Court could not adopt a per se rule that unless a defendant was in the middle of a confrontation, her belief that an attack was imminent was unreasonable.²⁰¹

The opinion explained that in the battered woman context, expert evidence could explain sufficiently why defensive force was necessary. It could also explain why a woman could gauge accurately the amount of force she needed to defend herself against an attack.²⁰² The opinion focused on the need for experts to describe the heightened sensitivity battered women have to their abuser's behaviour. As Justice Wilson wrote, without such expert testimony: "I am sceptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship."

Wilson then addressed the argument that a person must wait until an attack is imminent, as it is the only way to ensure that the woman's heightened sensitivity was correct. The opinion attacked this point, arguing that because of women's "size, strength, socialisation and lack of training" women forced to wait for a conflict would be at a serious disadvantage in the fight.²⁰³ Quoting the New Mexico Supreme Court in *Gallegos*, this would "be tantamount to sentencing her to 'murder by installment.'"²⁰⁴

To determine reasonableness, the opinion adopted a mixed objective-subjective test under which reasonableness is to be measured against a person in the same circumstances as the defendant.²⁰⁵ Wilson relied in part on gender differences and in part on scepticism about a layperson's understanding of domestic violence to explain the adoption of this standard.²⁰⁶

If it strains credibility to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances that are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.

The majority opinion also attacked the duty of retreat from the battering relationship implicitly required by courts in cases where battered women kill their abusers. Wilson found the question of why the woman did not leave the relationship to be irrelevant to whether the woman needed to defend herself at that moment.²⁰⁷ Accordingly, Canadian law has no duty to retreat; nor does a woman waive her right to self-defence for failing to leave a relationship before self-defence became necessary.²⁰⁸ To the extent a prosecutor raises that question in support of the view that the battered woman could leave the relationship freely, the opinion suggested that expert testimony could counter any such inferences.²⁰⁹

Justice Wilson concluded her opinion by summarising the points to which expert testimony is relevant, including:

- To explain battered wife syndrome;
- To dispel common myths about battering relationships;
- To explain a battered woman's ability to perceive danger from her abuser, which speaks to a reasonable apprehension of death or bodily harm;
- To explain why a battered woman remained in the relationship;
- To explain why the woman did not leave when she thought her life was in danger.

Under this judgment, these points must be made explicit to a fact finder. Wilson noted, however, that the woman's status as a battered woman alone does not justify killing her partner. Rather it helps explain her perceptions and actions for purposes of a criminal defence.^{[211](#)}

There have been two Supreme Court of Canada decisions subsequent to the *Lavallee* decision that have upheld the principles and rules applied by Justice Wilson. In its 1994 decision in *R v. Petel*, [1994] 1 SCR 3, the Court upheld the principle that Canadian law does not require a person to prove imminence to succeed in a claim for self-defence.^{[212](#)} Rather, imminence is a factor in determining whether killing her abuser was necessary and reasonable.^{[213](#)} This interpretation is similar to the proposed reform to eliminate imminence and replace it with necessity, where imminence would be one factor in determining necessity.

The *Petel* court also accepted the relevance of a history of past abuse to explain whether a defendant felt threatened by an assault at the time she acted and that her belief that she risked death or bodily harm was reasonable.^{[214](#)}

The most recent Supreme Court opinion on battered women who kill their abusers in non-confrontational situations also upheld the *Lavallee* decision. The most interesting aspect of the *Mallot* opinion, however, is the concurring opinion by Justices L'Heureux-Dube and McLachlin. In their opinion, the Justices emphasised the gain *Lavallee* made for women's equality in the criminal justice system. It reported as significant that the *Lavallee* decision accepted that men's and women's experiences are different and need to be treated as such when judging the reasonableness of a woman's behaviour.^{[215](#)} The concurring Justices wrote:

This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events. But it is wrong to think of this development of the law as merely an example where an objective test – the requirement that the accused claiming self-defence must reasonably apprehend death or grievous bodily harm – has been modified to admit evidence of the subjective perceptions of a battered woman. More important, a majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self-defence.^{[216](#)}

At the provincial level, the provinces of Alberta and Ontario have applied the reasoning of the *Lavallee* majority to justify pre-emptive self-defence for defendants other than battered women. In the Alberta case *R v. Nguyen*, [1997] AJ No. 129 (Alberta Court of Appeal), the deceased had threatened the defendant several times before the defendant walked up to the deceased and shot him in his car. The Alberta Court of Appeal allowed the defendant to claim self-defence.^{[217](#)}

Similarly, the Court of Justice in Ontario expanded the justification for pre-emptive self-defence to a prison inmate. In *R v. Plain*, [1997] OJ No. 4927, the court allowed a prison inmate to argue self-defence after stabbing another inmate to whom he owed money for purchasing cocaine. The court relied on Lavallee, finding that the defendant "did not act out of revenge or retaliation, or because he had any particular animosity towards Mr Salmon (the deceased). Mr Plain did what he did because he was afraid that he was going to be killed or seriously injured by Mr Salmon and his friends if he didn't do something."²¹⁸

4.2 United States

There are 51 different jurisdictions in the United States that apply criminal law. These jurisdictions are divided in how they treat battered women who kill their abusers in non-confrontational situations. A large minority of American states allows these women to argue self-defence, many of which have reformed self-defence law statutorily to aid battered women. Only a few states have unequivocally refused self-defence claims for battered women who kill in non- confrontational situations.

Because of the differences in jurisdictional treatment of battered women who kill their abusers, anyone wishing to rely on American case law may find their arguments countered by other American case law reaching the opposite conclusion.

4.2.1 Studies

Studies in the United States show that the definitions of the elements of self-defence are wide enough to cover the experiences of battered women but typically are not applied that way.²¹⁹ Holly Maguigan reported that based on anecdotal evidence, trial courts do not believe battered women cases fit within traditional self-defence law. For this reason, many of these trial court decisions are reversed at the appellate level.²²⁰ Most of the cases surveyed, however, did not arise from non-confrontational situations.²²¹

Maguigan also refutes that self-defence law reflects the paradigmatic case of the one time barroom brawl between strangers.²²² Instead, she argues that self-defence cases recognise that often the two parties are familiar to each other, and allow evidence regarding their relationship. She suggests that self-defence law is applied differently in battering cases than in other such cases, making the problem a misapplication of existing law.

4.2.2 Statutory Law

Many of the recommended reforms to existing elements of self-defence have been adopted by American states. Described below are the various changes to traditional self-defence law. This discussion includes reforms that are not favourable to battered women who kill in non-confrontational situations, as well the ones that comport with above reform recommendations.

Unlawful Act

Five states have changed their unlawful act requirement to include when the defendant believes the deceased had a plan or 'design' to commit a felony or other bodily harm and that there was imminent danger of the 'design' being accomplished.²²³ This language seems

broad enough to justify pre-emptive self-defence where a defendant can show the pattern of abuse was part of a design to commit the felony of domestic violence. For battered women who kill in non-confrontational situations, this could be the opening they need for their experiences to be recognised under criminal law.

More obviously helpful to these battered women, one state statute allows a pattern of domestic violence to serve as the unlawful act against which the defendant was protecting. Although the language of the Arkansas statute is confusing, it seems to allow a person to claim self-defence when the deceased was "imminently about to victimise the person ... from the continuation of a pattern of domestic abuse."²²⁴

The states of Maryland and Louisiana allow the admission of evidence of an abusive relationship between the deceased and defendant when a defendant claims self-defence, even in the absence of the requisite evidence that the defendant was responding to an overt act.²²⁵ This reform seems intended to allow for a pattern of abuse to explain the unlawful act the defendant feared.

A few other states have broadened the types of unlawful acts against which lethal force may be used. Some statutes now include kidnapping or rape by force or threat of force to qualify for this element.²²⁶ Other states allow lethal force to stop a felony,²²⁷ while still others allow lethal self-defence only against forcible felonies.²²⁸

Imminence

Also by statute, several states have reformed statutorily their imminence requirement, although not all have proved to be helpful to battered women who kill their abusers in non-confrontational situations. One of the more favourable changes for battered women who kill are the Kentucky and Utah statutes that allow the pattern of domestic violence to determine imminence. The Kentucky statute infers imminence from "a past pattern of repeated serious abuse" in domestic violence cases.²²⁹ The state of Utah statutorily lists factors courts should use to determine both reasonableness and imminence; the statute explicitly states that any or all factors can be considered and that the factors open for consideration are not limited to the list. The factors provided in the list are:

- The nature of the danger;
- The immediacy of the danger;
- The probability that the unlawful force would result in death or serious bodily injury;
- The other's prior violent acts or violent propensities; and
- Any patterns of abuse or violence in the parties' -relationship.²³⁰

The state of New Mexico replaced imminence with a general necessity requirement, as recommended under self-defence reforms.²³¹ Vermont replaced imminence with a standard when lethal force is "just and necessary."²³² The extent to which the New Mexico and Vermont reforms will be helpful to battered women who kill will depend on whether a strict imminence requirement is read into the definition of necessity or necessary.

The reform by the Nevada legislature is more confusing as to whether it will loosen the

imminence requirement for battered women. Nevada allows self-defence when the threatened danger is "urgent and persisting" and lethal self-defence is "absolutely necessary."²³³ The word "persisting" seems helpful to these women, as it should allow for evidence of a pattern of abuse to justify imminence, although "urgent" may make this difficult. Nevada is one of the five states discussed directly above that allows defence against a 'design' to commit bodily harm, which suggests that pre-emptive self-defence can be permissible in certain circumstances.

Many states have adopted an immediately necessary standard in place of imminence.²³⁴ As described in section 3.3, this standard is more cumbersome for battered women who kill in non-confrontational situations. Some courts have interpreted the word immediate as a stricter temporal requirement than imminence.

Reasonableness

By statute, several American jurisdictions have reformed the reasonableness requirement of the law of self-defence, in most instances benefiting battered women who kill in non-confrontational situations. Maine now provides the widest reasonableness standard for claims of self-defence. It requires only that the defendant's actions and beliefs not be grossly deviant from how a reasonable person would act and believe in the defendant's circumstances.²³⁵ This is a straight subjective standard, where only the most unreasonable of defendants will not qualify for self-defence.

The state of Massachusetts insists upon expert testimony on abusive relationships or evidence of a history of abuse to establish a defendant's reasonableness in acting in self-defence.²³⁶ The evidence is intended to apply to the reasonableness of the defendant's belief in the existence of all elements of self-defence.

Utah courts consider the deceased's violent nature and prior acts of abuse between defendant and deceased when determining imminence and reasonableness.²³⁷

Two states have statutorily adopted a mixed objective-subjective standard. Arizona requires a reasonable victim of domestic violence standard for domestic violence cases (Option 2 of the two mixed standards described above).²³⁸ Hawaii determines reasonableness from the perspective of the defendant in the circumstances, as he believed them to be (Option 1 of the mixed standards).²³⁹

Texas has codified an objective reasonable standard.²⁴⁰ The harsh result associated with this standard is mitigated by another Texas statute that allows the admission of evidence of a past pattern of abuse and expert testimony on the effects of abuse in self-defence claims where domestic violence is alleged between the defendant and the deceased.²⁴¹

Duty to Retreat

Only a minority of states retains a requirement of a duty to retreat from one's home.²⁴² Two states have changed the duty generally so that a person must retreat only if she can retreat in complete safety.²⁴³

All Elements

Finally, one American state has adopted a "new" defence that allows a person to argue a justification or excuse defence for "all other instances that stand upon the same footing of reason and justice as those enumerated."²⁴⁴ Nevada's statute would allow a person who could not meet the elements of self-defence but whose claim is based on the same rationale to argue a justification defence. This change gives the widest latitude for women who can show that in their circumstances the underlying reasoning behind self-defence applies to them.

4.2.3 Case Law

American jurisdictions are divided on whether battered women who kill their abusers in non-confrontational situations should benefit from a self-defence claim. The first part of this section will examine the cases that allow women who kill in non-confrontational situations to argue self-defence. This will be followed by a description of the cases that have refused battered women this defence.

1 Battered Women May Argue Self-Defence

At least 16 American states and Washington DC allow battered women who kill their abusers in non-confrontational situations to argue self-defence against a charge of murder or manslaughter.²⁴⁵ The ease with which these women can argue self-defence varies among the jurisdictions, but each has allowed the argument.

a Unlawful Act

No American decision has been located that allows a past pattern of abuse without evidence of an escalation of violence or a threat just prior to the time the woman acted to justify self-defence. The escalation of violence or the threat just prior to the defensive action, however, can be sufficient to prove the requirement of an unlawful act.²⁴⁶ For example, the Supreme Court of New Mexico held that it was necessary to consider the battered woman's cumulative fear and the predictability of the pattern of violence to determine whether the woman was responding to an unlawful act. As the Court described:

Remarks or gestures, which are merely offensive or perhaps even meaningless to the general public, may be understood by the abused individual as an affirmation of impending physical abuse. To require the battered person to await a blatant, deadly assault before she can act in defence of herself would not only ignore unpleasant reality, but would amount to sentencing her to 'murder by installment.'²⁴⁷

The Court concluded, however, that while it does not require an overt, apparent assault, it does require some kind of showing of threat, either through behaviour or words.²⁴⁸ The state of Washington Appeals Court similarly held that a defendant need not prove an actual assault to meet this requirement, but needed to provide something that would explain why the danger was imminent.²⁴⁹

b Imminence

The jurisdictions that recognise that threats supported by a pattern of abuse can meet the unlawful act requirement also allow this same information to explain why the threat of

assault was imminent.²⁵⁰ The claims of imminence are bolstered by the acceptance that battered women have an increased sensitivity to their batterer's behaviour based on the patterns of abuse. This increased sensitivity allows them to accurately predict when the next round of abuse will begin.

The California and South Carolina Supreme Courts have held that the heightened sensitivity developed from the history of abuse could be used to prove the reasonableness of the defendant's belief that her life was in imminent danger.²⁵¹ Similarly, the Supreme Court of Washington wrote in a battered child non-confrontational case:

That the triggering behavior and the abusive episode are divided by time does not necessarily negate the reasonableness of the defendant's perception of imminent harm. Even an otherwise innocuous comment, which occurred days before the homicide, could be highly relevant when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode.²⁵²

The state of South Dakota has an interesting approach to imminence. Although described with respect to a duty of retreat, the Supreme Court of South Dakota seems to hold that a battered woman who faces a continuing threat can pursue her assailant as long as necessary to stop the constant threat. In *State v. Burtslaff*, 493 NW2d 1 (Supreme Court, SD 1992), the defendant shot her abusive husband while he was watching TV. The Court justified allowing a self-defence claim in part because:

A person who is exercising her right of lawful self-defence is not required to retreat, and she not only may stand her ground and defend herself against the attack but also may pursue her assailant until she has secured herself from the danger if that course appears to her, and would appear to a reasonable person in the same situation, to be reasonably and apparently necessary; and this is her right even though she might more easily have gained safety by withdrawing from the scene.²⁵³

c Reasonableness

Courts have given all four of the types of reasonableness standards wide enough latitude to justify a battered woman's claim for self-defence even in non-confrontational cases. South Carolina found that a woman who killed her sleeping husband after a long history of domestic violence met the objectively reasonable test: "When torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness."²⁵⁴

The majority of American courts apply some form of a mixed objective-subjective reasonableness standard to self-defence claims,²⁵⁵ most of which apply the first option in which reasonableness is based on the circumstances of the defendant.²⁵⁶ It is important to caution that when reviewing American case law, some states will refer to this mixed test as a purely subjective test. Looking at the standard that is actually applied will determine the type of test involved, not its title.²⁵⁷

The Supreme Court of California highlighted the difference between the first option of a mixed reasonableness test and a particularising mixed objective-subjective standard. The

Court wrote:

Contrary to the Attorney General's argument, we are not changing the standard from objective to subjective, or replacing the reasonable 'person' standard with a reasonable 'battered woman' standard. Our decision would not, in another context, compel adoption of a 'reasonable gang member' standard The jury must consider the defendant's situation and knowledge, which makes the evidence relevant, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm.²⁵⁸

In addition to Arizona's statute, the states of Missouri and Pennsylvania under case law use a reasonable battered woman test to measure the defendant's reasonableness.²⁵⁹

North Dakota is the only state located that seems to apply a purely subjective test of reasonableness in self-defence cases. In *North Dakota v. Leidholm*, 334 NW2d 811 (1983), the Supreme Court of North Dakota wrote:

Under the subjective standard, the issue is not whether the circumstances attending the accused's use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in the accused an honest and reasonable belief that he must use force to defend himself against imminent harm.²⁶⁰

Essentially, the -court looks at what the defendant sees and knows and then determines whether that could lead the defendant to believe defensive force is necessary.²⁶¹

d Proportionality

Most jurisdictions allow a battered woman to defend herself with a weapon against an unarmed attacker in recognition of the difference in size, strength and social conditioning between men and women.²⁶² As the Supreme Court of Washington recognised: "In our society women suffer from a conspicuous lack of access to training in and means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons."²⁶³

e Defendant did not provoke the attack

In states that allow battered women who kill their abusers in non-confrontational situations to argue self-defence, if the woman is able to show an unlawful act because of a pattern of abuse, a threat or a symbol of violence, she will automatically prove this element.²⁶⁴

f Duty to Retreat

In line with the suggested reform of self-defence, South Carolina has fully eliminated a duty to retreat for battered women, including the implied duty that battered women should leave their relationships long before lethal self-defence is necessary. The Supreme Court of South Carolina noted that some women have no means of avoiding their partner's abuse, including by retreat, although this element is often irrelevant because a battered woman has

no duty to retreat from her home.²⁶⁵

2 Battered Woman Cannot Argue Self-defence

Three American states have made it impossible for battered women who kill their abusers in non-confrontational situations to claim self-defence.²⁶⁶ Two of these states hold that these women are per se excluded from the defence, while the other built impossible hurdles for these women to jump.

a Unlawful Act

Two American states require something more than a reaction to a pattern of abuse to support the existence of an unlawful act. While the language of these decisions seems no different from the jurisdictions that allow pre-emptive self-defence claims, these courts seem to ignore the signs and symbols of future abuse. Instead, unless the threat of harm is temporally closer to the time the woman responds, these courts have difficulty locating the overt act. The Supreme Court of Kansas wrote:

In order to instruct a jury on self-defence, there must be some showing of an imminent threat or a confrontation circumstance involving an overt act by an aggressor. There is no exception to this requirement where the defendant has suffered long-term domestic abuse and the victim is the abuser. In such cases, the issue is not whether the defendant believes homicide is the solution to past or future problems with the batterer, but rather whether the circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary.²⁶⁷

b

The Supreme Court of Wyoming agreed that some showing of confrontation is necessary before the defendant can argue self-defence.²⁶⁸ Both courts seem to be saying that the symbols, gestures or evidence of threats, including the pattern of abuse, is inadequate to prove the risk of imminent harm. They say that only a confrontation or the threat of immediate confrontation will suffice.

c Death or Serious Bodily Harm/Proportionality

At least one court has used the past pattern of abuse to argue against the evidence that the battered woman was defending against death or serious bodily harm. In *State v. Norman*, the North Carolina Supreme Court ruled that a woman who suffered escalating abuse at the hands of her husband provided insufficient evidence that her abuser threatened her with severe harm.

The *Norman* court explained: "It is far from clear in the defendant's poignant evidence that any abuse by the decedent had ever involved the degree of physical threat required to justify the defendant in using deadly force."²⁶⁹ The Court seems to be saying that a woman must suffer serious bodily harm or attempts on her life prior to the unlawful attack against which she responded before she can justify claiming that this unlawful attack would have resulted in serious harm. In other words, she had to live through it once to prove this element to a court.

d Imminence

Interestingly, one study of cases in which battered women killed their abusive partners showed that 84% of the cases that raised imminence as an unproved issue involved a confrontational situation – either an objective imminence or a putative imminence case.²⁷⁰ This suggests that the barrier imminence creates has more to do with the status of the defendant as a wife or partner than with the facts of the case.²⁷¹

Two American states have ruled definitively that battered women who kill in non-confrontational cases cannot claim self-defence because they can never meet the imminence requirement. The Supreme Court of North Carolina held that battered women who kill in non-confrontational situations per se are excluded from a self-defence claim.

In *State v. Norman*, the defendant left her husband on several occasions only to be violently dragged home. She called the police only to be beaten after they left or her husband returned home from the police station. Just prior to killing her husband, she had suffered days of abuse when she called the police who would not provide immediate help. Government officers witnessed the defendant's being dragged violently by her husband from their offices as she sought welfare benefits to help her leave her husband. She then shot her husband in his sleep.

The *Norman* court defined imminence as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law."²⁷² The *Norman* court found that because the deceased was sleeping, "the defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, all of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband." The Court assumed that all battered women not in the middle of a confrontation have the opportunity to escape the abuse of their partner, despite the evidence to the contrary.²⁷³

The *Norman* court further refused to accept an argument that the violence was inevitable, despite evidence of the futility of the defendant's escape efforts. The court refused to "equate" inevitability with imminence.²⁷⁴ It justified its decision on the grounds that to loosen the imminence requirement would justify killing a human being upon someone's "purely subjective speculation."²⁷⁵

The Kansas Supreme Court decision in *Stewart* also held that pre-emptive self-defence cases per se lack the necessary requirement of imminence.²⁷⁶ It concluded: "To hold otherwise in this case would in effect allow the execution of the abuser for past or future acts and conduct."²⁷⁷ The Court was concerned that if a woman could kill her abuser without being subjected to an actual attack or threat of an immediate attack, she would essentially be punishing her partner with the death penalty for abuse that would not necessarily occur.²⁷⁸

e Reasonableness

In situations in which courts rule that battered women who kill in non-confrontational situations per se are excluded from a self-defence claim, the reasonableness standard is irrelevant. Typically, this is just one factor in the host of others that eliminates women from

the defence. For this reason, in most of the cases, it is unclear what test for reasonableness the court was using.

In Kansas, however, the Supreme Court expressly used a mixed objective-subjective standard of reasonableness in which all of the defendant's circumstances were considered, yet continued to justify the per se exclusion of battered women who kill in non-confrontational cases from a self-defence claim.²⁷⁹ It based its reasoning not on the reasonableness standard but the imminence requirement.²⁸⁰

f Duty to Retreat

Regardless of the fact that most jurisdictions have abolished the duty to retreat from one's own home, jurisdictions that refuse to apply self-defence to battered women who kill in non-confrontational situations continue to imply such a requirement. They assume that the abused woman can always leave her abuser or call the police.

g Hired Killer Cases

No court decision presently allows a battered woman to claim self-defence when she hired a third person to kill her abuser for her. Typically, because hiring a third party takes time, it is difficult for these women to prove they were responding to a particular unlawful act or threat of an unlawful act or that they feared imminent harm.²⁸¹ Other reasons include that despite the difficulty many battered women encounter in leaving their abusers, allowing self-defence in such cases undermines the basis for the defence.²⁸²

4.3 Australia

As in Canada, Australia has a decision from its highest court that allows battered women who kill their abusers in non-confrontational situations to argue self-defence using expert evidence on the psychological effects of abuse and evidence of a pattern of abuse. This is, however, not as helpful as it could be. Despite this decision, other published decisions and studies suggest that provocation and diminished capacity defences are the most common defences argued for these women.²⁸³ Because of this, while Australia can be used as an example of a jurisdiction that protects these battered women, it poses some difficulties when looking at trends.

4.3.1 Statutory Law

Two of Australia's states have altered requirements from traditional self-defence law. New South Wales legislation allows a person to claim self-defence when protecting against a loss of liberty,²⁸⁴ and when the defensive action is necessary and reasonable.²⁸⁵ It also adopts a mixed objective-subjective reasonableness standard based on what is "a reasonable response in the circumstances, as he or she [the defendant] perceives them to be."²⁸⁶ How the courts apply this statute will ultimately determine how useful the reforms away from traditional self-defence law will be.

The South Australian statute seems to have altered the elements of self-defence even more than the New South Wales legislation, making it more accessible for battered women who kill their abusers in non-confrontational situations. Under the South Australian Criminal Law Consolidation Act 1935, s. 15(1), a person may claim self-defence if:

(a) The defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and

(b) The conduct was, in the circumstances, as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

This statute seems to adopt a purely subjective reasonableness standard. If the defendant perceived her abuser as threatening her life, then the test is whether taking lethal self-defence is reasonable in light of that perception.

4.3.2 Case Law

In an opinion arising from a case in Victoria, Australia's highest court accepted that a battered woman who kills her abuser in a non-confrontational situation could claim self-defence. In *Osland v. Queen*, [1998] HCA 75 (High Court, Australia.), the High Court of Australia heard an appeal from the Victoria Supreme Court of Appeal after a battered woman who killed her abuser in his sleep was convicted of murder. The husband had abused his wife for many years. It appears he had also abused her son. The night of the killing, the son came home to find the husband beating his mother. When he intervened, the husband hit the son on the head and told him he would kill him if he interfered.

That night, the woman drugged her husband during dinner and then watched while her son killed the sleeping husband. The woman and her son buried the husband's body in a hole they had dug the day before. They were tried jointly for murder and both argued self-defence and provocation defence. The mother was convicted of murder. The son was retried after the jury failed to reach a decision on his guilt. At a later trial the son was acquitted.

On appeal to the High Court, the woman argued that (1) her conviction should be overturned on the basis that it was inconsistent with her son's verdict and (2) the trial court had not properly instructed the jury on how the battered women syndrome (BWS) evidence and the past pattern of abuse related to her defences. BWS is a psychological theory that attempts to explain a cycle of domestic violence and the effects that cycle has on battered women's beliefs and perceptions.²⁸⁷

By a majority of three judges to two, the High Court ruled that the verdicts were not inconsistent, as there was additional incriminating evidence of a plan by the woman to kill her husband that did not exist for the son.²⁸⁸ All judges ruled that because the defendant's attorney did not ask for jury instructions explaining the relationship between the BWS testimony and prior abuse testimony to the elements of the defences, the judge instructed the jury sufficiently on the defences of self-defence and provocation.²⁸⁹

While the decision is not as helpful as *Lavallee*, it shows that Australia accepts that a battered woman who kills in a non-confrontational situation can claim self-defence and provocation.

The opinion of Justice Kirby, which is not a majority opinion, is particularly helpful to battered women. First, he accepted that based on a heightened awareness of danger a

woman might be defending against imminent harm that an average person would not recognise.²⁹⁰ He refused a strict imminence requirement. Instead, Kirby stated, "The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that he or she had no alternative but to take the attacker's life."²⁹¹

At a local level, the Northern Territory Supreme Court was asked generally whether a battered woman who kills her abuser in his sleep could argue self-defence. Two of three judges agreed that she could argue self-defence despite the time lapse between the last battering or threat, when the woman acted and when the woman expected the impending attack.

Both judges justified their decisions on the basis that the deceased threatened his wife just prior to falling asleep—not long enough to eliminate the threat. Justice Angel concluded:

At the time the threat was uttered there was an ability (actual or apparent) to carry out the threat when the stipulated time came. On the facts, short of being disabled from effecting the threat, whether by pre-emptive strike or the accused's flight or otherwise, the deceased's ability to carry out the threat continued.²⁹²

The justices agreed that the Northern Territory statute that included a threat that a person was presently able to carry out in its definition of an assault against which a person could protect supported this justification.²⁹³

The Australian state of Queensland similarly allows battered women who kill in non-confrontational situations to argue self-defence. The Court accepted this in the case *R v Mackenzie*, [2000] QCA 324 (Supreme Court, Q. 2000), although the defendant actually was precluded from arguing self-defence because she claimed she accidentally shot her husband when she tripped with a loaded gun she thought was unloaded.²⁹⁴

4.4 England

England seems to provide little protection in the form of justification defences for battered women who kill their abusers in non-confrontational situations. Minimal British case law suggests these women may argue self-defence, but the majority of the cases located involved women who argued a provocation or diminished capacity defence.

4.4.1 Case law

The English Court of Criminal Appeals seems to accept that battered women who kill in non-confrontational situations can argue self-defence. Although ultimately rejected by the jury, a battered woman who killed her husband while he was screaming at her from a living room chair argued self-defence.²⁹⁵ Surprisingly, a battered woman who hired a third person to kill her husband was allowed to argue self-defence, although eventually she was convicted of murder.²⁹⁶

4.5 New Zealand

New Zealand is in the process of reforming its statutory law on criminal defences to include the experiences of battered women who kill their abusers. In May 2001, New Zealand's Law Commission published a report on how best to protect battered women who kill their abusers through criminal defences. While no recommendations have been adopted yet, they serve as recognition of the trend in the criminal treatment of these women.

Ultimately, the New Zealand Law Commission (NZLC) recommends adapting current self-defence law to battered women's experiences and abolishing all excuse defences, replacing them with the court's sentencing discretion.

4.5.1 Statutory Law

The New Zealand statute on self-defence reads: "Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable."²⁹⁷ The statute requires a subjective reasonableness test asking only whether the amount of force used by the defendant to defend himself was reasonable under the defendant's perception of danger.

4.5.2 Case Law

The only source of case law information derives from the NZLC report. Based on this report, New Zealand courts read an imminence requirement into the statute, which works to the detriment of battered women who kill their abusers in non-confrontational situations.²⁹⁸

4.5.3 NZLC recommendations

The NZLC recommends adopting an inevitability standard when imminence cannot be proved. This would account for battered women's and other domestic violence victim's situations, while still subjecting the majority of self-defence claims to an imminence test.

4.6 Conclusions – Self-Defence

For many battered women who kill their abusive partners, self-defence seems to be the most appropriate defence to murder. It reflects that these women felt that they were protecting themselves from imminent, inescapable harm when they killed their abuser.

Unfortunately, courts have placed numerous roadblocks in the path of women trying to access this defence. Without significant reform, battered women will not be able to utilise the defence.

Among the reforms the discussion document recommends in Chapter 13, self-defence must be informed by women's experiences. Two specific recommendations include that: (1) the defence must reflect that threat of violence continues even if the abuser is passive and (2) battered women have a better ability to predict their abuser's violence than an ordinary person unfamiliar with the circumstances.

Fortunately, the recommended reforms do not change the nature of the defence but merely

make it accessible to battered women. While this necessarily stretches most countries' existing definitions of self-defence, courts should be able to adapt easily to the reforms because conceptually the defence remains the same. That several common-law countries have begun such adaptations shows that courts can develop self-defence to include battered women's experiences.

This discussion document recommends that self-defence be reformed to make it accessible to battered women who kill.

Chapter 5: Necessity Defence

A second existing defence that battered women who kill their abusers may be able to utilise with significant reform is the necessity defence. This is an independent defence in which a person is allowed to act in a way that is otherwise unlawful if compliance with the law would cause more harm than breaking it.²⁹⁹ It is a choice of the lesser of the two evils. What differentiates necessity from self-defence is that the victim under the necessity defence is not unjustly or unlawfully threatening the defendant and the victim can legally resist the defendant's actions.³⁰⁰ Furthermore, the defence seems intended to cover instances where the harm is to the victim's property, not to his or her person.

5.1 Elements of the Necessity Defence

To argue necessity requires a defendant to prove that she had a legal interest being threatened with imminent harm and that her unlawful action was intended to defend against that threat.³⁰¹

The necessity defence typically only applies if natural causes or something other than someone's unlawful act created the necessity. For example, if a storm threatened to destroy a boat anchored in a lake, the owner would be justified in docking the boat illegally on someone else's dock if it would likely stop the boat from being destroyed. If the boat damages the dock, the boat owner may be obligated to compensate the owner of the dock but would be acquitted of trespassing charges. The defence is not used for murder cases.

5.2 Necessity Defence as an Option for Battered Women who Kill

Proponents believe this defence will eliminate an explicit imminence requirement. Instead, they believe the defence allows a battered woman to defend herself when the necessity of a response arises, rather than waiting until the harm actually occurs. However, without the removal of the requirement that the necessity arises from something other than unlawful conduct, battered women who kill their abusers cannot use this defence. Furthermore, even if battered women relied on this defence, its realistic application would be nearly the same as self-defence.

5.3 Reforms of the Necessity Defence

5.3.1 Remove the requirement that a natural force or something other than an unlawful act caused the necessity

Once the requirement that something other than an unlawful act created the necessity is

removed, battered women will be able to use this defence. Proponents of a reformed necessity defence hope to create the same result as reforming the imminence requirement in self-defence to a necessity requirement.

This reform seems likely to accomplish very little, as it would make the necessity defence no different from self-defence. If self-defence remained an option, it would be difficult to determine when to use self-defence or this defence. Regardless of this, courts might be inclined to apply self-defence law to something that looks like self-defence. Unless this reform was accompanied by an explanation of how the necessity defence is intended to be different, nothing would change for these women.

Furthermore, this defence could then be used to justify homicide against a person who is not unlawfully attacking the defendant. The example of this is a real case. In *R. v. Dudley and Stephens*, [1884] 14 QB 273, Dudley and Stephens and their cabin attendant were adrift at sea with no drinkable water, food or land in sight. The only way they believed they could survive was for one of them to be killed for food for the others. Dudley and Stephens killed the cabin attendant and ate him. When they ultimately washed ashore, Dudley and Stephens were arrested and convicted of the murder of the attendant.³⁰² If this defence were extended to killing a person who has done nothing wrong, Dudley and Stephens would have been justified in eating the cabin attendant.

5.3.2 Statutorily allow women to access the necessity defence in cases of domestic violence

Additional criticisms of this reform include that it would be difficult for a court to ever say that taking one life to save another is the lesser of two evils.³⁰³ Secondly, courts should not be permitted to say that one life is worth more than another, which a lesser-of-two-evils standard would allow. Finally, this defence may not eliminate the requirement of imminence. As such a requirement is typically read into a necessity defence.³⁰⁴

No researched jurisdiction has adopted the necessity defence or any of its reforms in order to provide a new defence for battered women who kill.

5.4 Conclusions – Necessity Defence

While using the necessity defence for battered women who kill their abusers would reflect that these women felt they had no choice but to kill to protect their own lives, the defence is not the most appropriate for the situation. First, the defence would need to be reformed in a manner that would change its nature. The defence was intended to protect defendants who had no choice but to respond to a threat in itself not illegal or intended to harm the defendant. In contrast, self-defence was created expressly to allow a person to defend against another's illegal assaults or threats of assault.

To the extent that the defence could be reformed to give battered women access to it, in practice it would probably be interpreted using self-defence decisions. The necessity defence would require the same reforms as self-defence. For these reasons, this discussion document does not support using the necessity defence for battered women who kill their abusers.

Chapter 6: Battered Women's Syndrome Defence & Victim's Defence

The remaining two justification defences – Battered Women's Syndrome (BWS) defence and a victim's defence – are theories that have never been used as actual defences. Both rely on the premise that victims of domestic abuse should be able to argue a special type of self-defence. Because the average person understands little about the circumstances of abuse victims, these defendants would have difficulty accessing justice. A separate defence would force courts to recognise and understand victims' experiences. Where the State fails to protect them from serious harm or death, they should have the right to access more easily a defence that justifies their behaviour.³⁰⁵ No jurisdiction presently applies a separate BWS defence.

Both defences are based on traditional self-defence altered to accommodate victims of abuse. However, they focus on the psychology peculiar to victims of domestic violence. The psychological theory underpinning each of these defences is different.

6.1 Battered Women's Syndrome Defence

Proponents of a separate BWS defence argue that a separate defence is necessary to force the recognition that battered women's actions are a normal response to an abnormal situation.³⁰⁶ They make three general assumptions in advocating for this defence:

- (1) social context evidence based on a psychiatric theory that explains a woman's behaviour and evidence of a pattern of abuse are necessary to understand why a battered woman acted in self-defence when she killed her partner;
- (2) battered women who kill their abusive partners suffer from battered women's syndrome;
- (3) a woman's status as a battered woman alone does not justify killing her abusive partner.³⁰⁷

Proponents rely on BWS theory for a separate defence in hopes of capitalising on the broad acceptance of the psychological theory and its successes in helping acquit these women.

6.1.1 Battered Women's Syndrome

To understand how the defence would work, this discussion will begin with an explanation of BWS and how it has been used successfully in self-defence claims. A woman begins to develop BWS following the repetition of a three-stage cycle. The first stage of the cycle is the tension-building period in which the relationship begins to face some amount of difficulty, and includes minor violence against the woman.³⁰⁸ During this stage, a woman may become complaisant to try to placate her partner. The second stage involves an explosion of violence against the woman, which begins a woman's feeling of isolation and helplessness.³⁰⁹ In the third stage, the batterer shows remorse and loving contrition.³¹⁰

As the cycle repeats itself, women become more and more convinced that escape is

impossible. Eventually they will begin to suffer from learned helplessness, a condition of passivity caused by the woman's recognition that she has no power to stop or escape her partner's random acts of violence.³¹¹ The battered woman learns to cope with each individual attack against her, rather than focusing on changing her circumstances as a whole.³¹²

Social conditioning and limited financial resources only exasperate this feeling of helplessness. Women are taught that families must stay together, no matter how bad things may seem, and often have limited financial resources to support themselves and their children.³¹³ Learned helplessness and social conditioning then explains why a battered woman does not leave her abusive partner. Only when a battered woman feels she can no longer survive the abuse will she react violently to her abuser.³¹⁴

In practice, BWS has been used to bolster battered women's self-defence claims, often successfully. BWS has been used to explain why an attack by the deceased was imminent even when he was killed in a non-confrontational situation.³¹⁵ Much of this explanation depends on courts accepting that a woman becomes sensitised to the batterer's violent behaviour and because of that can accurately predict the violence, even if an unfamiliar observer could not see the signs.³¹⁶

BWS further explains why a woman did not leave the abusive relationship.³¹⁷ It has been used to explain why lethal force was necessary, particularly why a woman could not leave the relationship or go to the police.³¹⁸ It further helps courts understand why a woman's actions were reasonable by explaining to a court how the effects of abuse lead to these actions.³¹⁹

Finally, advocates have used this psychological theory to dispel myths about battered women that blame her for the abuse and result in unfavorable treatment by courts,³²⁰ including:

1. A woman must be a masochist if she stayed in the relationship;³²¹
2. The woman provoked the violence and therefore deserved it;³²²
3. If the violence was so severe, she would have left her partner, so the abuse must be exaggerated and the defendant must lack credibility;³²³
4. Reasonable people would not allow themselves to be abused;³²⁴ and
5. Spousal abuse only occurs among lower socio-economic groups and minorities.³²⁵

6.1.2 Elements Of A Battered Woman's Syndrome Defence

The author has not located specific elements of this defence. Since proponents consider it a special form of self-defence, presumably it would require the woman to first provide some evidence that she is a battered woman suffering from BWS. Once this is met, she would

need to prove that a reasonable battered woman would have believed that lethal force was necessary to defend against an unlawful attack likely to cause death or serious bodily harm. All social context evidence and evidence of a pattern of abuse would necessarily be admissible.

6.1.3 Advantages And Disadvantages Of A Separate Victim-Centered Defence

The advantages and disadvantages to a BWS defence need to be considered on two levels. The first is whether a separate defence for battered women who kill is the appropriate reform to provide better protection to them under the criminal justice system.³²⁶ The second level is whether BWS should be the basis for such a defence.

Perhaps the most important advantage of a separate victim-centered defence is that it would allow battered women to argue self-defence in all situations. It would force courts to consider women's experiences in a criminal defence law, correcting the inherent gender bias in the existing elements of self-defence. Also, a separate defence would expose the underlying gender inequality that causes the woman to kill her abuser.³²⁷

Another benefit is that abusive men could not use a separate victim-centered defence to justify killing women; nor could people who are not victims of domestic violence appropriate the defence. Finally, adoption of a separate defence would result in immediate changes in the criminal justice system.

The predominant criticism of a separate victim-centered defence is that it would focus on the psychological assessment of the woman (or victim) and away from the current preoccupation in self-defence – was the woman defending herself against an unlawful attack by the batterer.³²⁸ Instead of asking whether the batterer's behaviour led the defendant to protect herself through violence, a separate victim-centered defence dependant on psychological theories turns the inquiry on to whether the woman's peculiar psychology caused her to respond violently to her abuser.³²⁹ In doing so, it treats the woman's behaviour as deviant from what 'normal' people, particularly men, would do in the same situation.³³⁰ A separate victim-centered defence also seems to blame her for the need for self-defence.³³¹

One academic argued specifically about a BWS defence, but applicable to any psychological theory defence. Coughlin said that "it relieves the accused woman of the stigma and pain of criminal punishment only if she embraces another kind of stigma and pain: she must advance an interpretation of her own activity that labels it the irrational product of a mental health disorder."³³²

The decision of the Supreme Court of Kansas, *State v. Hodges*, 239 Kansas 63 (Supreme Court, Kan. 1986) (overruled), highlighted this problem when it wrote:

Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence.

They become disturbed persons from the torture.³³³

While the court was attempting to sympathise with the defendant, it painted a picture of a psychologically deviant person unable to control herself.

A related disadvantage is that a separate victim-centered defence treats men and other women defendants differently from victims of domestic violence, seeming to give victims the latitude to justify otherwise unreasonable behaviour.³³⁴ Victims would be perceived as being judged under a weaker standard of reasonableness, one that accepts that domestic violence victims cannot conform to ordinary standards of reasonableness.³³⁵

Critics further complain that a separate victim's defence obscures another issue – how gender socialisation and the domination of women generally are excluded from the experiences that inform legal defences.³³⁶ The gender bias a separate defence hoped to cure would remain in all other areas of criminal law.

Another criticism asks why the woman did not leave her abuser. A separate victim-centered defence "concedes that the typical person would have chosen to terminate the relationship long before the battering escalated to the point where the use of deadly force became necessary."³³⁷ Its creation suggests that the woman's behaviour was unreasonable, otherwise a separate defence would not be necessary.³³⁸

Being treated as unreasonable serves to bolster the stereotype BWS and other psychological theories of victims of domestic violence intended to fight – that women are incapable of "rational self-control."³³⁹ As the Justice Kirby of the Osland court warned:

Care needs to be taken in the use of language and in conceptualising the problem presented by evidence tendered to exculpate an accused of a serious crime on the grounds of a pre-existing battering or abusive relationship. As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms. Such categories tend to reinforce stereotypes. They divert application from the fundamental problem, which evokes a legal response to what is assumed to be the typical case.³⁴⁰

Reliance on psychological theories to argue a woman's reasonableness creates contradictions within a justification defence. It can lead courts to treat a victim's defence as nothing more than a diminished capacity defence, a point exasperated with BWS, which uses syndrome or medical language.³⁴¹ This reliance can further affect women in other areas of law, particularly custody cases.³⁴² Abusive men have argued that women suffering from BWS are not fit to care for a child, as they cannot care for themselves.³⁴³

Other critics argue that a separate victim-centered defence erodes personal responsibility and leads to the development of new "excuses" or psychological theories that justify otherwise unjustifiable behaviour.³⁴⁴ Moreover, a separate victim-centered defence will legalise revenge and vigilantism based on a psychological impairment.³⁴⁵

Finally, critics argue that simply because people have a common response to a particular stimulus does not make that response reasonable.³⁴⁶ For example, as one critic argued, simply because hallucinations are a common reaction to toxic drugs, does not make the hallucinations reasonable.³⁴⁷

6.1.4 Advantages And Disadvantages To Relying On Battered Women's Syndrome

The primary advantage to using BWS as the psychological basis for a special domestic violence self-defence is that BWS is widely accepted by courts around the world. As a result, BWS is treated as a credible scientific theory upon which courts can rely and it gives advocates a model from which to work. Secondly, BWS refutes many sexist assumptions that blame the woman for falling victim to abuse.³⁴⁸

The criticisms around using BWS as a basis for a legal defence fall into three areas: (1) BWS creates new myths about battered women; (2) the theory is susceptible to narrow application by courts, and (3) it does not accommodate change in the scientific community.

The first area of criticism is that in place of the old myths BWS counters, this psychological theory creates new ones. BWS emphasises the disabling effects of battering on women, rather than women's survival skills.³⁴⁹ It treats battered women as victims who suffer psychological impairment from their experiences. As Anne Coughlin wrote:

The defence itself defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defence is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.³⁵⁰

Moreover, particular reliance on a theory of learned helplessness stereotypes women as passive, emotional, excitable in a minor crisis, dependent, weak, fearful and gentle.³⁵¹ This further creates the impression that battered women who kill their abusers are irrational. In a concurring opinion, justices on the Canadian Supreme Court wrote:

By emphasising a woman's 'learned helplessness', her dependence, her victimisation, and her low self-esteem, in order to establish that she suffers from 'battered woman syndrome', the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important advancements.³⁵²

Critics also argue that learned helplessness and these stereotypes are inconsistent with lethal self-defence,³⁵³ which may harm the credibility of these defendants. The Supreme Court of Pennsylvania identified this argument as a myth in *Commonwealth v. Stonehouse*, 521 Pa. 41 (Supreme Court, Pa. 1989) after the prosecutor argued that the defendant must not have been suffering from BWS or she would not have fought back.³⁵⁴

Learned helplessness and these stereotypes are inconsistent with the idea that women can accurately predict danger from their abuser.³⁵⁵ How can one argue that battered women suffer from a psychological impairment that warps their perceptions of available alternatives and at the same time argue that they can accurately predict their abuser's behaviour and the need for self-defence?³⁵⁶

The very preciseness of the definition of learned helplessness, along with the stereotypes it creates, narrows the applicability of a BWS defence to a smaller portion of battered women who kill their abusive spouses.³⁵⁷ Women who do not fit the stereotype of the passive battered woman have difficulty accessing a defence based on BWS.³⁵⁸ The Wyoming Supreme Court upheld the conviction of a battered woman who killed her abusive husband in his sleep, noting:

... appellant hardly qualifies for what the literature describes as a battered wife. She was not afraid to contact the police, having done so on five prior occasions. Each time the police came to their residence, there was an argument between the parties over who had done what, who was at fault; and in each instance appellant was enormously drunk ... She had been married four times prior to this marriage to the deceased, three of those marriages ending in divorce. She knew how to get out of her marriage without killing Clyde Griffin. She could hardly have believed it necessary to kill him to terminate the relationship.³⁵⁹

Critics argue that in fact BWS was developed based on the experiences of middle-class white women to the exclusion of minority and poor women, making BWS less accessible for them.³⁶⁰ Minorities, poor and lesbian women are the most affected by a narrow application of the theory, as they first must counter the general stereotypes that they are aggressive women before they can claim to suffer from learned helplessness, even if they would otherwise meet the requisite element of passivity.³⁶¹

Learned helplessness further excludes women who responded to battering aggressively or who appear independent financially or socially.³⁶² Lawyers then struggle to shape defence claims of the women who do not fit the BWS profile.³⁶³ To the extent this defence remains a battered women's defence, male and child victims of domestic violence are also excluded from using the defence.³⁶⁴

The last area of criticism focuses on the long-term applicability of a defence based on BWS. Domestic violence researchers have begun questioning the scientific validity of BWS,³⁶⁵ which if deemed faulty science could destroy a victim's defence based on that theory. As Justice Kirby from the Australian High Court described:

Critics of the scientific foundation of BWS have described it as having 'no medical legitimacy', as failing to meet established criteria for 'scientific reliability', as being an unsubstantial concept' increasingly doubted in the United States courts where it originated and likely soon to 'pass from the American legal scene.'³⁶⁶

Finally, such a specific psychological theory will not accommodate new developments in the scientific community.³⁶⁷

6.1.5 Defence Of Others – BWS Defence

Although defence of others is a separate defence under which a person is justified in using force to protect another person, there is one case worth mentioning in the context of a battered woman's defence for women who kill in non-confrontational cases. In *Springer v. Kentucky*, 998 SW2d 439 (Supreme Court, Ky. 1999), a wife and her sister killed the wife's husband while he was sleeping. The wife and sister claimed they shot the husband to defend the wife and the daughter after the husband threatened to continue abusing the wife and to start sexually abusing the daughter. The wife depended on BWS in part to make out the elements of a self-defence claim.³⁶⁸

The Court refused a defence of others argument for the sister because the sister could not use BWS to justify her belief that the danger was imminent.³⁶⁹ It seems that had the wife successfully argued self-defence without relying on a psychological theory to justify her beliefs, the sister could have successfully argued defence of others.

6.1.6 Conclusion – BWS Defence

This document anticipates that the numerous disadvantages of a separate defence outweigh its benefits. The stereotypes and negative perceptions about battered women that might develop from a BWS defence counteract the benefits of ensuring that battered women's experiences are reflected in criminal defences under this defence.

The discussion document is particularly concerned with the appearance that a separate victim's defence holds battered women to a lesser standard of accountability than all other criminal defendants. While inherently there is no basis for such a claim, any such perceptions will create only more hurdles to the protection of battered women. Because existing criminal defences could be modified to allow battered women to access them, it seems unnecessary to risk the perception that battered women are not being made accountable for their crimes.

Even if a separate victim's defence could avoid the above risk, the theory underlying the BWS defence has numerous flaws that cannot be overcome easily. Most of the disadvantages described in section [6.1.4](#) provide sufficient reason to avoid relying on BWS. More particularly, the discussion document is concerned with the stereotyping of battered women as irrational and unreasonable It also gives courts reasons to exclude women who do not fit the stereotype. Comparative experiences with BWS seem to prove this.

Finally, the document is concerned that the defence depends wholly on one psychological theory, which means it does not leave room for adaptations to new scientific developments. This is particularly worrisome since psychologists are already questioning the theory's validity.

For each of these reasons, this discussion document does not advocate the adoption of a BWS defence.

6.2 Victim's Defence

The second of the two theoretical defences for battered women who kill their abusers is a victim's defence. As its name reflects, a victim's defence would be a separate defence accessed by all victims of domestic violence, not just women. The general theory of this defence is that the rules of self-defence should vary based on the relationship between the accused and the deceased or the person being protected and the deceased. This defence would disappear once the state properly protects the victims of domestic violence and self-defence becomes unnecessary.

Although the elements of the defence are not specifically tied to any one psychological theory of the effects of domestic violence on victims, proponents of a victim-centered defence that does not use BWS focus on a coercive control theory to support a self-defence claim.³⁷⁰ The defendant would use a the coercive control theory to explain how the batterer's conduct of utter control left the defendant no choice but to react violently to him/her, even if the batterer and defendant were not in the middle of a confrontation.³⁷¹ Like BWS, coercive control fills in the elements of self-defence.

6.2.1 Coercive Control Theory

Under the coercive control theory, the abuser's purpose is to control the life of his partner. He does this by isolating the victim from outside support and reinforcing the futility of the victim's efforts to leave or protect herself.³⁷² An abuser may even control the woman's life down to the most minor of details in order to prove his power.³⁷³

The premise of this theory is that the victim is a survivor trying to find mechanisms to handle the abuse and control by her partner. Research reflects that it may be control more than the violence that creates a psychological profile of a battered woman:

Work with battered women outside the medical complex suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family; children, and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of 'the battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.³⁷⁴

The victim's reaction to such coercive control is to fight for her autonomy.³⁷⁵ In this fight, she may be aggressive or passive or something in between, as there is no one model of behaviour under this theory.

There are several ways an abusive partner can maintain coercive control and his credibility. First, an abuser can use violence on a frequent or ritualised basis to convince the victim s/he has no escape from it or the abuser.³⁷⁶ Secondly, an abuser can take coercive control by using violence only when necessary and to the extent necessary to instil fear and

obedience in the victim.³⁷⁷ An abuser also can maintain coercive control over his/her partner through hostage taking – threatening a dependent or frail person whose welfare the victim of abuse would do almost anything to protect.³⁷⁸ Humiliation rituals may accomplish the same goal – for example, forcing a woman to get on her hands and knees and bark like a dog.³⁷⁹ Where the woman will not participate, she is threatened with violence.

Violence escalates the more the victim tries to escape.³⁸⁰ When a victim contacts the authorities, the abuser punishes her at the first opportunity.³⁸¹ Because of the efforts to which the abuser goes to create the appearance that the victim cannot escape the abuse, proponents argue that lethal self-defence can be justified by forcing the abuser to take responsibility for his/her actions.³⁸²

Coercive control theory does not require physical violence, only that the victim perceives that there is no means of escape as a result of the abuser's behaviour. In fact, some academics argue that these cases are related closely to self-defence in kidnapping cases: "where a person is being kept against her will by force and threats, she should not lose her right to defend herself simply because the kidnapper is her spouse or cohabitant."³⁸³

Coercive control theory can explain why a woman did not leave the batterer and why she was reasonable in believing that the abuse was inescapable. Lack of resources, knowledge of one's options and low self-esteem often lead battered women to attempt to change the abuser rather than leave the relationship.³⁸⁴ Once they do try to leave, battered women seek help from the State, shelters and family, but typically receive little help.³⁸⁵ This reinforces women's isolation and feeling that they cannot escape.³⁸⁶

This theory also assumes that victims have a greater predictive capability of their abuser's violence. One academic explained that in fact some abusers condition their victims to expect violence or abuse through inflections in his voice or other triggers, which would explain a superior predictive capability.³⁸⁷

6.2.2 Elements of a Victim's Defence

The elements of a victim's defence are that the defendant must be responding to a history of personal violence with the deceased, and that she believed it was necessary to defend herself or another against more violence.³⁸⁸ The Queensland (Australia) Domestic Violence Council recommended that the elements of such a defence look like this:

1. A person is not criminally responsible for an offence which in fact involves the commission of an assault upon another if the person charged has suffered domestic violence of such a nature, duration and extent at the hands of the other as to make the assault in all the circumstances justifiable; provided that the force used must not be disproportionate to the domestic violence.
2. The provisions of this section only extend to an assault which causes the death of the other where the nature, duration and extent of the domestic violence has caused grievous bodily harm or an apprehension of death or grievous bodily harm to the

person charged; and

3. Where a person unlawfully kills, under circumstances to which (2) does not apply, but where the person charged proves that he or she has suffered domestic violence at the hands of the other and the nature, duration and extent of the domestic violence so justifies, then the person shall be guilty of manslaughter only.³⁸⁹

6.2.3 Advantages And Disadvantages Of A Separate Victim-Centered Defence

See section [6.1.3](#) for a complete discussion of the advantages and disadvantages of a separate victim-centered defence.

6.2.4 Advantages And Disadvantages To Relying On Coercive Control Theory

The primary advantage of relying on a coercive control theory is that it cures many of the disadvantages of relying on BWS theory. Coercive control theory recognises as rational women's behaviour in defending against her abuser, even in a non-confrontational situation. She is treated as fighting for her survival, not as a victim.

Unlike BWS, this theory does not require battered women to prove learned helplessness or other characteristics that would lead courts and outsiders to believe battered women suffer from a psychological impairment. This further cures the stereotyping created by BWS – battered women no longer have to prove their passive, gentle or emotional nature. Coercive control theory erases contradictions between the expected passive nature of battered women and aggressive self-defence.

By eliminating the syndrome requirements and stereotypes inherent in BWS, battered women's reactions no longer need to fit into one mould, particularly one biased against sexual minorities and women of colour.³⁹⁰ Instead, a woman can respond aggressively, passively or somewhere in between and still benefit from this defence.³⁹¹ Equally important, a coercive control theory focuses on the behaviour of the batterer, shifting attention to how the batterer limited the defendant's options to protect herself.³⁹² A court's attention is turned towards the batterer's domination and acts of control and away from the battered woman's psychology.³⁹³

A final advantage to relying on a coercive control theory is that it could be used to defend women who respond to purely psychological abuse, as violence itself is not necessary to maintain the abuser's dominance.³⁹⁴

The main disadvantage of this theory is that no court has yet adopted it as a basis for proving elements of self-defence. Unless adopted statutorily as the proper theory through which to view battered women's self-defence claims, courts may refuse to use it. Furthermore, it remains unclear whether this theory will be used as effectively as BWS.

6.2.5 Comparative Experiences With a Victim's Defence

1 New Zealand

The New Zealand Law Commission rejected the creation of a separate defence for victims

of domestic violence.³⁹⁵ It preferred, instead, to reform self-defence law to make it more inclusive of battered women who kill their abusers.³⁹⁶ The Law Commission did not explain its reasoning.

6.2.6 Conclusions – Victim's Defence

As with the BWS defence, this document is concerned that a separate victim-only defence will lead society to perceive that the criminal justice system is holding battered women to a lower standard of accountability than other defendants. It is also concerned with the stereotyping that may result from a separate defence.

Chapter 7: Putative Self-Defence

7.1 Excuses

As a reminder, excuse defences limit criminal liability when society can understand, at least in part, the defendant's unlawful conduct. The act remains unlawful but the defendant is treated as less culpable. By contrast, justification defences treat an otherwise criminal act as lawful.

Four of the defences described below are part of the law of foreign jurisdictions, while three remain theoretical.

7.2 Putative Self-Defence

Putative self-defence is the first of the four existing excuse defences. It is closely related to the justification of self-defence. Putative self-defence applies when a defendant meets all the requirements of self-defence except the belief in the need for self-defence is unreasonable.³⁹⁷ None the less, society is willing to understand that based on those perceptions, the defendant honestly thought she was acting in self-defence and should not be punished as fully blameworthy.³⁹⁸ To punish someone for murder when they genuinely believed they were acting out of necessity seems grossly unfair. This defence reduces a charge of murder to manslaughter or voluntary/culpable homicide.

7.3 Elements of Putative Self-Defence

The elements of putative self-defence require a defendant to honestly, but unreasonably believe defensive force is necessary to stop an imminent attack against her. A Kansas statute provides an example of how the defence has been codified:

"Voluntary manslaughter is the intentional killing of a human being committed:
(b) upon an unreasonable but honest belief that circumstances existed that justified deadly force under" statutes for self defence, defence of others and defence of property.³⁹⁹

Seven American states and two Australian provinces statutorily adopted putative self-defence as an excuse available to criminal defendants. Two more American states recognise this defence under common law. In North Carolina, battered women who kill their abusive

partner in non-confrontational situations are per se disqualified from using this defence.⁴⁰⁰

7.4 Putative Self-Defence as an Option for Battered Women who Kill

Some proponents of putative self-defence argue it is the proper defence for battered women who kill in non-confrontational cases, primarily because it is an excuse defence. George Fletcher wrote: "Where there is no reasonable choice but to attack someone who is sleeping or otherwise in an acquiescent mode, the proper argument is not that the attack is right and lawful, but the actor is not properly subject to blame for acting on the instinct of self-preservation."⁴⁰¹ This defence better reflects the circumstances in which these women kill, providing her with some protection, without sacrificing the batterer's right to life.

Another 'pro' argument is that while this defence is closely related to provocation, which allows anger to excuse a loss of self-control, it does not require a battered woman who believes she acted in self-defence to try to fit her defence into a provocation framework. This is not an easy task. Finally, batterers cannot use this defence to justify killing women.

Critics of putative self-defence generally argue that this defence fits uneasily into the excuse category, as the woman would have retained her self-control and would have recognised right from wrong when protecting herself.⁴⁰² This defence misses the element of incapacity expected in an excuse defence.

Moreover, if this defence was the only one available to a battered woman who killed her abuser in a non-confrontational situation, this defence undermines the goals set by advocates of victims of domestic violence to provide the greatest protection to battered women who are forced to kill. Limiting a battered woman's choice of defence to putative self-defence would treat a woman's reaction to abuse as inherently unreasonable. It would leave some battered women in an untenable situation, forcing them either to continue to take the abuse, which may ultimately kill them, or be convicted of manslaughter or culpable/voluntary homicide.

Finally even if criminal law offered putative self-defence in addition to self-defence to battered women, courts could rely on the former to avoid the difficult issues in self-defence. It could give the court an easy way out of deciding whether the non-confrontational cases fit a self-defence claim.

7.5 Comparative Experiences with Putative Self-Defence

7.5.1 United States

A minority of American states allows a defendant to argue putative self-defence against a murder charge. One jurisdiction refuses to give battered women who kill in non-confrontational situations access to this defence.

1 Statutory Law

Seven American states have codified a defence of putative self-defence.⁴⁰³ Under three of these statutes, a person who has been reckless or negligent in believing that they needed to act in self-defence cannot be charged with murder, but only with crimes with an element of

recklessness or negligence.⁴⁰⁴ This means that a person who unreasonably believes she needed to defend herself by killing her partner cannot be charged with murder, as she does not have the requisite intent for murder. Instead, she can be charged with manslaughter or culpable/voluntary homicide for her reckless or negligent behaviour in failing to determine whether she actually needed to defend herself. The statutes of Kansas, Pennsylvania, and Wisconsin have the same effect as the prior three statutes, but are worded differently.

The North Dakota statute charges a defendant with voluntary manslaughter if she had an honest but unreasonable belief her behaviour was justified or excused.⁴⁰⁵ This statute extends the defence to include the possibility of a putative provocation defence.

As described under section 4.2.2, Maine takes a lenient approach towards defendants who honestly believe they were acting in self-defence. Unless the defendant's beliefs were grossly deviant from what a reasonable person would believe in the circumstances, the defendant can argue self-defence. Whose beliefs qualify as grossly deviant can only be charged for crimes involving negligence or recklessness.⁴⁰⁶

2 Case Law

There is very little case law on the application of putative self-defence to battered women who kill their abusers in non-confrontational situations. California allowed a battered woman who killed her abusive boyfriend while he was sleeping to argue both self-defence and putative self-defence.⁴⁰⁷ North Carolina, however, created a per se rule excluding these women from arguing the defence. The Norman court felt that these women could never have a reasonable belief that their circumstances necessitated lethal defensive force.⁴⁰⁸ The exclusion of battered women who kill in non-confrontational situations from putative self-defence makes little sense considering that the defence was intended for people who honestly but unreasonably believed defensive force was necessary.

7.5.2 Australia

1 Statutory Law

New South Wales and South Australia have adopted the doctrine of putative self-defence into their legislation for defendants who unreasonably used lethal self-defence.⁴⁰⁹

2 Case Law

According to a report by the New Zealand Law Commission, the High Court of Australia accepted a defence of putative self-defence for some period of time.⁴¹⁰ Eventually the High Court abolished the defence because of the difficulties of a six-step analysis the earlier decision required.⁴¹¹

7.5.3 England

The England and Wales Law Commission has introduced draft bills to Parliament that included putative self-defence as a new partial defence.⁴¹² These bills have not been enacted.⁴¹³

7.5.4 New Zealand

Presently, putative self-defence is not a legal defence to murder in New Zealand. The New Zealand Law Commission (NZLC) considered whether this defence should be created for women who fail the subjective reasonableness test on the basis that they used excessive force against the perceived threat. Ultimately the NZLC rejects the adoption of such a defence in favour of sentencing discretion for courts that would allow them to mitigate a defendant's sentence based on her honest but unreasonable belief in needing lethal self-defence.⁴¹⁴

Should New Zealand fail to adopt sentencing discretion, the Law Commission believes that putative self-defence may be appropriate for New Zealand law. It views this defence as more appropriate than provocation or diminished capacity for battered women who believe they are acting lawfully in protecting themselves.⁴¹⁵ Furthermore, the concepts would be familiar to courts because they are closely related to self-defence.⁴¹⁶

7.6 Conclusions – Putative Self-Defence

By itself, putative self-defence is an insufficient solution to the inequities and difficulties battered women face accessing legal defences. It would treat women who kill in all but the confrontational cases as unreasonable.

This defence, however, would be an ideal companion to the reform of self-defence. Not all battered women who kill their abusive partners deserve a self-defence claim. Where the woman acted unreasonably, but otherwise believed she acted in self-defence, she should be allowed to use putative self-defence to mitigate both the charge and the sentence for her crime.

As described above, there is a real risk judges will use the existence of this defence to justify never making the hard decision that a battered woman who kills in a non-confrontational situation deserves acquittal on the basis of self-defence. Reforms need to make clear that a woman reasonably may have been defending her life even in a non-confrontational situation.

Chapter 8: Provocation Defence

The provocation defence is the best known of the excuse defences. This defence partially excuses a defendant's unlawful act when the victim provoked her into reacting with violence. The limit on this defence depends on the intensity of the emotions the provocation evokes. The stronger the emotion, the more likely the person acted under provocation.⁴¹⁷ The underlying provoking behaviour that caused a violent response seems to be irrelevant to the analysis beyond determining how much it likely provoked the defendant.

The theory behind this defence is that society is willing to accept that a victim's adequate provocation is an external force that removed the defendant's self-control.⁴¹⁸ It recognises that passionate responses to provocation are human weaknesses⁴¹⁹ and that "emotion hinders the individual's ability to act reasonably."⁴²⁰ The loss of self-control removes some

of the defendant's blameworthiness.⁴²¹ The provocation defence places at least some measure of blame on the victim, which removes more of the defendant's blameworthiness.⁴²²

Through this defence, society is willing to understand certain of the defendant's emotions, while continuing to condemn taking action into her own hands. This defence also recognises that defendants who respond in extreme emotion are not likely to be deterred from an unlawful act because they lack self-control. In these situations, it is less necessary to punish as harshly in order to deter others, as by definition a person claiming provocation lacks the necessary rationality for deterrence to work.⁴²³

8.1 Elements of a Provocation Defence

To succeed on a provocation defence, a defendant must prove: (1) that she acted in response (2) to a reasonable provocation (3) that did in fact provoke her; (4) that a reasonable person would not have cooled off in the interval between the provocation and the fatal blow, and (5) that the defendant actually did not cool off.⁴²⁴

Battered women who kill their abusive partners can have great difficulty accessing the provocation defence. Several elements create large obstacles for these women.

8.1.1 A Provocation

A battered woman must prove she killed her partner in response to his provocative act. While this is an easy element to prove in confrontational cases, a battered woman who kills in a non-confrontational situation faces some of the same problems she encounters under the unlawful act requirement in self-defence. Courts will be looking for an apparent overt act that caused the woman to lose control. Without context evidence, a court may not recognise that something as minor as a gesture can be very threatening or that cumulative violence may have been the provoking act.⁴²⁵

8.1.2 Cooling Off

The next element requires showing that a reasonable person would not have regained control, or cooled off, in the time period between the provoking act and the lethal response. The cooling-off element ensures that a person reacts unlawfully out of a "sudden and temporary loss of self-control."⁴²⁶

Like the imminence requirement in self-defence, the cooling-off requirement serves as a significant barrier to battered women who kill in non-confrontational situations. As a temporal requirement, the cooling-off period has traditionally been interpreted narrowly, assuming that a reasonable person would have cooled off within a short span of time.⁴²⁷ The doctrine does not accommodate reactions in fear, which may not be immediate and which remain long after the provoking act ended.

More and more jurisdictions are recognising that people respond to provocation differently.⁴²⁸ These courts are starting to accept that often in a battering situation the cumulative effects of domestic violence result in a slow burn of emotions, rather than a sudden and

temporarily loss of self-control. Under these circumstances, a person might not have regained self-control shortly after a period of violence or a threat of continuing abuse.

8.1.3 Reasonableness

Reasonableness is raised in two elements of this defence – (1) whether a reasonable person would have been provoked by the victim's provocative act, and (2) whether a reasonable person would have cooled off in the time between when the provocation occurred and the defendant's response. The purpose of the reasonableness requirement is to protect against condoning violence that is an unreasonable response to the victim's behaviour in addition to stopping revenge or vigilante killings. This requirement is intended to give some measure of protection to a person who provokes another.

As with self-defence, there are four types of reasonableness tests available.⁴²⁹ Courts, however, seem to use all but the particularising mixed objective-subjective test.

The reasonableness standard (see section [2.1.4](#)) of self-defence is applicable to this defence, specifically the question of context evidence. Without evidence of the history of violence and without expert testimony explaining the effects of domestic violence on the defendant, (1) a battered woman may not be able to prove her response to an otherwise innocuous act or minor act of violence was reasonable, and (2) a court may not understand how a battered woman would not have cooled off in a span of hours or longer.

8.1.4 Defendant Did Not Cool Off

Under the next element, the defendant must prove she did not regain control before she killed the provoker. The purpose of focusing on whether a defendant cooled off after the provoking act is to prevent people from killing a provoker in revenge or from executing self-help. While society is willing to understand a loss of self-control, it is not willing to accept coldly calculated revenge or vigilantism as an excuse for murder.

Battered women who kill their abusive partners in non-confrontational situations may not even reach this element if a court determines that a reasonable person would have cooled off by the time the defendant acted. Both the objective and putative imminence situations will have little difficulty meeting this element because there is little to no time lapse between the provoking act and the defendant's response.

In non-confrontational cases, courts will consider whether the woman seemed to plan her violent response to determine whether she cooled off. The more that time passes, the more the woman's actions look calm and deliberate. Additionally, because many of the battered women who killed in non-confrontational situations use this defence when self-defence is unavailable to them,⁴³⁰ many acted with full control before killing their partner, which makes proving this element of defence nearly impossible (and perhaps should). For example, if they experience an escalation in violence, some battered women choose to arm themselves. This is in case self-defence becomes necessary. This can appear to be too cold and calculated to be treated as a sudden and temporary loss of self-control.

8.2 Provocation Defence as an Option for Battered Women who Kill

The predominant advantage of using the provocation defence for battered women who kill their abusive partners seems to be that it provides a defence for battered women when self-defence is unavailable, mostly for women who kill in non-confrontational settings or those believed to have used excessive force.⁴³¹ Because courts often treat battered women who kill in non-confrontational settings as unreasonable, this defence accepts she may have lost self-control and thus will not be per se excluded from it.

A provocation defence also recognises that a woman's reaction to abuse was in fact reasonable, even if not justifiable.⁴³² It accepts that a "normal" person in the shoes of the battered woman could have been similarly provoked into killing her batterer. The provocation defence, unlike putative self-defence, is accepted universally.⁴³³

Many of the disadvantages to battered women relying on a provocation defence recommend the eradication of the defence.⁴³⁴ Criticisms of this defence focus on three different areas: (1) the inherent gender bias in the defence; (2) the inappropriateness of this defence for women who acted in what is essentially self-defence; and (3) the irrationality of the defence.

The first area of criticism argues that a provocation defence is inherently gender biased. The provocation defence is based on a male view of what is understandable and does not include female experiences in this defence. The classic example of provocation is the man who kills his wife after finding her having sex with another man – an honour claim. Courts almost universally accept (or accepted) adultery as a sufficient provocation to excuse a defendant who killed his partner.

As can be seen from the prototypical provocation defence situation, the defence implicitly condones violence against women.⁴³⁵ As Emily Miller described: "There is a disturbing argument that the loss of control claimed by the voluntary manslaughter defendant echoes and reinforces the loss of control claimed by the domestic battery defendant."⁴³⁶ The defence condones, at least in part, male rage against women, blaming her for his lack of control.⁴³⁷ Currently, men have been able to argue a provocation defence after having killed their partners for nagging them, for leaving them or after having killed a gay man for making non-violent sexual advance.⁴³⁸

Furthermore, critics argue that the only emotional response typically thought to trigger a 'sudden and temporary' loss of control is anger. Fear is usually excluded from the defence.⁴³⁹ Excusing or understanding anger derives from male socialisation, as men are socialised to respond in immediate anger, not women.⁴⁴⁰ The ease with which men who kill adulterous partners access the defence and the difficulties battered women have using it highlights that male jealousy is considered reasonable while women's cumulative terror is not.⁴⁴¹ The exclusion of fear from the defence ignores female experiences with domestic violence and serves as further evidence of the gender bias in this defence.

The next area of criticism focuses on the inappropriateness of this defence for women who acted to save themselves. The provocation doctrine requires a woman to argue she lost

control, though typically women believe they were acting reasonably when taking defensive action.⁴⁴²

Other criticisms say the doctrine is irrational as it allows the defendant to punish the victim when the law is not able to do so. Although adultery is no longer illegal, the defendant is partially excused for killing an adulterer. Victoria Nourse highlights this problem in the context of domestic violence as follows:

Whereas men's claims of provoked distress may be triggered by lawful and protected rejections (e.g., filing for a divorce), women's claims of self-defence are typically triggered by something the law unequivocally condemns (i.e., violence). As a result, the combination of these doctrines can, in some jurisdictions, lead to a cruel dilemma for the battered woman: If she leaves and is killed, the law may say that the very act of leaving provoked her killer's distress. But if she acts on her own fears and kills, the law may question her claim for compassion precisely because she did not leave.⁴⁴³

Furthermore, critics argue the provocation defence inquiry places too much emphasis on the intensity of anger, rather than focusing on whether anyone should respond violently to the provocative act.⁴⁴⁴ As can be seen from the examples of when men have invoked the provocation defence to excuse femicide, this defence benefits people with short tempers, jealous and selfish natures to the detriment of mild-mannered, more moderate people.⁴⁴⁵ It discourages people from taking responsibility for their anger.⁴⁴⁶ Finally, it can be and is often used by batterers to justify violence against women.

8.3 Reforms

8.3.1 Abolish the provocation defence

Before discussing reform possibilities to make the provocation defence more accessible to battered women who kill their abusive partners, it is necessary to discuss efforts to abolish the doctrine. Many feminists are arguing for the abolition of the provocation doctrine precisely because it is considered a gender-biased defence that justifies femicide.⁴⁴⁷ As described above, men have argued a provocation defence when they have killed their wife or girlfriend after finding her having intercourse with another man, after she tried to leave him, and because she nagged him. Many of these arguments have been successful. Men also have used a provocation defence to excuse killing a gay man for a non-violent sexual advance. None of the underlying "provocations" are illegal and it seems unjust to allow male rage to excuse or partially excuse this behaviour.

Other feminists argue that a provocation defence must be maintained because it is often the only available defence for battered women who kill their partners.⁴⁴⁸ Without it, more women would be convicted of murder because they are not allowed to argue self-defence. There are few other options available for these women for any mitigation of sentence. Only if self-defence is reformed or some other defence is created to include the experiences of battered women who kill their abusive partners should the provocation doctrine be abolished. Also, abolishing this doctrine could increase the acquittals of men who lose

control because courts may not be willing to stomach convicting them of murder.⁴⁴⁹

8.3.2 A provocation

1 Eliminate certain underlying provocation that can serve as a basis for this defence

The first reform option suggests that rather than focus solely on the intensity of a person's emotions to determine whether she lost control, the inquiry needs to include whether the underlying provocation should be one that excuses otherwise unlawful behaviour.

Proponents advance that attempts by men to control their partners should never serve as a reasonable provocation.⁴⁵⁰ Reformers would like to eliminate this defence for men who claim to have been provoked by their partner's adultery, by their partner's attempt to leave, and by homosexual advances.⁴⁵¹ These types of reform would eliminate some of the gender bias inherent in the defence and recognise that femicide should not be excused so easily.

Several American states have statutorily reformed which underlying provocation are acceptable bases for the defence.⁴⁵² One state excludes insulting words, gestures, or hearsay reports of a victim's conduct. Another expressly refuses to allow the use of this defence if the provocative act was discovery of the partner's having sex with another person. Two other states do not allow anger to serve as the basis for this defence.

2 Require the provoking act itself to be illegal

As an alternative to the above proposal, some reformers argue that the underlying provoking act needs to be illegal in order to excuse a violent response to it.⁴⁵³ Society should 'understand' anger only where the law could act in anger.⁴⁵⁴ This reform would stop this defence from being used to excuse femicide or violence committed based on prejudice.⁴⁵⁵ Also, it would remove the subjective judgment of whether the underlying provoking act deserved some punishment.

A disadvantage to this reform is that words alone likely could not serve as the provocative act.⁴⁵⁶ Where this is important is in the context of a person who loses control in response to racist insults or where a woman responds to an insult or gesture knowing it will lead to violence.⁴⁵⁷ Where hate speech itself is illegal, this disadvantage generally disappears. For women, the only way to get around this problem is if the pattern of abuse is admitted to explain why she was responding to an actual illegal act – domestic violence — which may not be an easy argument.

3 Allow a pattern or the cumulative effects of abuse to serve as a reasonable provocation

Another proposed reform is to recognise a pattern of abuse or the cumulative effects of abuse as a sufficient act of provocation.⁴⁵⁸ This reform would allow women to argue this defence even in the face of only a minor incident that a reasonable person otherwise might not understand to have been 'the last straw.'⁴⁵⁹ It would also allow women to explain why a gesture or facial expression is sufficient to prove a provocative act. This change could open up the defence to include battered women's experiences and would neutralise some of the gender bias inherent in the defence.⁴⁶⁰

The primary drawback of this approach is that it is hard to determine when a woman has

reached that breaking point or when she is acting in calculated revenge.⁴⁶¹ Is the fact that she finally responded by killing her partner sufficient to prove a loss of self-control or would this just be letting the woman's unlawful act on its own prove the defence? If the latter, then couldn't a woman simply act in revenge at will?

Canada, Australia and many jurisdictions in the United States accept that provocation can be based on the cumulative effects of battering or picked up from a pattern of abuse.⁴⁶²

4 Expand acceptable emotions in response to provocation to include fear

Reformers also recommend expanding the provocation doctrine to include responses in fear.⁴⁶³ Through this change, reformers hope to include women's experiences with violence in the legal defence.⁴⁶⁴ Proponents argue that fear is an equally strong emotion that can result in a loss of self-control and that often anger and fear are linked.⁴⁶⁵ By recognising fear, the provocation defence doctrinally will move closer to a defence of putative self-defence.⁴⁶⁶ In a sense, both would then be arguing the woman thought she was acting in to protect herself, but that her belief was unreasonable.

Expanding the list of emotions protected by the provocation defence to include fear would allow for reactions other than a sudden loss of control to be excused. This may be an advantage or disadvantage. The advantage is that women's responses in fear would be covered despite a time lapse before she took actions that might otherwise seem calculated. The disadvantage is it is much more difficult to determine whether the defendant was actually acting under the force of the provocation.⁴⁶⁷ The signs of a response in fear are far less obvious.⁴⁶⁸

5 Allow cumulative fear to serve as a basis for acting in response to provocation

This reform combines the above two reforms. It would allow a defendant to argue that a history of abuse is the provocative act and that she responded in fear, which in combination is excusable. Proponents argue this would allow battered women equal access to the defence.⁴⁶⁹ This type of reform, however, could leave open the possibility that cumulative rage will be accepted as an appropriate response to a series of provocative acts, which could benefit batterers.⁴⁷⁰

6 Change the provocation requirement to one of an extreme emotional disturbance

To open the defence to battered women who kill their abusive partners, some reformers suggest that courts should not look at whether a person was provoked. Instead, courts should consider whether a person was responding to an extreme emotional disturbance caused by the victim. By doing so, this defence would recognise and partially excuse a broader range of emotions including fear.⁴⁷¹ Proponents argue that this change would begin to incorporate women's experiences with violence.

The disadvantages to this approach include its promotion of behaviour that society otherwise would not want excused.⁴⁷² Men could use this defence to excuse femicide on the basis of idiosyncratic moral values or because their culture requires it – such as a brother killing his sister for violating religious law by having sexual relations outside marriage. This reform would continue the focus on the intensity of the defendant's emotion and away from whether the victim's conduct is the type society would want to allow

individuals to punish.⁴⁷³

Critics also argue that this defence reinforces the view that male aggression is understandable, as it protects sudden intensity of emotion as a result of something the victim did. The beneficiaries are largely men who are socialised to respond more quickly in flashes of anger.

Many jurisdictions in the United States have adopted this reform, the results of which highlight the disadvantages of the defence.⁴⁷⁴ The reform results in vague and inconsistent verdicts as juries "give voice to their own prejudices."⁴⁷⁵ How juries feel about the underlying provocative act seems to determine the outcome. It has the same practical effects as a provocation defence – men benefit and women do not – as it remains premised on masculine and traditional notions of provocation and excuse.⁴⁷⁶ American courts have allowed men to argue this defence when the impetus for the rage was a restraining order that stopped the defendant from seeing his wife and when the woman no longer wanted to live with her partner.⁴⁷⁷

8.3.3 Cooling Off

1 Recognise that response to provocation can be a slow burn of emotions

This next reform relaxes the temporal element of the cooling-off requirement. It reflects that some people respond to provocation after a slow burn of emotions that eventually flares. This reform is intended to counter the requirement of a sudden response to the provocation. Reformers argue that men have been socialised to fight immediately after being provoked, which this suddenness requirement reflects.⁴⁷⁸ By recognising a slow burn of emotions, this reform recognises women's socialisation towards passivity.⁴⁷⁹

Critics say that if this reform is intended to reflect women's passive socialisation, equality concerns could require the defence to accept men's aggressive socialisation.⁴⁸⁰ This could allow men to 'stew' in jealousy over a longer period of time.⁴⁸¹

Furthermore, women who kill in non-confrontational situations may not be able to use this defence even with the reform. The longer the time lapse, the more courts will believe the defendant coolly planned to kill her partner, despite arguing a slow burn of emotions.⁴⁸² Or, on this same basis, the provocation defence could lose much of its safeguard that keeps defendants who acted while in full control from using this defence.⁴⁸³

2 Relax the time frame for cooling off

A closely related reform to the one above is to relax the time frame in which a person is expected to respond to provocation. This reform is intended to achieve the same goal as relaxing the imminence requirement under self-defence. It also reflects that different people react differently to provocation. The advantages and disadvantages of this reform are identical to the reform described directly above.

8.4 Comparative Experiences with the Provocation Defence

8.4.1 Canada

In Canada, battered women who kill their abusers in non-confrontational situations can argue a provocation defence.

1 Statutory Law

Canada's provocation statute adopts one of the reforms described above: it makes inaccessible the defence of provocation when the victim was acting within her legal rights. The pertinent part of the statute reads: "no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do."⁴⁸⁴ This means men could not justify killing a partner for trying to leave the relationship, for nagging or for having sexual relations with another person.

2 Case Law

The Canadian provinces of British Columbia and Ontario, in a few cases, have limited a battered woman's punishment for killing her abusive partner to non-custodial sentences when they have pleaded guilty to manslaughter. This seems to be in recognition that battered women do not pose a threat of recidivism.

In *R v. DEC*, [1995] BCJ No. 1074, a battered woman killed her husband after he sexually assaulted their daughter. The woman pleaded guilty to manslaughter. The Superior Court of British Columbia gave her a one-year suspended sentence. While it is unclear whether the woman pleaded provocation manslaughter, this decision reflects that in at least some cases, Canadian courts are willing to punish battered women who kill their abusers with non-custodial sentences.

The Court of Justice in Ontario also showed its willingness to give battered women convicted of manslaughter non-custodial sentences. In *R. v. Ferguson*, [1997] OJ. No. 2488, the Court ordered a non-custodial punishment for a battered woman who shot her abusive husband while he was lying on the couch.⁴⁸⁵

8.4.2 United States

Several of the reforms suggested earlier have been adopted into American law. Some of these changes were intended to protect against excusing femicide, while others were intended to create a more inclusive defence. Limited case law exists for the treatment of battered women who kill in non-confrontational situations under the doctrine of provocation. It appears that most of these defendants argue self-defence rather than a provocation defence.

1 Statutory Law

Statutory reform of the provocation defence centers on two areas: changing the types of provoking acts that serve as the basis for the defendant's claim and recognising emotions other than anger that provocation elicits. Alaska eliminated "insulting words, insulting gestures or hearsay reports of conduct engaged in by the victim" from the type of acts the defendant can use to excuse her behaviour.⁴⁸⁶ Maryland excludes discovery of the victim in

an adulterous relationship,⁴⁸⁷ a reform feminists champion.

Other states have reformed the emotions that the defendant can claim resulted in her loss of control. Oklahoma and South Dakota no longer excuse a defendant's anger in response to the provoking act; fear appears to be the appropriate emotion for the excuse.⁴⁸⁸ In contrast, Maine's statute is more inclusive, allowing defendants who respond in "extreme anger or extreme fear" to argue provocation.⁴⁸⁹

Eight states have codified the Model Penal Code reformulation of provocation to excuse a defendant who acted under an extreme emotional disturbance.⁴⁹⁰ Most of these statutes require that the defendant have a reasonable excuse for the disturbance. They apply a mixed objective-subjective standard based on the circumstances of the defendant, as she perceives them to be to determine the reasonableness.

Finally, North Dakota's statute seems to allow an argument for putative provocation defence. The statute creates a separate defence that mitigates a charge when "the facts are such that his conduct is necessary and appropriate for any of the purposes that would establish a justification or excuse under this chapter, even though his belief is mistaken."⁴⁹¹

2 Case Law

Very few published opinions on battered women who kill their abusive partners fall under the defence of provocation. At least two of the jurisdictions that reached the issue allow women to respond to the cumulative effects of battering through a slow burn of emotions. One case involved an extreme emotional disturbance defence; another arose under traditional provocation law.

In the case *Springer v. Kentucky*, a wife and her sister killed the wife's abusive husband after he threatened to further abuse his wife and to begin sexually abusing their daughter. They killed him while he was sleeping. The Court considered the provocation defence, which in Kentucky has an extreme emotional disturbance standard. The Court held that a non-confrontational case could qualify for the defence, despite the defendant's delay in responding to the provocation. It wrote: "There is no definite time frame involved, so long as the triggering event remains uninterrupted ... extreme emotional disturbance 'may be more gradual than the flash point normally associated with sudden heat of passion.'"⁴⁹² The court concluded, "The fact that the triggering event may have festered for a time in Springer's (defendant's) mind before the explosive event occurred does not preclude a finding that she killed her husband while under the influence of extreme emotional disturbance."⁴⁹³

The Supreme Court of Pennsylvania reached a similar decision under traditional provocation doctrine. In *Commonwealth v. Stonehouse*, 521 Pa. 41 (1989), a woman was convicted for the murder of an ex-boyfriend who stalked her for years, beating her periodically, damaging her car and breaking into her house nearly every time she went out socially. The abuse and stalking caused the defendant to stop leaving her house other than for work for a period of eight months at one stage. Both the victim and the defendant were police officers. When the defendant would call the police after an incident with the victim, the police refused to help because it would involve arresting their friend. On the night he

was killed, the deceased broke into the defendant's apartment and struggled with her for a firearm. The defendant shot the victim, when he was walking out of her apartment building.

The Supreme Court granted the defendant a new trial for ineffective assistance of counsel for not requesting proper jury instruction on self-defence and provocation.⁴⁹⁴ The Court wrote that there was sufficient evidence to support that the defendant was provoked into killing the victim based on the cumulative effects of the victim's physical and psychological abuse of the defendant.⁴⁹⁵ It held that a fact finder must consider whether the defendant responded reasonably to the pattern of abuse, rather than just to the event of the evening.⁴⁹⁶

In contrast, an Arizona Supreme Court decision ruled that battered women who kill in non-confrontational situations could not meet the requirements for a provocation defence. Although the Court might reach a different conclusion under the Arizona statute creating a reasonable battered woman standard, the decision is instructive in its reasoning for excluding these defendants.

In *State v. Reid*, 155 Arizona 399 (1987), the Supreme Court considered a case of an abused child who killed her abusive father while he was sleeping. The defendant claimed that the look on her father's face before he went to sleep told her that he would abuse her when he woke up, as it was the look he usually had before becoming violent. The Court ruled that the defendant could not argue provocation first because she was not responding to a sudden quarrel or any other provocation by her father.⁴⁹⁷ Secondly, she must have cooled off or regained self-control in the two and one-half hours that passed between the time he went to sleep and when she killed him.⁴⁹⁸

8.4.3 Australia

Battered women who kill their abusers in non-confrontational situations benefit from a relaxation of certain provocation requirements in some of Australia's state and territorial statutes and from case law.

1 Statutory Law

One Australian state and one Australian territory have adopted identical statutes that loosen provocation requirements in ways that will allow better access to the defence for battered women who kill their abusers in non-confrontational situations. New South Wales and the Australian Capital Territory allow defendants to use the provocation statute even if the defendant's response was not sudden,⁴⁹⁹ essentially leaving room for a defendant to argue that her emotions were on a slow burn until the time she acted.

2 Case Law

Battered women who kill in non-confrontational situations have been able to benefit from a provocation defence in Australia. The defendant in *Osland v. Queen*, [1998] HCA 75 (High Court, Australia.) also argued a provocation defence. All of the judges implicitly accepted that a battered woman who kills her abuser in a non-confrontational situation might qualify for a provocation defence. All of the judges accepted that evidence of the psychological effects of battering and a history of abuse is relevant to any such defence.

Three of the *Osland* judges explicitly accepted that BWS and a history of abuse could help

explain why a battered woman was provoked by an act that an 'ordinary' person might not find offensive.⁵⁰⁰ As Justices Gaudron and Gummow explained:

[There] may be cases in which a matter of apparently slight significance is properly to be regarded as evidence of provocation when considered in light of expert evidence as to the battered woman's heightened arousal or awareness of danger. And evidence of that may also be relevant to the gravity of the provocation, as may the history of the abusive relationship.⁵⁰¹

Courts in New South Wales and Victoria also accepted battered women's defences of provocation where they killed their abusers in non-confrontational situations.⁵⁰² In the New South Wales decision, however, the court used the several hour time-lapse to justify its decision that the battered woman did not deserve a non-custodial sentence.⁵⁰³

8.4.4 England

Based on an overview of case law, British women who kill their abusers in non-confrontational situations rely more heavily on a provocation defence than self-defence.

1 Case Law

British courts allow battered women who kill in non-confrontational situations to claim a provocation defence. The Criminal Court of Appeals in *R v. Thornton*, [1996] 2 All ER 1023, allowed expert testimony on the effects of battering to explain why the battered woman responded as she did to what seemed like a minor provocation. The court also allowed the testimony to be used to explain the characteristics of a battered woman when judging reasonableness.⁵⁰⁴ The Court accepted that a woman may respond with lethal force to the "last straw," and that a jury might accept this loss of control as reasonable in the circumstances.⁵⁰⁵

In its earlier decision *R v. Ahluwalia*, [1992] 4 All ER 889, the Criminal Court of Appeals also accepted that a battered woman may respond to a provocation in a state of slow burn. It concluded, however, "the longer the delay and the stronger the evidence of deliberation on the part of the defendant," the more difficult it will be for the woman to claim provocation.⁵⁰⁶

8.4.5 New Zealand

In New Zealand, battered women who kill their abusers in non-confrontational situations can access the provocation defence.

1 Case Law

According to the NSLC, New Zealand courts have allowed battered women who kill in non-confrontational situations to argue provocation on the theory that their response to the provocation was a slow burn of emotions.⁵⁰⁷ These courts have also accepted that a defendant may be responding to a minor incident as the "last straw" of cumulative violence.⁵⁰⁸

2 New Zealand Law Commission recommendations

The NSLC recommends abolishing all excuse defences and replacing them with sentencing discretion. Without doing this, it is unclear whether the NSLC would keep the provocation defence, as it stated:

The Commission also considers that the defence diverges from modern values in some significant respects. The defence arose at a time when society supported an angry retaliation for slights against a man's 'honour'. Despite later developments, this historical genesis can still be seen in the modern defence. This is apparent in the way in which the defence has been used to partially excuse killings arising from sexual jealousy and possessiveness, or in response to perceived insults to a man's 'honour'.⁵⁰⁹

8.5 Conclusions – Provocation

Provocation sets up a difficult conflict for battered women advocates. While it may be the most accessible defence for battered women who kill abusers, men frequently use it to justify femicide.

With significant reform, the provocation defence should be used for the benefit of battered women who kill their abusive partners alongside self-defence and putative self-defence. It is an appropriate defence for women who lost self-control in response to abuse, but did not feel their lives were at risk.

The most significant reform to the defence must be to require the underlying provoking act to be illegal. By doing this, men will not be able to justify femicide. It removes from the judge the discretion to respond to biases of male conditioning towards violence and aggression for perceived wrongs.

This alone is insufficient to end the multiple injustices and inequalities in the judicial treatment of this defence. To make this defence accessible to battered women who kill, the law and courts need to recognise the unlawful act could be a gesture or words that signal an impending illegal act – domestic violence. Another significant reform requirement is for the law to recognise that people react to provocation differently. Not all respond immediately or in anger. With these reforms, it is possible to eliminate the gender-biased aspects of the defence as well as men's ability to justify femicide.

Chapter 9: Diminished Capacity / Non-pathological Criminal Incapacity & Insanity

9.1 Diminished Capacity/Non-pathological Criminal Incapacity

The defence of diminished capacity, also known as non-pathological criminal incapacity, excuses either partially or fully a defendant's action when it results from a temporary, severe incapacity that disables the defendant's ability to determine right from wrong or maintain self-control in a particular situation.⁵¹⁰ Society is willing to understand that the action was an abnormal occurrence caused by an abnormal mental situation, unlike responses in anger to a provocation, which is an expected part of human behaviour.⁵¹¹ The temporary disability mitigates the defendant's blameworthiness.⁵¹²

9.1.1 Elements Of A Diminished Capacity Defence

A diminished capacity defence argues that a defendant engaged in unlawful conduct as a result of suffering from a temporary condition, caused by physical or psychological trauma that the mind of an ordinary person would not, in all likelihood, have withstood and that is not likely to recur.⁵¹³

A defence of diminished capacity seems to be the most common defence as well as the most successful for battered women who kill their abusive spouses in England,⁵¹⁴ and it is commonly argued by battered women in Australia. In England, women convicted of manslaughter on the basis of diminished capacity have received non-custodial sentences, although not in the majority of cases.

9.1.2 Diminished Capacity As An Option For Battered Women Who Kill

The advantages of relying on diminished capacity for battered women who kill their abusers, particularly in non-confrontational situations, is it mitigates a charge of murder when no other defence is available and it may allow for non-custodial punishment. Some academics argue that this is the appropriate defence for women suffering from BWS or from any other psychological disturbance resulting from abuse as it reflects the true nature of their action. At the time they killed, the effect of the abuse diminished their capacity to see right from wrong.

The disadvantage of relying on this defence, as with many of the other defences, is that it brands the battered woman as irrational. It treats her as suffering from a mental impairment that caused her to lose control, when in fact she acted in the only rational way left open to her.⁵¹⁵ Furthermore, batterers can use this defence to justify femicide.

9.1.3 Comparative Experience With Diminished Capacity

1 Australia

Battered women in Australia have successfully used the diminished capacity defence against a charge of murder for killing their abusers.

a Statutory Law

One Australian state and two territories statutorily recognise a defence of diminished capacity.⁵¹⁶

b Case Law

On an appeal from the Criminal Appeal Court of Western Australia, the Australia High Court ruled that psychological trauma resulting from a history of abuse could serve as a sufficient basis for a defence of diminished capacity for battered women who kill in non-confrontational situations.⁵¹⁷ The court ruled that evidence of the abusive relationship must be admitted for a fact finder to determine whether an ordinary person in the defendant's circumstances would also have suffered from diminished capacity.⁵¹⁸

New South Wales also allows for battered women who kill in non-confrontational situations to succeed on a diminished capacity defence.⁵¹⁹ The New South Wales Supreme Court

allowed one battered woman to succeed on both a provocation defence and a diminished capacity defence.⁵²⁰

2 England

Battered women who kill their abusers in England appear to rely heavily on this defence to mitigate a murder charge.

a Case Law

Unfortunately, the most commonly used defence for battered women who kill their abusers in non-confrontational situations in England seems to be diminished capacity.⁵²¹ In two cases in which the defendant claimed a provocation defence, the Criminal Court of Appeal remanded the case for a hearing on diminished capacity.⁵²² Both decisions based the remand on the admission of BWS as fresh evidence.⁵²³

Similarly, the Criminal Court of Appeal allowed a woman to admit BWS testimony as fresh evidence of diminished capacity after she was convicted of murder, having lost on self-defence.⁵²⁴ Four other Criminal Court of Appeal cases found that the battered women who killed in non-confrontational situations suffered from diminished capacity.⁵²⁵ The only real benefit from this defence is that two of the women received non-custodial punishment.⁵²⁶

3 New Zealand

Presently, New Zealand does not recognise a partial defence of diminished capacity.⁵²⁷

Based on consultations with forensic psychiatrists, the New Zealand Law Commission feels that most battered women should not qualify for this defence as the psychological effects of battering do not result in a sufficient "abnormality of the mind" to meet the requirements of this defence.⁵²⁸

9.1.4 Conclusions – Diminished Capacity

Diminished capacity has served as an effective excuse defence for mitigating battered women's charges and sentences for killing their abusive partners. Despite its efficacy, the discussion document cannot support the generalised use of this defence. To do so would be to assume that all of these women lost control when killing their abusive partners. This defence does not recognise that many women kill their abusers because of a threat to their lives. To the extent a woman did suffer from a temporary psychological condition that led her to kill her abuser, she should be allowed access to the defence.

9.2 Insanity Defence

Insanity is a defence available to defendants who can argue that their unlawful behaviour resulted from an extreme psychological impairment. Unlike diminished capacity, the psychological impairment must be extreme, long lasting and likely to cause the unlawful behaviour to recur if left untreated. It is a very difficult defence to prove and is inappropriate for battered women who kill their partners in order to stop the abuse. The only reason it is mentioned here is that it was argued in the past as a defence for these women.

Chapter 10: Warranted Excuse, Battered Woman's Syndrome Defence and Victim's Defence

10.1 Warranted Excuse

Warranted excuse is the first of three theoretical excuses that could be developed as a defence for battered women who kill their abusive partners. Under this defence, a defendant's actions may be excused where they were caused by an emotional response to illegal conduct on the part of the victim that resulted in loss of control. The defendant's act could be understood because she was responding to an illegal action, which reduces her blameworthiness, although the defendant's behaviour remains unlawful. The defendant's blameworthiness is reduced further by the victim's culpability.⁵²⁹ This defence is similar to the reform suggested under provocation that would require the underlying provoking act to be illegal. It could be treated as either a full or partial excuse.

The theory of this defence is that a defendant may be excused for 'punishing' a victim for conduct the State also finds abhorrent. A woman who killed her rapist after the rape ended could use this defence to partially excuse her unlawful act because the State could have punished the victim for the same conduct.

10.1.1 Elements of a Warranted Excuse

The requirements for a warranted excuse would be that the defendant's action must be caused by an emotional response against another, for the other's illegal conduct. The defence does not specify what type of emotional response is required, which means fear could be included. There is no reasonableness requirement. All that matters is that the defendant has actually responded emotionally,⁵³⁰ although presumably the response must have been strong.

To some extent, proponents might be assuming that any response to illegal conduct is inherently reasonable. The main proponent of this theory, Victoria Nourse, suggests that there would be an imminence requirement, as her justification for considering all emotional responses to illegal conduct is that "sincere, spontaneous emotion" will counter inferences of cold, calculated planning.⁵³¹

10.1.2 Warranted Excuse as an Option for Battered Women Who Kill

The primary advantage of this defence is that it removes the subjective judgment of what behaviour would cause a person to lose self-control; instead it assumes that all illegal behaviour could cause a person to lose control. The defence further allows a defendant to respond to illegal conduct in fear, rather than simply in anger, and limits femicide by requiring the 'provoking' conduct to be illegal.⁵³² Finally, a woman's actions in killing her abuser would appear rational given that the law could also have punished the behaviour.

A strict imminence requirement would be read into this defence. Battered women who kill their abusers in non-confrontational situations would have the same difficulty accessing this defence as they would under the provocation defence. Furthermore, courts could turn to the provocation doctrine to interpret this defence, which could create the same barriers battered

women encounter under provocation.

10.1.3 Conclusions – Warranted Excuse

The main reason the discussion document does not recommend relying on this defence for battered women who kill their abusers is that it remains a purely theoretical defence – nearly identical to the provocation defence under the suggested reforms. Strategically, lawmakers and courts would probably understand and accept a defence they recognise even with significant reform.

10.2 Battered Woman's Syndrome Excuse Defence

This purely theoretical defence is no different than BWS defence in the justification section except that it makes it an excuse rather than a justification. The purpose of doing this is to recognise that when a woman must rely on a psychological condition to explain the reasonableness of her behaviour, the defence is more appropriately an excuse.⁵³³ All other defences in which a person suffers from some form of mental incapacity are labeled excuses. A successful defence could be either a partial or full excuse.

The change to an excuse answers a few of the objections to a BWS justification defence, although the analysis remains fundamentally the same as under section [6.1](#). This change would primarily respond to the concern that the law should not justify acts that result from a psychological condition.⁵³⁴ As Stephen Morse described:

Talk of the reasonable battered victim syndrome sufferer is akin to talk of the reasonable person suffering from paranoia. Not only is this a failure of nerve concerning the possibility of objectivity, it threatens to make right whatever the agent honestly believes is right What the syndrome sufferer is really claiming is that her responsibility as a moral agent is compromised. This, of course, is the classic basis for an excuse.⁵³⁵

This change would also respond to the fear that a justification defence would condone vigilantism and revenge, as here the conduct remains unlawful although the defendant is less blameworthy.

10.3 Victim's Excuse Defence

As with the BWS defence, the victim's defence can be an excuse rather than a justification. The reasons for making this defence an excuse and the advantages and disadvantages to that are described directly above under the BWS excuse defence. Section [6.2](#) provides a general analysis of a victim's defence.

10.4 Conclusions – Battered Woman's Syndrome Excuse Defence and Victim's Excuse Defence

While these defences address a few of the concerns raised under a BWS justification defence and a victim's defence, they still send the message that all battered women are irrational and suffer from psychological illness. For this reason, the discussion document rejects relying on these defences for battered women who kill their abusers.

Chapter 11: Post-Conviction Relief

Some commentators argue that the proper way in which to handle cases in which battered women kill their abusers in non-confrontational situations is to allow them to claim post-conviction relief. Rather than use or create a defence that would treat a woman's action as justified, a battered woman should request that the executive branch of her government relieve her of punishment. Another option is to provide courts with sentencing discretion, which would allow them to mitigate a defendant's blameworthiness through sentencing. This would eliminate the need to force the defendant to fit her facts into a pre-existing excuse defence.

The analysis of post-conviction relief will be cursory, as the intention of this discussion document is to examine actual legal defences that could be made available to battered women who kill their abusive partners. The author and CSVR do not think post-conviction relief should be the only option available for these women, although it should remain as an option if a defence fails.

11.1 Sentencing Discretion

Rather than adopt new excuse defences or reform the old ones, the New Zealand Law Commission recommends eliminating all excuse defences and replacing them with sentencing discretion for courts. This necessarily would entail eliminating any mandatory minimum sentences for any murder. The reform suggestion is intended to allow all circumstances to be considered for mitigation, rather than particular circumstances that fit within existing excuse defences.⁵³⁶ Unlike excuse defences, only the sentence would be mitigated, not the charge. If she could prove that she is less blameworthy than an intentional killer is, a defendant would be convicted of murder and receive a shorter sentence.

11.1.1 Sentencing Discretion As An Option For Battered Women Who Kill

Proponents argue that the first advantage of sentencing discretion for courts and the elimination of excuse defences is that the reform would recognise that when a person intentionally kills another person without justification, the person is guilty of murder.⁵³⁷ The charge is appropriate. The fact that there are reasons that people intentionally kill that make them less blameworthy does not speak to whether they are guilty of murder, but to the length of their punishment.

Other proponents argue that presently some deserving defendants are excluded from excuse defences although their circumstances make them less blameworthy than other murder defendants.⁵³⁸ Sentencing discretion would then allow for a wider variety of circumstances to mitigate blameworthiness.⁵³⁹ As the NSLC described: "It does not seem fair to make a distinction between those intentional killers who are able to bring themselves within one of the ... [excuse] defences and those who cannot."⁵⁴⁰

Another argument is that if sentencing discretion is granted to courts, more defendants would be willing to plead guilty to murder, saving the time and resources of a trial.⁵⁴¹ Finally, proponents advance that excuse defences are difficult to use in practice, whereas

sentencing discretion could account for mitigating circumstances more easily.⁵⁴²

Those who wish to retain excuse defences argue that a reduction in charge based on circumstances carries less of a stigma than a murder conviction, even if the defendant would have served the same sentence.⁵⁴³ Excuse defences ensure that certain circumstances are taken into consideration, which sentencing guidelines might not.⁵⁴⁴ Some proponents of excuse defences argue that as defences, the circumstances that justify a reduction in charge and sentencing will remain under constant scrutiny, as trials usually get more attention than sentencing hearings.⁵⁴⁵ Sentencing discretion would not be subject to the same scrutiny, so courts could more easily abuse the doctrine.

Finally, some proponents are concerned that the standard of proof will change if the excuse defences are replaced with sentencing discretion. Once a defendant provides some evidence to support a defence, the prosecutor must prove beyond a reasonable doubt that the defendant does not qualify for the defence. As part of sentencing discretion, the prosecution might not have to meet such a strict standard. Rather, the prosecutor might be able to refute a defence by the preponderance of the evidence.

11.2 Clemency

Clemency is an instrument of justice used when strict or misapplication of the law or inadequacy of the law brings harsh, unfair and unjust results that need to be corrected.⁵⁴⁶ Clemency can result in a complete pardon where the person is released from the conviction; it can relieve some of the punishment or some but not all of the consequences of the conviction.⁵⁴⁷ The executive branch holds the discretion to grant clemency.

There are several possible bases for a clemency application. Battered women who killed their abusive partners could argue for such relief based on evidentiary rules that unfairly excluded testimony on the pattern of abuse or expert evidence on social context and the effects of abuse.⁵⁴⁸ They could argue for relief based on having served sufficient punishment or because they are not a threat to the community.⁵⁴⁹ Finally, they could argue that the effects of battering were such that a conviction for murder is fundamentally unfair.⁵⁵⁰ One academic argued that the executive should set up a special committee specifically to review battered women's clemency applications.⁵⁵¹

11.2.1 Clemency As An Option For Battered Women Who Kill

Proponents of clemency for battered women who kill in non-confrontational situations argue that reliance on clemency would keep self-defence intact while states have the opportunity to eliminate battered women's need to resort to killing their abusers. This would eliminate the inherent abuses of the defence inherent in the self-defence reform recommendations, while recognising that the State inadequately protects victims of domestic violence.⁵⁵² Such post-conviction relief also would acknowledge the unworkable situation in which these women find themselves without condoning killing a person or vigilante justice.

This post-conviction relief would apply only to those women who deserve protection from

the harsh results of conviction, based on their circumstances. It would take away from judges the desire for a quick fix for a handful of cases in which justice seems to fail. Moreover, the executive's determination of justice does not have to fit within existing legal rules, which means justice can be defined more broadly than in courts and could be more inclusive of battered women.⁵⁵³ Finally, relying on clemency would solve evidentiary problems for these women, as all social context information without limitation could be provided to the executive for consideration of her case.⁵⁵⁴

The disadvantages of relying solely on this post-conviction relief are that it raises issues of separation of powers. If the executive grants clemency to a sufficient number of battered women who kill their abusers, s/he usurps the power of the court to make criminal judgments.⁵⁵⁵ Also, if common enough, battered women will be able to use their status as an excuse to kill without facing consequences. Others can appropriate this regardless of whether or not they have been battered.⁵⁵⁶

Proponents of clemency do not explain why women's experiences should be ignored by the criminal justice system. Why should battered women be convicted of murder for killing the men who abuse them when men are convicted of only culpable homicide or manslaughter when they kill the women who try to leave them? The gender inequalities flourish under this approach.

Finally, the discretionary nature of this option poses great difficulties for battered women who kill their partners. While some executives may be willing to use their clemency power on behalf of these women, they are not required to do so, whereas courts are required to apply legal defence law. This power could easily be used as a political tool for the executive at the expense of the battered women.⁵⁵⁷

Governors in Massachusetts, Ohio, Maryland and North Carolina have granted clemency to groups of abused women who killed their batterers in non-confrontational situations.

11.3 Conclusions – Mitigation of Sentences and Clemency

Clemency and sentencing discretion need to be options for battered women convicted for the murder of their abusive husbands. However, they should not be the only options for these battered women to mitigate their sentences or to hope to avoid sentencing. Battered women who kill their abusers in self-defence should not have to wait to be convicted at trial before having the realities of their situations understood. Furthermore, to rely solely on post-conviction relief would perpetuate the gender bias inherent in the criminal justice system.

Chapter 12: Evidentiary Issues

Evidence of the history of domestic violence between the victim and the defendant, expert evidence on the social context and effects of domestic violence on the defendant and evidence of the victim's other acts of violence contextualise a battered woman's action of killing her abuser. These types of evidence are necessary to explain why a battered woman who kills her abusive partner, particularly in a non-confrontational situation, meets the requirements of the criminal defences described above.

This section will describe the different types of evidence that may be necessary for battered women who kill their abusive partners to receive a fair trial and how each type would be used.

12.1 History of Past Abuse

The first of the evidentiary matters is the history or pattern of past abuse. The word abuse is intended to incorporate violence, psychological abuse and the threat of violence and/or psychological abuse. Under each of the defences above, this document described the ways in which a history or pattern of abuse could be used to meet the elements of these defences. In most of the defences, a history or pattern of abuse is relevant to the defendant's state of mind when she acted.⁵⁵⁸ Specifically, this evidence can prove that the defendant was responding to an unlawful act or a provocation. As described by the Wyoming Supreme Court: "The confrontational nature of an incident where a battered woman kills her abuser might only become apparent when viewed in the context of a pattern of violent behaviour rather than as an isolated incident."⁵⁵⁹

A history of abuse is relevant to the reasonableness of a battered woman's fear of further abuse. It explains that the woman was not acting out of revenge, but under a reasonable expectation of imminent harm for justification defences or under a strong emotional reaction for the excuse defences.⁵⁶⁰ It also helps explain battered women's available alternatives for justification defences.⁵⁶¹ One point needs to be emphasised: the past abuse by itself does not justify or excuse a battered woman's killing her abuser. Instead, evidence of the pattern of abuse is necessary to understand her experiences and actions for the purposes of determining a defence.⁵⁶²

Advocates for battered women who kill their abusive spouses argue that where there is a history of violence between the victim and defendant in any type of assault case, courts should admit testimony of the nature, duration and extent of abuse where it is relevant to the woman's claim.⁵⁶³

12.1.1 Comparative Experiences With Evidence of a History of Past Abuse

1 Canada

The Supreme Court of Canada definitively ruled that a pattern of violence between the defendant and the deceased is admissible in battered women's self-defence claims when they kill in non-confrontational situations. The decision in Lavallee is fully described under section [4.1.2](#).

2 United States

All American jurisdictions treat as relevant prior acts of violence between the victim and defendant in the trials of battered women who kill their abusive partners, whether by statute or case law.

a Statutory Law

A minority of American states has codified the admissibility of prior acts of violence by the victim against the defendant in murder trials. Admissibility differs between the states as to the types of trials in which this evidence is admissible and the ways in which the evidence

can be used.

These statutes vary generally in the types of cases in which the evidence of prior violence between the victim and defendant is admissible. Nine American states statutorily allow for evidence of past domestic violence between the victim and defendant to be admitted in murder trials.⁵⁶⁴ All but one of these states statutorily admits such evidence for any use in a murder trial. One state limits its statutory recognition of this evidence only to that which forms part of the foundation of expert testimony on the social context and effects of abuse, which is admissible in these trials.⁵⁶⁵ Another state admits testimony of a past history of violence if it was used to establish battered women's syndrome.⁵⁶⁶

One state allows the admission of this evidence in any proceeding, civil or criminal.⁵⁶⁷ Another allows it in all criminal trials involving domestic violence.⁵⁶⁸ Three of the states statutorily admit this evidence in self-defence cases only.⁵⁶⁹ Two more admit a past history of violence in assault and murder cases.⁵⁷⁰ One state allows it in murder trials only.⁵⁷¹ The fact that the history of abuse is not deemed automatically admissible in other types of cases does not necessarily preclude its admission – the defendant will need to argue for its admission under other evidence rules rather than rely on these particular statutes.

State statutes also vary on the thresholds defendants must meet before the testimony is admissible. One state specifies that such testimony is admissible even where there is no evidence of an overt, unlawful act by the victim in a self-defence claim.⁵⁷² Another specifically admits the evidence of violence even where: (1) the defendant cannot prove the victim was the first aggressor, (2) the defendant did not act on the duty to retreat or (3) the defendant is accused of using excessive force.⁵⁷³

b Case Law

The remaining American jurisdictions admit prior acts of domestic violence by the victim against the defendant under case law. While this evidence typically is helpful to battered women who kill in non-confrontational cases, jurisdictions that admit this testimony will not necessarily allow these battered women to argue self-defence.⁵⁷⁴

Some of the jurisdictions have created conditions precedent to the admission of testimony of a history of abuse. These range from prima facie evidence of the elements of self-defence to some evidence of self-defence, but less than required for a prima facie case.⁵⁷⁵ These conditions on the admission of a history of abuse can create difficult obstacles for battered women who kill in non-confrontational cases because sometimes the only way to prove a prima facie case of self-defence is through this evidence.⁵⁷⁶

3 Australia

a Case Law

The High Court of Australia accepted the need for evidence of a history of past abuse to explain elements of self-defence and provocation for claims by battered women who kill in non-confrontational situations.⁵⁷⁷ With respect to self-defence, one justice cautioned that evidence of abuse alone is insufficient to justify a self-defence claim:

Clearly, it is still necessary to discriminate between a self-defensive response to a grave danger which can only be understood in the light of a history of abusive conduct and a response 'that simply involves a deliberate desire to exact revenge for past and potential – but unthreatened – future conduct.'⁵⁷⁸

The Supreme Court of Queensland concluded that a history of abuse could be "sufficient to raise the defence of self-defence."⁵⁷⁹ The author has located no decision explicitly excluding a past history of abuse in battered women murder trials.

4 England

The decisions located did not discuss the admissibility of a history or pattern of abuse, although from the facts as described in the cases, it must have been admitted.

12.2 History of Violence Against Others

Advocates for battered women argue that the admission of evidence of the deceased's violence against others, when the defendant knew of the violence prior to killing him is necessary for a fair trial. Battered women can use the victim's history of violence against others to explain why they feared serious bodily harm or death from an attack and the reasonableness of their belief.⁵⁸⁰ For example, a woman who knows that her husband stabbed another person might have more reason to fear serious harm from him. This evidence would bolster the credibility of her belief. Testimony on the history of violence against others may also be useful in proving that the deceased was the first aggressor for self-defence and provocation defences.⁵⁸¹

12.2.1 Comparative Experience With Evidence of the History of Past Violence against Others

1 United States

a Statutory Law

Only one state has codified the admissibility of evidence of the victim's prior acts of violence against others in self-defence cases.⁵⁸² Another state statute implies the right to admit this evidence based on broad language that allows the admission of all facts and circumstances that are relevant to the defendant's state of mind.⁵⁸³ Since the purpose of this testimony is to show that defendant's knowledge of the victim's other acts of violence led, in part, to her reasonable fear of further violence against her, this evidence should be admissible.

b Case Law

Only one decision was located that allowed evidence of the victim's prior acts of violence against third parties.⁵⁸⁴ Another decision, however, refused to permit such evidence in a case of a battered woman who killed her abuser in his sleep because she could not provide sufficient evidence of self-defence.⁵⁸⁵

12.3 Expert Testimony on the Effects of Battering

As described throughout the discussion document, without evidence on the effects of abuse on battered women and the social context of domestic violence to support the elements of both the justification and excuse defences, battered women who kill their abusive partners

have difficulty accessing defences. It should be reiterated that proving that a battered woman suffers from the psychological effects of battering does not defend her behaviour; rather it helps fill in the elements of the existing defences. For example, in the United States, the Ohio Supreme Court wrote in the context of a trial of a battered child who killed his father in a non-confrontational situation:

[Testimony] on the syndrome or psychological effects of abuse is essential to proving the elements of a self-defence claim. Non-confrontational killings do not fit the general pattern of self-defence. Without expert testimony, a trier of fact may not be able to understand that the defendant at the time of the killing could have had an honest belief that he was in imminent danger of death or great bodily harm. Further, it is difficult for the average person to understand the degree of helplessness an abused child may feel. Thus, expert testimony would also 'help dispel the ordinary lay person's perception that a [person] in a battering relationship is free to leave at any time.' In either instance, the expert testimony 'is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion.'⁵⁸⁶

Without this context evidence courts might not be able to understand the battered woman's perceptions and why they were reasonable in her situation.⁵⁸⁷ Admission of expert testimony on the effects of battering and its social context is the only way to incorporate women's experiences into traditional legal defences.⁵⁸⁸

There are at least four different psychological theories on the effects of abuse on battered women, two of which were described above. The remaining theories are post-traumatic stress disorder and traumatic bonding, also known as the Stockholm syndrome. An analysis of the remaining two theories is beyond the scope of this discussion document, although an analysis will be included in an upcoming CSVR document.

Expert testimony on the effects of battering has a variety of uses in criminal law, all of which were described above, particularly in section [6.2](#) on a battered woman's syndrome defence, and will be further identified below in the comparative law section [12.3.1](#). All jurisdictions researched for this discussion document admit expert testimony in trials of battered women who kill their abusive spouses.

Elizabeth Schneider described a variety of disadvantages to relying on expert testimony that are worth mentioning here, although discussed in early sections of this document.⁵⁸⁹ She wrote:

Many courts have accepted the need for expert testimony. But consider what judicial acceptance of this testimony implies. It emphasises the profound gap between the experiences of battered women and those of the rest of society; it reaffirms the notion of a woman's viewpoint and separate experiences ... It also suggests that women's own description of their experiences lacks credibility, because these experiences differ from the male norm, and because women generally are not viewed as believable.⁵⁹⁰

Some academics fear that in reality an expert does not explain women's experiences, but moulds them into "the entrenched male model of responsibility by making their claims the exception to the rule."⁵⁹¹

Further, psychological testimony on the effects of battering confuses courts as to whether the defendant is arguing a justification defence or diminished capacity. In fact, the English Criminal Court of Appeal allowed for rehearings in three murder trials of battered women. The Court treated BWS as new evidence relating to a diminished capacity defence, although two of the women had argued unsuccessfully for a provocation defence and one an unsuccessful self-defence claim. This suggests confusion over how expert testimony on the effects of battering fits into criminal defences.⁵⁹²

Finally, some battered women advocates argue that expert testimony is unnecessary to explain a battered woman's behaviour or perceptions.⁵⁹³ Rather, once the women's experiences are explained in a common sense manner, a court could understand why she qualifies for self-defence.⁵⁹⁴ For example, a woman who killed her drunken, sleeping husband after he threatened her can argue self-defence without expert testimony on the effects of battering on the woman.⁵⁹⁵ She can explain that from her past experience, her husband beats her when he wakes from a hangover. Since he threatened her before he passed out drunk, she had a reasonable belief that he would in all probability carry out his threat when he woke up. Assuming she is under no duty to retreat, she has the right to defend herself when she is threatened with imminent harm. Where there is no duty to retreat from one's home, the evidence of the past history of abuse and its severity should be sufficient to meet the elements of self-defence.⁵⁹⁶

The Canadian Supreme Court agreed with these advocates in *R v. Mallot*, [1998] 1 SCR 123 (Supreme Court, Canada) when it wrote:

The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from 'battered woman syndrome.'⁵⁹⁷

These advocates seem to suggest that where a woman must rely on a psychological theory to explain her behaviour, her actions should not qualify for a justification defence, but for an excuse defence.

12.3.1 Comparative Experiences With Expert Testimony on the Effects of Battering

1 Canada

As described in detail under the Canadian comparative experience with self-defence, section 4.1, the *Lavallee* court described the importance of expert testimony to explaining how a woman's behaviour fits within the elements of self-defence and other such defences. As a reminder, the *Lavallee* court ordered that fact finders must be notified that expert testimony should be used to:

- explain battered wife syndrome;
- dispel common myths about battering relationships;
- explain a battered woman's ability to perceive danger from her abuser, which speaks to a reasonable apprehension of death or bodily harm;
- explain why a battered woman remained in the relationship;
- explain why the woman did not leave when she thought her life was in danger.⁵⁹⁸

2 United States

All American jurisdictions admit expert testimony on the effects of battering on abused women in trials for battered women who kill their abusers. These jurisdictions differ on what the defendant needs to show before this evidence is admissible, but all will allow the evidence if the threshold for admissibility is met. Because this research focused on case law on battered women who kill in non-confrontational situations, the discussion document did not locate all of the different threshold tests for admissibility.

a Statutory Law

A significant minority of American states statutorily allows expert evidence of the social context and the effects of battering in murder trials of battered women who kill. One group of states makes admissible Battered Women's Syndrome specifically,⁵⁹⁹ while another group admits non-specific expert testimony on the effects of battering.⁶⁰⁰ The state of Georgia has a statute that generally admits expert testimony on the effects of battering, but case law has interpreted this narrowly to admit BWS only.⁶⁰¹ Four of the eleven states with expert testimony statutes additionally allow the admission of all relevant facts and circumstances that are the basis for the expert's testimony.⁶⁰²

Another set of variations between the statutes that admit expert testimony on the effects of battering is the express purposes for which the testimony is admissible. Many of the state legislatures chose to identify the purposes of the testimony to make them clear to courts, although most allow them.

Of the eleven states with such statutes, six of them admit the testimony as evidence towards the defendant's state of mind,⁶⁰³ although implicitly all do. Four of these states make this testimony explicitly relevant to the defendant's belief in the imminence of death or serious bodily harm.⁶⁰⁴ Three states make expert testimony specifically admissible to the reasonableness of the defendant's beliefs and perceptions.⁶⁰⁵ Two others specify that expert testimony on the effects of battering can be used for self-defence generally.⁶⁰⁶ One state makes clear that this evidence is admissible in self-defence cases even where the defendant cannot meet all elements of self-defence.⁶⁰⁷

These eleven statutes also vary in the types of cases in which expert testimony on the effects of battering is admissible. All eleven statutes make this testimony admissible in murder trials. Four of the states make it admissible in justification defence cases only.⁶⁰⁸ One state admits expert testimony in assault or murder cases.⁶⁰⁹ Three states make expert testimony admissible in all criminal actions,⁶¹⁰ while one state makes it admissible in any proceeding.⁶¹¹ One other state specifically admits this expert testimony in insanity cases.⁶¹²

b Case Law

No jurisdiction has been located that per se excludes expert testimony on the effects of battering to support a defence in cases in which battered women kill their abusive partners.⁶¹³ This testimony has been used to prove the reasonableness of the battered woman's belief that she is facing imminent, serious or deadly harm.⁶¹⁴ Defendants have used this testimony to overcome stereotypes and myths of battered women.⁶¹⁵ Expert testimony has helped women prove that they were not the aggressors,⁶¹⁶ and it has been used to bolster the credibility of battered women defendants.⁶¹⁷

Another use for the testimony is that it explains why the woman did not leave the relationship.⁶¹⁸ The Colorado Court of Appeal recognised that psychological testimony on the effects of battering explains that:

[Battered] women may not psychologically or emotionally have the alternative of leaving the abuser because of their low self-esteem, their emotional and economic dependency, the absence of another place to go, and the woman's legitimated fear of the abuser's response to her leaving. Thus, according to the expert testimony, battered women become trapped in their own fear and often feel that their only recourse is to kill the batterer or be killed.⁶¹⁹

Some states require a defendant to make out a prima facie case of self-defence before they will admit into evidence expert testimony on the effects of battering.⁶²⁰ What amount of evidence is sufficient to meet the prima facie test depends on the jurisdiction. In one case, the Court of Appeal of Missouri refused to allow BWS evidence where the defendant hired a third party to kill her abusive ex-husband.⁶²¹ The Court found that the three-month period in which the defendant developed the contract for the killing eliminated the imminence requirement necessary for a prima facie showing.⁶²² Other states require evidence of an overt act against which the defendant alleges she was protecting herself.⁶²³ A few states have required women to prove they suffer from BWS before such evidence can be admitted.⁶²⁴

3 Australia

No authority has been found to suggest that expert testimony on the social context and effects of abuse are inadmissible in any Australian jurisdiction. Despite the acceptance of expert testimony, one Australian academic has criticised Australia's treatment of BWS evidence, finding that courts apply it to show that battered women have abnormal perceptions.⁶²⁵

a Case Law

The *Osland* decision by the High Court of Australia explicitly accepts the need for expert testimony on the effects of domestic violence and the need for evidence on a history of abuse. Three of the five judges agreed that BWS testimony applies to understanding: (1) why the woman did not leave;⁶²⁶ (2) the woman's credible claims of severe abuse;⁶²⁷ and (3) that battered women have a heightened awareness of impending violence.⁶²⁸ One justice also discussed that expert testimony on the effects of battering can explain why the woman had no other available alternatives to lethal self-defence.⁶²⁹ All of these

explanations aid a battered woman in meeting the elements of criminal defences.

Justice Kirby of the *Osland* court took an aggressive approach in criticising the particular use of BWS testimony for battered women who kill. He argued that any doctrine used to explain the effects of battering on women should avoid the many problems found in BWS. First, he argued that it is necessary that any such expert testimony avoid stereotyping victims of abuse.⁶³⁰ Kirby showed concern that BWS misrepresents battered women's experiences, particularly those of minority and poor women.⁶³¹ In doing so, battered women who do not fit the stereotype of the passive woman will be excluded wrongly from legal defences.⁶³² He stated that such testimony "distracts attention from conduct which may constitute a perfectly reasonable response to extreme circumstances."⁶³³ Finally, he discussed his concern that BWS is grounded insufficiently in science and that it is outdated after more than 20 years of research.⁶³⁴

4 England

Expert testimony appears to be admissible under British case law, although to what extent is unclear.

a Case Law

The only decisions in which courts discussed expert evidence on the effects of battering appeared under provocation and diminished capacity defences. Battered women convicted of murder or manslaughter before the first British court admitted testimony on BWS were allowed rehearings in courts that treated BWS evidence as fresh evidence. Unfortunately, the Criminal Court of Appeals used this expert evidence often towards proof of diminished capacity, suggesting that women who suffer from BWS suffer from "abnormalities of the mind" rather than from a normal response to abnormal circumstances.⁶³⁵

Battered women, however, have been successful in using expert evidence appropriately for a provocation defence claim. In one such case, the Court used BWS as a characteristic to be considered in a reasonableness test and as a way of explaining how a woman could feel provoked by an otherwise minor act by her batterer.⁶³⁶ In another, the Court used BWS to explain why a battered woman who did not respond immediately to provocation could use the defence, relying on an explanation of a slow burn of emotions to suffice as evidence of provocation.⁶³⁷

Regrettably, one academic reports that it appears that when the battered women rely on BWS, British courts feel they cannot allow them to succeed on self-defence.⁶³⁸

5 New Zealand

a Case Law

From the New Zealand Law Commission (NZLC) report, it appears that BWS testimony is presently admissible. The NZLC provided little detail on what requirements defendants need to meet to have this evidence admitted or on how this evidence is applied.

b NZLC recommendations

The NZLC recognises that expert testimony on the effects of battering and the social context of domestic violence can help fact finders understand: (1) why people remain in

battering relationships; (2) that battered women can predict their abuser's violence; (3) the dangers women face in leaving a relationship; (4) the difficulty women face in getting help from the police or courts; and (5) the defendant's perspective on the need for self defence.
[639](#)

The NZLC rejects using the BWS as the sole psychological explanation of the effects of abuse on battered women. The NZLC notes that BWS explains only one pattern of violence, not all.^{[640](#)} As a result, the narrowness of this theory led the New Zealand Court of Appeal to reject a battered woman's claim to have been in a battering relationship because she did not suffer from the learned helplessness requirement of BWS.^{[641](#)} The NZLC recommended that codification of the admissibility of expert testimony should not refer specifically to BWS, instead it should refer "to the nature and dynamics of battering relationships and the effects of battering."^{[642](#)}

12.4 Admissibility of Prior Acts of Violence Against the Defendant

Another type of evidence that may be appropriate for defences to murder for battered women who kill in non-confrontational situations is evidence of past abuse against the defendant, where the abuser was not the deceased. This seems most relevant to the excuse defences, as it suggests that the woman may have been reacting to something other than the deceased's actions.

12.4.1 Comparative Experiences With The Admissibility Of Prior Acts Of Violence against The Defendant

1 United States

A few jurisdictions in the United States specifically permit evidence of a history of violence against the defendant as part of the evidence admissible in a battered woman's criminal defence against murder charges.

a Statutory Law

In only a few states do statutes allow for the admission of testimony of prior acts of violence against the defendant that were not committed by the victim.^{[643](#)} Two states unequivocally permit this testimony. Another two states seem to permit this testimony under a general clause allowing the admission of evidence relevant to the defendant's state of mind.^{[644](#)}

Chapter 13: Preliminary Recommendations & Legislative Models

Chapter 13 provides the preliminary recommendations and legislative models for reform of criminal law based on experiences and legislative models of the countries examined in this document. The final recommendations are contained in Chapter 8 of the "Discussion Document Part 2: South African Criminal Law and Battered Women Who Kill". They are based on research specific to South African criminal law and the outcome of a Justice for Women workshop held by the CSVr on 5-6 July 2003.

While many of the defences described above offer real options for battered women, only a few accomplish the goals set by CSVr. These goals include: (1) providing battered women with the best possible defences, both justification and excuse defences, (2) that will include

their experiences and will not stereotype them, treat them to a lower standard of accountability and (3) will not provide batterers with a defence for femicide.

This document recommends:

- All battered women be given access to self-defence through recognition that where she can prove the inevitability of the next attack, she meets the underlying purposes of self-defence law;
- The adoption of putative self-defence for all criminal defendants who honestly but unreasonably believed they were acting in self-defence;
- With the understanding that the provocation defence historically has been used to justify femicide, this document recommends that it remain a defence with at least one major reform: the underlying provocation must be illegal for a defendant to qualify for the defence. Battered women whose violent acts resulted from a loss of self-control should use the provocation defence.
- The law of evidence should be reformed to include the admissibility of a history of past abuse between the deceased and the defendant and the deceased's history of violence against others and specifically against the defendant. Reforms should allow expert testimony on the social context and effects of abuse on a battered person whenever domestic violence is relevant to the proceedings at trial.

The recommended statutes below are an amalgamation of a variety of different statutes from foreign jurisdictions and suggestions from academic literature.

13.1 Justification Defence

This document assumes that some battered women face a pattern of abuse from their partners that they cannot escape. Until such time that states provide appropriate protection for battered women that allows them to safely end their relationships, they deserve access to a justification defence when their partners threaten their lives and they respond violently.

Of the four options for justification defences, self-defence remains the most effective option for accomplishing CSV's goals. While none of the four defences allows batterers to justify femicide, the BWS defence and a separate victim's defence suffer from accusations that battered women or victims generally would be held to a lesser standard of accountability than other criminal defendants. This different treatment does not necessitate different levels of accountability, but increases the risk the defences will be perceived that way as well as the risk that new stereotypes will be created.

A separate victim's standard unintentionally suggests that domestic violence victim's experiences are so different that an average person cannot understand them and that victims of domestic violence have been so psychologically damaged by the abuse that their perceptions can never be reasonable. Risking these potential stereotypes seems unnecessary when considering the approaches different jurisdictions have used to allow battered women who kill in non-confrontational situations to argue self-defence. Battered women have been able to benefit from self-defence law when jurisdictions have admitted the evidence

described in the previous chapter.

While traditional self-defence law does not accommodate battered women who kill, with some reform, this defence can be opened to them without creating new stereotypes or the impression that they are less accountable for their actions than other defendants. Furthermore, reforming self-defence law will seem less foreign to courts than the adoption of a new, separate defence.

While the necessity defence could be reformed to accommodate battered women, this seems pointless. Self-defence was intended to protect people from the threat of an unlawful attack by another person. Necessity, on the other hand, was intended to protect against threats to a person or property that do not result from criminal behaviour. Rather than stretch the necessity doctrine to accomplish goals it was not intended to accomplish, it would be better to reform self-defence.

13.1.1 Reforming Self-Defence Law

Before battered women can access self-defence law, several reforms need to be made to include their experiences with domestic violence into the elements of the defence. Although nearly all elements of the defence must be changed to accommodate these experiences, changes can be made with only limited reforms, none of which would alter the doctrine of self-defence.

1 Unlawful Act – First Aggressor

The first element, that a defendant must prove an unlawful act, needs to be informed by a past pattern of abuse. This history or pattern of abuse would explain why something as small as a gesture or a change in the behaviour of the deceased reflects a threat of serious harm or death. If a defendant uses a past pattern of abuse to explain the first element, inherently they will use it to explain why the defendant was not the first aggressor.

2 Death or Serious Bodily Harm

The second element of the defence, that the defendant fears death or serious physical harm, can probably be proved with this same evidence.

3 Imminence

The imminence requirement needs to be broadened to reflect that there are some situations in which a person can be threatened with inevitable and inescapable harm, although not imminent harm, which makes self-defence necessary. When self-defence becomes necessary, a battered woman should be allowed to act. To prove this, evidence of the past history of abuse and expert testimony on the social context of the battering experience can explain that the abuse was both inevitable and inescapable. The change from imminence to necessity should be required in only a minority of cases, which the reform should reflect.

4 Retreat

Part of any explanation of why the battered woman cannot effectively escape the violence will result in an explanation of why she cannot end the relationship safely at the point she is threatened with death or serious bodily harm. To the extent battered women alone are required to explain why they did not leave the dangerous situation earlier, in this case the relationship, this double standard needs to be eliminated. Whether she could have left or

ended the relationship safely in the past is irrelevant, as it does not speak to whether self-defence was necessary at the moment she acted.

Whether a woman could have retreated from her own home at the moment she acted should be irrelevant. Leaving her home at the time she feels threatened would do little to end the ultimate threat, as she cannot be expected to run out in the middle of the night, never to return again. Research shows the risk to battered women who try to leave their abusers. Many who do leave end up severely beaten or killed when their abusers ultimately find them. Furthermore, to require a woman to leave her home is to punish her for the illegal behaviour of her partner, since he would be allowed to remain in the home while she would be forced to leave. Why should she have to leave her home to protect the life of the man threatening to take hers?

Once these irrelevant duties are obliterated, the court should be left asking whether the woman could have stopped the threat other than through violence or retreat at the time it became inevitable. Basically, this asks whether law enforcement realistically could protect battered women from her partner's abuse for more than the immediate short term. Unless law enforcement is prepared to protect the battered woman for longer than on the night she first feels threatened, the woman should qualify for self-defence.

Defendants should use evidence on the history of abuse between the two parties and expert evidence explaining the dangers women face in separating their abusers to prove the battered woman had no realistic option to lethal self-defence. Other evidence will need to show the ineffectiveness of law enforcement's efforts to protect battered women.

5 Reasonableness

The last of the requirements, reasonableness, should be viewed from the perspective of a reasonable person in the circumstances of the defendant, seeing what she sees and knowing what she knows. This standard will require evidence of the past pattern of abuse and expert testimony on the social context of the battering relationship and the effects of abuse. Under this mixed standard, the question the court would ask is whether a reasonable person who knows what the defendant knows and sees what the defendant sees would have reacted to the circumstances in self-defence. This standard would not allow defendants with idiosyncratic moral values or racist beliefs to justify their behaviour when killing. Furthermore, it would eliminate any appearance that the law is justifying illegal behaviour resulting from psychological trauma.

6 Proportionality

To the extent proportionality remains an issue, the same evidence of a history of abuse, of the deceased's violent nature and on the social context of domestic violence should be sufficient to explain why the woman's response was proportionate to the threat.

7 Codification

These reforms need to be codified to ensure that courts will include the experiences of victims of domestic violence in self-defence law.

13.1.2 Evidence in Self-Defence Cases

A self-defence statute dealing with evidentiary issues, to the extent possible, should

enumerate the types of evidence that must be admissible in these cases and the uses of such testimony to avoid any confusion over the purpose of the statute. The statute should not limit the uses or types of evidence solely to those listed in the provision.

It is impossible for domestic violence victims to receive a fair trial without the admission of testimony on the history of abuse between the defendant and the deceased and expert testimony on the social context of domestic violence and its effects on victims of abuse. Evidence of the deceased's propensity for violence is relevant to whether the defendant reasonably feared death or serious bodily harm from the deceased and to whether she was the first aggressor. For these reasons, this document recommends the inclusion of such evidence in any statute. When the defendant claims an excuse defence, evidence of other abuse against her may be relevant.

With respect to expert testimony, no one theory on the effects of domestic violence on its victims should be included in the statute, leaving room for scientific development of old and new theories that better reflect battering experiences.

13.1.3 Recommendation for Self-Defence Statute

The ideal statute to offer the best protection for battered women who kill in self-defence would involve a redefinition of self-defence and provisions for the admissibility of the history of abuse and expert testimony on the social context and effects of abuse. Such a statute could read:

Justifiable Self Defence:

A. A defendant is justified in using physical force upon the victim if s/he reasonably believes that such force is necessary for the purpose of protecting the defendant or another person against the use of unlawful force by the victim on the present occasion.

(1) The use of deadly force is justifiable under this section if the defendant believes such force is necessary to protect the defendant against death, serious physical injury, kidnapping, forced sexual intercourse, sexual abuse or the continuation of severe domestic violence.

(2) Notwithstanding a general duty to retreat when it can be made in complete safety, a defendant is not required to retreat if s/he is in his/her dwelling and was not the original aggressor.

(3) In the context of domestic violence, belief that a defendant is protecting against an unlawful force on the present occasion can be inferred from a past pattern of abuse.

(4) Reasonableness shall be determined from the point of view of a reasonable person in the defendant's circumstances.

B. Even if the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offence, the subsequent criminal trial will allow the introduction of a range of evidence concerning defence of self or another, defence of duress or coercion, or accidental harm. The court must establish:

- (a) the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent,
- (b) the reasonableness of the defendant's belief that there were no other available means to avoid physical combat,
- (c) the reasonableness of the defendant's perception of the amount of force necessary to deal with the perceived threat; or
- (d) any other element of self-defence. It must allow

(1) Evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse at the hands of the victim;

(2) Evidence of the victim's dangerous propensities of which the defendant was aware; and

(3) Evidence by expert testimony regarding abusive relationships, the nature and effects of physical, sexual or psychological abuse and responses to this. The evidence might include how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances that form the basis for such opinion; and any other expert testimony relevant to a claim of self-defence.

13.2 Excuse Defences

While justification defences can be appropriate for battered women who kill their abusers, not all battered women should qualify for them. Where battered women cannot meet the elements of self-defence, particularly under the recommended reforms, many will deserve excuse defences. There are two different types of excuse defences that battered women should use (1) putative self-defence for the woman who maintained self-control at the time she acted; and (2) a provocation defence for the woman who acted because she lost self-control.

13.2.1 Putative Self-Defence: When Battered Women Do Not Lose Control

For women who honestly believe they were acting in self-defence, but their belief was unreasonable, putative self-defence is the appropriate excuse defence for them. Women who believe they are acting in self-defence, reasonably or otherwise, are not arguing they lost control but that their action was rational.

Of the excuse defences described, putative self-defence, a BWS excuse defence and a victim's excuse defence are the only defences that do not require evidence that the defendant lost her self-control. BWS excuse defence and a victim's excuse defence are ultimately excluded from these recommendations for the same reasons they were excluded from justification recommendations. They increase the likelihood that victims of domestic violence will be stereotyped and that society will perceive them as being held to a lesser standard of accountability than other defendants.

1 Evidence In Putative Self-Defence Cases

Because putative self-defence will be argued in the alternative to a self-defence claim, evidence that is admissible for self-defence claims will already have been presented to a court.

2 Recommendation for Putative Self-defence Statute

Although this document describes the reform recommendation as putative self-defence, the reform actually broadens the defence to create a putative justification defence. This new defence would apply where a defendant thought s/he was acting justifiably, whether in defence of self, another or property, but in fact was unreasonable in this belief. The statute should read:

A defendant's conduct is partially excused if s/he believes that the facts are such that his/her conduct is necessary and appropriate for any of the purposes that would establish a justification under this criminal statute, even though his/her belief is unreasonable.

13.2.2 Provocation Defence When Battered Women Lose Control

Some battered women kill their abusers after losing control in response to their strong emotions, rather than because they thought their abusers were going to seriously hurt or kill them. Neither self-defence claim is appropriate for these women. For this reason, this document recommends keeping a provocation defence only when the provoking act was unlawful and with a few other reforms to make the defence accessible for battered women.

The choice of excuse defences for women who responded after losing control are provocation, diminished capacity, insanity and warranted excuse. Both insanity and a diminished capacity defence are inappropriate for most of these battered women because the psychological harm they suffered at the hands of the abuser should be insufficient to meet the requirements of either defence. Furthermore, it would brand women suffering from such psychological harm as deviant or abnormal, rather than pushed to their limits by their circumstances. For the same reason, creating a separate victim-centered defence, either a BWS excuse defence or a victim's excuse defence should be avoided.

The warranted excuse defence is identical to a provocation defence that is limited to cases in which a defendant was provoked by an unlawful act. Since both accomplish the same reform, it seems unnecessary to abolish an existing defence and create a new one. This would make the reform seem more complicated.

1 Reforming the Provocation Defence

a Unlawful Act

The first required reform of provocation law must be that the underlying provoking act be unlawful. The purpose of this reform is to eliminate common justifications for femicide and to eliminate the typically gender-biased judgments that determine what conduct would provoke a reasonable person.

b Provocation

The second required reform would be to accept that in domestic violence situations, an unlawful act that provoked a defendant could be something as minor as a gesture or even a facial expression. A simple gesture or expression might be the clue, based on past patterns, of the deceased's intention to physically harm the defendant. This is the only way some battered women will be able to access the defence.

c Cooling Off

The inclusion of fear in the types of emotions that can lead a defendant to kill her abuser

under provocation is another necessary reform. Tied to this suggestion, the provocation defence will need to be altered to reflect that not all people respond to a provocation immediately. Some respond more slowly, before there is a flare up.

d Reasonableness

Finally, the reasonableness standard should be changed to the first option of the mixed objective-subjective standard that tests reasonableness against an ordinary person who knows what the defendant knows and sees what the defendant sees. As with self-defence, this standard keeps some element of an objective perspective while understanding that circumstances may determine how a person would respond to a situation.

2 Evidence in Provocation Defence Cases

A provocation statute should enumerate the admissibility of specific evidence pertaining to domestic violence when a defendant alleges that she responded to a provocation because of that domestic violence. By eliminating a court's discretion to determine the admissibility of certain evidence, the statute could create the necessary elements for a fair trial of victims of domestic violence. As with any evidence statute for domestic violence victims, the statute should clarify that the relevant evidence is not restricted to the types of evidence listed in the statute.

3 Recommendation for a Provocation Defence Statute

1. A defendant's conduct may be excused if it her loss of self-control was induced by the unlawful conduct of the deceased towards or affecting the defendant; and if the deceased's conduct could have induced a reasonable person in the same circumstances to have lost self-control.

2. For the purposes of determining whether the defendant's conduct occurred under provocation, the court must apply this provision even if:
 - (a) There was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;

 - (b) The defendant's conduct did not occur suddenly; or

 - (c) The act or omission causing death occurred with any intent to take the life or inflict grievous bodily harm.

3. The loss of self-control may result from any emotion so long as it caused the defendant to lose self-control.

4. Notwithstanding insufficient evidence that the defendant was responding to an unlawful provocation, where the defendant alleges domestic violence, she may use the following types of evidence to prove she was responding to an unlawful provoking act or any other element of this defence:
 - (a) Evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse; and

(b) Expert testimony on the nature and effect of physical, emotional or mental abuse on the beliefs, perceptions, or behaviour of victims of domestic violence, including the relevant facts or circumstances relating to the domestic violence that are the bases of the expert opinion.

13.3 Reform of Evidence Law

Another option for the inclusion of the evidence of a past history of violence between the defendant and the deceased, of the deceased's violent propensities and expert testimony on the social context and effects of abuse in criminal defences is to create a separate evidence statute. Rather than include admissibility provisions within the separate defence, the legislature could adopt a general provision.

The discussion document recommends including evidence provisions within the defence statutes in order to allow for these provisions to specify how the evidence could and should be used. Unfortunately, in attaching the evidence provisions to the individual defences, battered women will not be able to rely on the statutes in cases outside of the defences. For all other circumstances, a general evidence statute should be adopted.

13.4 General Recommendation

To the extent reformers fear that other defendants who deserve justification or excuse defences will be unfairly excluded from these reforms, they could advocate for a general provision that reads:

All other instances that stand upon the same footing of reason and justice as those criminal defences enumerated shall be considered justifiable or excusable homicide.

Notes:

¹ Unfortunately, the author was able to locate information on criminal defence law and statutes only in Australia, Canada, England, New Zealand and the United States, although she searched the law in a wider variety of countries. Each of the countries discussed shares a common law system similar to South Africa's.

² This document uses the term "partner" as one word that encompasses husbands, boyfriends and lovers. In no way is it intended to suggest that the batterer and his victim have equal power in their relationship.

³ Human Rights Watch, *Violence Against Women and the Medico Legal System*, August 1997; S. Bollen, L. Artz, L. Vetten and A. Louw, *Violence Against Women In Metropolitan South Africa: A study on Impact and Service Delivery*, Institute of Security Studies Monograph Series, No. 41, September 1999.

⁴ Ibid.

⁵ This is a common problem around the world.

⁶ Jane Maslow Cohen 'Self-Defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill' (1996) 57 U Pitt. L. Rev. 757, 785; Emily L. Miller '(Wo)manslaughter: Voluntary Manslaughter, Gender and the Model Penal Code' (2001) 50 Emory Law Journal 665, 685; Richard A Rosen 'On Self-Defence, Imminence, and Women Who Kill their Batterers' (1993) 71 North Carolina Law Review 371, 395; The Canadian Association of Elizabeth Fry Societies 'Response to the Department of Justice re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property' <http://www.elizabethfry.ca/response.htm> E13.

⁷ One academic argues that the reason criminal law and its defences reflect male violence is because male violence is much more prevalent and that criminal law has been developed and enforced predominantly by men. Laurie J. Taylor 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defence' (1986) 33 UCLA L. Rev. 1679, 1681. See also, Anne Coughlin 'Excusing Women' (1994) 82 California Law Review 1, 92.

⁸ Taylor supra note 7 at 1679-80.

⁹ Op cit. at 1701.

¹⁰ Op cit. at 1681.

¹¹ Op cit. at 1701.

¹² Social context evidence refers to the expert evidence describing the difficulties battered women encounter accessing social and legal services to protect them from domestic violence and the difficulties battered women face in trying to escape domestic violence, including the risk to their personal safety. The phrase is intended to incorporate all evidence that relates to the circumstances in which battered women commonly find themselves.

¹³ Erica Beecher-Moas 'Domestic Violence: Competing Conceptions of Equality in the Law of Evidence' (2001) 47 Loyola Law Review 81, 127.

¹⁴ Benjamin Zipursky 'Self-Defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Self-defence, Domination, and the Social Contract' (1996) 57 University of Pittsburgh Law Review 579, 583-83. Each of the categories described is from this article.

¹⁵ Victoria Nourse 'Passion's Progress: Modern Law Reform and the Provocation Defence' (1997) 106 Yale LJ 1331, 1395; Coughlin supra note 7 at 13; Lois MacDonald 'The Violation of Women – Towards a Clearer Consciousness' (1992) 30 Alberta Law Review (No.3) 900, page 18 of printout; Elizabeth M. Schneider 'Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering' (1986) 9 Women's Rights Law Reporter 195, pages 34 and 40 of printout.

¹⁶ Taylor supra note 7 at 1679.

¹⁷ Coughlin supra note 7 at 14-15; Kevin Hon Heller 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defence and Provocation Cases' (1998) 26 American Journal of Criminal Law 1, 22-23. By contrast, justification defences assume that a defendant always remains in control and is capable of rational thought even when faced with dangerous situations.

¹⁸ Coughlin supra note 7 at 13.

¹⁹ Nourse supra note 15 at 1394; MacDonald supra note 15 at page 18 of printout; Schneider supra note 15 at page 40 of printout.

²⁰ Taylor supra note 7 at 1699-1700.

²¹ Patricia Kazan 'Reasonableness, Gender Difference, and Self-Defence Law' (1997) 24 Manitoba Law Journal 549, ¶25; Rosen supra note 6 at 410.

²² See e.g. Anthony Sebok 'Self-Defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Does an Objective Theory of Self-Defence Demand Too Much?' (1996) 57 University of Pittsburgh Law Review 725, 752-53.

²³ Heller supra note 17 at 11-12.

²⁴ Op cit. at 12.

²⁵ In a minority of jurisdictions, a victim of an attack must retreat from her home when she can do so safely.

²⁶ Donald Alexander Downs, More than Victims, Battered Women, the Syndrome Society and the Law (London 1996) 236.

²⁷ *State v. Gallegos*, (1986) 104 New Mexico 247 (Ct. of Apps. New Mexico) (disapproved of on other grounds); *State v. Gaethe-Leonard*, (2001) 2001 Wash. App. LEXIS 2488 (Ct. Apps. Washington). See also, *Lavallee v. Queen*, (1990) 55 CCC3d 97 (Sup. Ct. Canada) and *Osland v. Queen*, (1998) HCA 75 (High Ct. Aust. 1998). There is some evidence that many American jurisdictions will not allow verbal threats to satisfy the overt act requirement. Downs supra note 26 at 236.

²⁸ Ibid.

²⁹ At 265 (Citations omitted).

³⁰ George Fletcher 'Self-Defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Domination in the Theory of Justification and Excuse' (1996) 57 University of Pittsburgh Law Review 553, 559-60; *Lavallee* supra note 27 at 115; *State v. Norman*, (1989) 324 North Carolina 253, 261 (Sup. Ct. NC).

³¹ Cohen *supra* note 6 at 797; Fletcher *supra* note 30 at 571.

³² Jeffrey B. Murdoch 'Is Imminence Really Necessity? Reconciling Traditional Self-defence Doctrine With the Battered Woman Syndrome' (2000) 20 Northern Illinois University Law Review 191, 197.

³³ Courts also have treated the imminence requirement as a proxy for other self-defence elements, such as strength of the threat, whether the defendant could have avoided the conflict, whether the defendant was the first aggressor, and the proportionality of the defendant's response to the overt act. VF Nourse 'Self Defence and Subjectivity' (2001) 68 University of Chicago Law Review 1235, 1236.

³⁴ Holly Maguigan 'Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals' (1991) 140 Univ. Pa. L. Rev. 379, 413; Joan H. Krause 'Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill' (1994) 46 Fla. L. Rev. 699, 711-712.

³⁵ In fact, a study in the United States showed that the element of imminence was contested most often in cases with little time delay between the confrontation and the woman's response, typically in objective or putative imminence cases. Nourse *supra* note 33 at 1252-53.

³⁶ Danielle R. Dubin 'A Woman's Cry for Help: Why the United States Should Apply Germany's Model of Self-Defence for the Battered Woman' (1995) 2 ILSA J Int'l and Comparative Law 235, 240.

³⁷ *Lavallee* *supra* note 27 at 115.

³⁸ A few American states hold a *per se* rule that non-confrontational claims of self-defence can never meet the imminence requirement. At least 16 American states and Washington DC allow defendants to claim self-defence, either implicitly or explicitly accepting that these cases can meet this element. See section [4.2](#). Canada and Australia have ruled that defendants in non-confrontational situations can meet this element. See sections [4.1](#) and [4.3](#). There is some suggestion that English courts also recognize that non-confrontational claims can meet the imminence requirement. See section [4.4](#).

³⁹ Arthur Ripstein 'Self-Defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Self-Defence and Equal Protection' (1996) 57 U. Pitt. L. Rev. 685, 688.

⁴⁰ *Op cit.* at 691.

⁴¹ Maguigan *supra* note 34 at 413.

⁴² Heller *supra* note 17 at 66.

⁴³ Maguigan supra note 34 at 409.

⁴⁴ Op cit. at 409.

⁴⁵ Ripstein supra note 39 at 689.

⁴⁶ Kazan supra note 21 at ¶25.

⁴⁷ Heller supra note 17 at 8.

⁴⁸ Fletcher supra note 30 at 570; Heller supra note 17 at 4 and 9.

⁴⁹ Cohen supra note 6 at 801.

⁵⁰ Sharon Angella Allard 'Rethinking Battered Woman Syndrome: A Black Feminist Perspective' (1991) 1 UCLA Women's Law Journal 191, 193.

⁵¹ Fletcher supra note 30 at 562.

⁵² Allard supra note 50 at 193.

⁵³ Martha Shaffer 'R v. Lavellee: A Review Essay' (1990) 22 Ottawa Law Review 607, ¶13.

⁵⁴ Ibid.

⁵⁵ Schneider supra note 15 at pages 41-42 of printout; Naomi R. Cahn 'The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice' (1992) 77 Cornell Law Review 1398, 1405.

⁵⁶ At 91.

⁵⁷ Heller supra note 17 at 55.

⁵⁸ Op cit. at 56.

⁵⁹ Fletcher supra note 30 at 563-64.

⁶⁰ Elizabeth Fry Societies supra note 6 at E16; Heller supra note 17 at 65.

⁶¹ Cabey v. Goetz (4/96) <http://www.courttv.com/verdicts/goetz.html>. Goetz lost a civil claim brought by one of the men he shot, but was acquitted of criminal charges for the shootings.

⁶² Nourse supra note 33 at 1279-80.

⁶³ Op cit. at 1279-80.

⁶⁴ Heller supra note 17 at 4.

⁶⁵ See sections [4.2](#) and [4.3](#).

⁶⁶ Maguigan supra note 34 at 410.

⁶⁷ Ibid.

⁶⁸ Op cit. at 448.

⁶⁹ Elizabeth Fry Societies supra note 6 at E6.

⁷⁰ Heller supra note 17 at 78.

⁷¹ Op cit. at 78.

⁷² See sections [4.1](#), [4.2](#), and [4.3](#).

⁷³ Heller supra note 17 at 81.

⁷⁴ The advantages and disadvantages of these two standards will be described in detail under reform options for self-defence. See section [2.1.4](#).

⁷⁵ Heller supra note 17 at 81.

⁷⁶ Op cit. at 84.

⁷⁷ Op cit. at 87.

⁷⁸ Ibid.

⁷⁹ Ripstein supra note 39 at 708.

⁸⁰ Ibid.

⁸¹ Kerry A. Shad 'State v. Norman: Self-Defence Unavailable to Battered Women Who Kill Passive Abusers' (1990) 68 North Carolina Law Review 1159, 1174. Excuse defences maintain that the unlawful act is wrong, but remove the defendant's blameworthiness because of her compelling circumstances.

⁸² Maguigan supra note 34 at 444-45.

⁸³ Department of Justice, Reforming the Criminal Code Defences,

<http://www.canada.justice.gc.ca/en/cons/rccd/section1p1.html>, Section 2, Option 2, 2(c).

⁸⁴ Maguigan supra note 34 at 442.

⁸⁵ Department of Justice supra note 83 at Section 2, Option 2, 2(c).

⁸⁶ Martin E Veinsredideris 'The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defence by Battered Women' (2000) 149 University of Pennsylvania Law Review 613, 636-37.

⁸⁷ See section [4.2](#).

⁸⁸ Fletcher supra note 30 at 559-60.

⁸⁹ Beecher-Moas supra note 13 at 107.

⁹⁰ Krause supra note 34 at 711; Dubin supra note 36 at 244.

⁹¹ See Chapter 4.

⁹² Nourse supra note 33 above at 1282-83.

⁹³ Beecher-Moas supra note 13 at 110; Coughlin supra note 7 at 51.

⁹⁴ Beecher-Moas supra note 13 at 110; Coughlin supra note 7 at 51.

⁹⁵ Nourse supra note 33 above at 1238.

⁹⁶ Op cit. at 1282-83.

⁹⁷ Ripstein supra note 39 at 711.

⁹⁸ The Women Who Kill in Self-Defence Campaign, Submission to the Model Criminal Code Officer's Committee Fatal Offences Against the Person', dated 21 August 98, at <http://www.nwjc.org.au/mccode.htm>, page 7 of printout; Taylor supra note 7 at 1701.

⁹⁹ Shaffer supra note 53 at ¶12; Krause supra note 34 at 710.

¹⁰⁰ Taylor supra note 7 at 1705.

¹⁰¹ Shad supra note 81 at 1177.

¹⁰² Veinsredideris supra note 86 at 640.

¹⁰³ Op cit. at 643.

¹⁰⁴ Krause supra note 34 at 711-12; Shad supra note 81 at 1175.

¹⁰⁵ Louisiana Code of Evidence, Article 404(2) and Maryland Code S. 10-916(3).

¹⁰⁶ Sebok supra note 22 at 754; Faigman 'Discerning Justice When Battered Women Kill' (1987) 39 Hastings LJ 207, 217.

¹⁰⁷ Charles Patrick Ewing, Battered Women Who Kill (1987) 85.

¹⁰⁸ Ibid.; Sebok supra note 22 at 754.

¹⁰⁹ Ewing supra note 107 at 83-4.

¹¹⁰ Op cit. at 84.

¹¹¹ Sebok supra note 22 at 754.

¹¹² Ewing supra note 107 at 87.

¹¹³ Shad supra note 81 at 1175.

¹¹⁴ Ewing supra note 107 at 80.

¹¹⁵ Ibid.

¹¹⁶ Op cit. at 85.

¹¹⁷ Ibid.

¹¹⁸ See section [4.3](#).

¹¹⁹ Ewing supra note 107 at 79-80; Sebok supra note 22 at 752-3; Faigman supra note 106 at 223-24.

¹²⁰ See section [4.2](#).

¹²¹ Taylor supra note 7 at 1704.

¹²² *Norman* supra note 30 at 271.

¹²³ Krause supra note 34 at 711-12.

¹²⁴ Shad supra note 81 at 1175.

¹²⁵ Veinsredideris supra note 86 at 625.

¹²⁶ Taylor supra note 7 at 1705.

¹²⁷ Ibid.

¹²⁸ Fletcher supra note 30 at 521.

¹²⁹ Shad supra note 81 at 1175.

¹³⁰ Ibid.

¹³¹ *People v. Aris*, 215 Cal. App.3d 1178, 1188 (Ct. App. Calif. 1989) (refused a self-defence claim of a battered woman who killed in non-confrontational situation).

¹³² See section [4.2](#).

¹³³ See section [4.2](#). Australia, Canada and at least 16 American states and Washington DC either implicitly or explicitly accept a pattern of abuse as sufficient evidence of imminence, even in non-confrontational situations, simply by allowing these women to argue self-defence. See sections [4.1](#), [4.2](#) and [4.3](#).

¹³⁴ Beecher-Moas supra note 13 at 105. Nourse supra note 33 above at 1270; Murdoch supra note 32 at 207; Peter Margulies 'Identity on Trial: Subordination, Social Science Evidence, and Criminal Defence' (1998) 51 Rutgers Law Review 45, 98; Rosen supra note 6 at 392.

¹³⁵ Murdoch supra note 32 at 211; Zipursky supra note 14 at 603.

¹³⁶ Robert Schopp, Barbara Sturgis and Megan Sullivan 'Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse' (1994) 1994 University of Illinois Law Review 45, 67-68.

¹³⁷ Rosen supra note 6 at 376. Schopp, Sturgis and Sullivan supra note 136 at 69; Shad supra note 81 at 1175; Krause supra note 34 at 711-712.

¹³⁸ *Norman* supra note 30 at 265.

¹³⁹ Zoe Rathus, working for the Women's Legal Service in Brisbane, Australia, proposed that self-defence be statutorily redefined as follows:

A person is justified in using defence of himself or herself or of any other person, such for as he or she believes, on reasonable grounds, is necessary in the circumstances. In determining the reasonableness of the beliefs of the defendant the personal history of the defendant and the history of any relationship between the defendant and the person against whom force is used

and the effects of the relationship upon the defendant are relevant.

Zoe Rathus, *Rougher Than Usual Handling: Women and the Criminal Justice System*, 2nd Edition, the Women's Legal Service: Brisbane (1995).

¹⁴⁰ Rosen supra note 6 at 380-81; Faigman supra note 106 at 225.

¹⁴¹ Beecher-Moas supra note 13 at 101-02.

¹⁴² At 250 (citations omitted).

¹⁴³ Rosen supra note 6 at 380.

¹⁴⁴ Op cit. at 406.

¹⁴⁵ New Zealand Law Commission, Report 73: Some Criminal Defences With Particular Reference to Battered Defendants, May 2001, p. 7.

¹⁴⁶ The Court in *State v. Norman*, (1989) 324 North Carolina 253 (Sup. Ct. NC) wrote:

Such reasoning proposes justifying the taking of human life not upon the reasonable belief it is necessary to prevent death or great bodily harm--- which the imminence requirement ensures--- but upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat. 264

One academic argued that proving the inevitability of a domestic violence attack that would cause serious harm of death is particularly difficult, as such a small portion of domestic violence cases end in that type of harm. Sebok supra note 22 at 746. Because of the low percentage of men who kill their partners, the academic argues that no social scientist would be willing to testify that an attack in the future in all probability would result in serious harm or death. Ibid. Ultimately, he concludes that a defendant may be able to prove some probability through her experience with the deceased, but not sufficient probability to justify a claim for self-defence. Op cit. at 752.

¹⁴⁷ In *People v. Aris*, (1989) 215 Cal. App.3d 1178 (Ct. App. Calif.), which was later overruled, the Court wrote:

This definition of imminence reflects the great value our society places on human life. The criminal law would not sentence to death a person which as the victim in the case for a murder he merely threatened to commit, even if he had committed threatened murders many times in the past and had threatened to murder the defendant. At 1189.

¹⁴⁸ Nourse supra note 33 above at 1271.

¹⁴⁹ *Aris* supra note 131 at 1188 (overruled).

¹⁵⁰ *Ibid.*

¹⁵¹ *Downs* supra note 26 at 246.

¹⁵² *Shad* supra note 81 at 1175.

¹⁵³ *State v. Stewart*, 243 Kansas 639, 647 (Sup. Ct. Kan, 1988).

¹⁵⁴ *Norman* at 265; *Rosen* supra note 6 at 392.

¹⁵⁵ *Veinsredideris* supra note 86 at 622.

¹⁵⁶ *Rosen* supra note 6 at 398. *Rosen* counters this point by asking whether the woman "is blameworthy for trying to make a marriage work, for trying to convince her husband to get help, for not running away?" *Ibid.*

¹⁵⁷ James Q. Wilson, *Moral Judgment* (1997) 64-65.

¹⁵⁸ *Veinsredideris* supra note 86 at 625. The author has located a case in which a prisoner successfully claimed self-defence.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Op cit.* at 626.

¹⁶¹ *Downs* supra note 26 at 246.

¹⁶² *Ibid.*

¹⁶³ *Downs* supra note 26 at 249. Several jurisdictions in the United States have replaced their imminence standards with necessity standards. See section [4.2](#). Two states allow defensive force when necessary. Six states have changed imminence to immediately necessary requirement; and the State of Nevada allows self-defence claims when they are based on the same reasoning as other justification defences. *Ibid.* The Canadian statute does not have an explicit imminence requirement, and since the early 1990s, the courts have refused to read one into the statute. See section [4.1](#).

¹⁶⁴ *State v. Hodges*, (1986) 239 Kansas 63, 74 (Sup. Ct. Kan.) (overruled).

¹⁶⁵ *Maguigan* supra note 34 at 415.

¹⁶⁶ *Ibid.*

¹⁶⁷ Cahn supra note 55 at 1406.

¹⁶⁸ Op cit. at 1405.

¹⁶⁹ Op cit. at 1415.

¹⁷⁰ Taylor supra note 7 at 1703.

¹⁷¹ Cahn supra note 55 at 1416.

¹⁷² Op cit. at 1417.

¹⁷³ Cahn supra note 55 at 1413.

¹⁷⁴ *State v. Wanrow*, (1977) 559 P.2d 548, 559 (Amended by statute).

¹⁷⁵ At ¶38.

¹⁷⁶ Shad supra note 81 at 1173.

¹⁷⁷ Maguigan supra note 34 at 444-45.

¹⁷⁸ Shad supra note 81 at 1173-74; Kazan supra note 21 at ¶24.

¹⁷⁹ Heller supra note 17 at 86.

¹⁸⁰ See section [4.2](#).

¹⁸¹ Maguigan supra note 34 at 445.

¹⁸² Elizabeth Fry Societies supra note 6 at E8.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Op cit. at E6; Downs supra note 26 at 237.

¹⁸⁶ Elizabeth Fry Societies supra note 6 at E6.

¹⁸⁷ Op cit. at E11.

¹⁸⁸ Shaffer supra note 53 at ¶13.

¹⁸⁹ Elizabeth Fry Societies supra note 6 at E11.

¹⁹⁰ Op cit. at E6.

¹⁹¹ In the United States, Maine has implemented this reform by statute. See section [4.2](#).

¹⁹² *Lavallee* supra note 27 at 124.

¹⁹³ Ripstein supra note 39 at 701.

¹⁹⁴ *Lavallee* supra note 27 at 124; Downs supra note 26 at 233.

¹⁹⁵ Downs supra note 26 at 233.

¹⁹⁶ Elizabeth Fry Societies supra note 6 at E13.

¹⁹⁷ Downs supra note 26 at 233.

¹⁹⁸ Fletcher supra note 30 at 564 and 576.

¹⁹⁹ R.S. 1985, c. C-46, s.34 (1992)

²⁰⁰ *Lavallee* supra note 27 at 115.

²⁰¹ Op cit. at 116.

²⁰² Op cit. at 120.

²⁰³ Op cit. at 120-21.

²⁰⁴ Ibid.

²⁰⁵ *Lavallee* supra note 27 at 120.

²⁰⁶ Op cit. at 114.

²⁰⁷ Op cit. at 121.

²⁰⁸ Op cit. at 112.

²⁰⁹ Op cit. at 124.

²¹⁰ Op cit. at 125.

²¹¹ *Lavallee* supra note 27 at 126.

²¹² *R v. Petel*, (1994) 1 SCR 3 ¶22 (Sup. Ct. Canada).

²¹³ *Ibid.*

²¹⁴ *Op cit.* at ¶29.

²¹⁵ *R v. Mallot*, (1998) 1 SCR 123, ¶38 (Sup. Ct. Canada).

²¹⁶ *Ibid.*

²¹⁷ *R v. Nguyen*, (1997) AJ No. 129, ¶25 (Alberta Court of Appeal).

²¹⁸ At ¶21.

²¹⁹ Maguigan supra note 34 at 385-86.

²²⁰ *Op cit.* at 434.

²²¹ *Op cit.* at 387.

²²² *Op cit.* at 407.

²²³ Idaho Statutes, s. 18-4009(3); Nevada Revised Statutes Annotated, s. 200.160; New Mexico Statutes, s. 30-2-7B; Oklahoma Statutes Title 21, c. 24, s. 733(2); Washington Revised Code, s. 9A.16.050(1).

²²⁴ Arkansas Code s. 5-2-607.

²²⁵ Louisiana Code of Evidence, Article 404(2) and Maryland Code, s. 10-916(3).

²²⁶ Delaware Code s. 464; Hawaii Code Annotated, s. 703-304; and Kentucky Revised Statutes Annotated, s. 503.050.

²²⁷ Florida Statutes, s. 782.02 (when in own home at time of felony, felony need not be against the person); Idaho Statutes, s. 18-4009; Mississippi Codes, s. 97-3-15; Nevada Revised Statutes Annotated, s. 20.120; Oklahoma Statutes Title 21, c. 24, s. 733(1) (when in own home at time of felony, felony need not be against a person); Washington Revised code, s. 9A.16.050.

²²⁸ Official Code of Georgia, s. 16-3-21; Indiana Code, s. 35-41-3-2; North Dakota Century Code, s. 12.05.07; Utah Statutes, s. 76-2-402.

²²⁹ Kansas Revised Statutes, s. 503.010.

²³⁰ Utah Statutes, s. 76-2-402.

²³¹ New Mexico Statutes, s 30-2-7A.

²³² Vermont Statutes, s. 2305.

²³³ Nevada Revised Statutes Annotated, s. 200.200.

²³⁴ The states that have adopted this standard include Arizona, Delaware, Georgia, Hawaii, Tennessee and Texas.

²³⁵ Maine Criminal Code s. 103. If the defendant's beliefs are grossly deviant, she can then claim imperfect self-defence.

²³⁶ The Massachusetts Annotated Laws c. 233, s. 23F reads:

In the trial of criminal cases charging the use of force against another where the issue of defence of self or another, defence of duress or coercion, or accidental harm is asserted, a defendant shall be permitted to introduce either or both of the following in establishing the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he had availed himself of all available means to avoid physical combat or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat:

(a) evidence that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse;

(b) evidence by expert testimony regarding the common pattern in abusive relationships; the nature and effects of physical, sexual or psychological abuse and typical responses thereto, including how those effects relate to the perception of the imminent nature of the threat of death or serious bodily harm; the relevant facts and circumstances which form the basis for such opinion; and evidence whether the defendant displayed characteristics common to victims of abuse.

²³⁷ Utah Statutes, s. 76-2-402.

²³⁸ Arizona Revised Statutes, s. 13-415.

²³⁹ Hawaii Code Annotated, s. 703-304(3).

²⁴⁰ Texas Penal Code s. 1.07.

²⁴¹ Texas Code of Criminal Procedure s. 38.36.

²⁴² Beecher-Moas supra note 13 at 110.

²⁴³ Arkansas Code, s. 5-2-607(3)(b); Delaware Code, s. 464(2).

²⁴⁴ Nevada Revised Statutes Annotated, s. 200.150.

²⁴⁵ These states include California, Colorado, Georgia, Illinois, Kentucky, Minnesota, Missouri, New York, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Wyoming and Washington DC.

²⁴⁶ See e.g. *State v. Emick*, (1984) 481 NYS2d 552 (App. Div.).

²⁴⁷ *Gallegos* supra note 27 at 250 (citations omitted).

²⁴⁸ *Ibid*.

²⁴⁹ *Gaethe-Leonard* supra note 27 at *14; *State v. Walker*, (1985) 700 P.2d 1168, 1172 (Ct. Apps. Wa.).

²⁵⁰ *Gallegos* supra note 27 at 250; *Gaethe-Leonard* supra note 27 at *14.

²⁵¹ *People v. Humphrey*, (1996) 921 P2d 1, 8-9 (Sup. Ct. Ca.); see also *Robinson v. State*, (1992) 417 SE2d 88, 91 (Sup. Ct. SC).

²⁵² *State v. Janes*, (1993) 121 Wn.2d 220, 241-42 (Sup. Ct. Wash.).

²⁵³ *State v. Burtzloff*, (1992) 493 NW2d 1, 7-8 (Sup. Ct. SD).

²⁵⁴ *Robinson* supra note 51 at 91.

²⁵⁵ Maguigan supra note 34 at 409.

²⁵⁶ Interestingly, despite Kansas' acceptance of a mixed objective-subjective standard that looks at reasonableness based on the defendant's circumstances, the Kansas Supreme Court ruled that per se women who kill their abusers in non-confrontational situations cannot claim self-defence.

²⁵⁷ For example, New York describes its test as subjective when in fact it requires testing whether the defendant's subjective beliefs were reasonable. *State v. Torres*, (1985) 488 NYS2d 358 (Sup. Ct. NY).

²⁵⁸ *Humphrey* supra note 251 at 9.

²⁵⁹ See, *State v. Williams*, (1990) 787 SW2d 308 (Ct. Apps. Mo.); *Commonwealth v. Stonehouse*, (1989) 521 Pa. 41, 65 (Sup. Ct. Pa.).

²⁶⁰ *North Dakota v. Leidholm*, (1983) 334 NW2d 811, 817 (Sup. Ct. ND).

²⁶¹ Op cit. at 821.

²⁶² Maguigan supra note 34 at 417 and 419.

²⁶³ *Wanrow* supra note 174 at 558.

²⁶⁴ See *Robinson* supra note 51 at 91; *State v. Furlough*, (1990) 797 SW2d 631, 650 (Ct. Crim. Apps. Tenn.).

²⁶⁵ *Robinson* supra note 51 at 92.

²⁶⁶ This statement is not meant to suggest that all other American states allow battered women who kill in non-confrontational situations to claim self-defence. Some states have not published an opinion on the matter, while others allow the argument but it is unclear whether women have successfully used the defence. The three states are: Kansas, North Carolina, and Wyoming.

²⁶⁷ *Stewart* supra note 153 at 646. The Stewart decision overturned Kansas Supreme Court precedent that allowed battered women who killed in non-confrontational situations to argue self-defence. The prior decision permitted a woman to argue self-defence after she entered the bedroom where her husband was lying down and shot him. Hodges supra note 164. The defendant was acquitted of murder.

²⁶⁸ *Jahnke v. State*, (1984) 682 P2d 991 (Sup. Ct. Wy.) (*Jahnke* involved an abused child who killed his father; the arguments are equally applicable to battered women).

²⁶⁹ *Norman* supra note 30 at 265.

²⁷⁰ Nourse supra note 33 at 1252-53.

²⁷¹ Op cit. at 1258.

²⁷² *Norman* supra note 30 at 261 (citations omitted).

²⁷³ *Norman* supra note 30 at 261-62.

²⁷⁴ Op cit. at 263.

²⁷⁵ Op cit. at 264.

²⁷⁶ *Stewart* supra note 153 at 647-48.

²⁷⁷ *Stewart* supra note 153 at 647-48.

²⁷⁸ Op cit. at 647-48.

²⁷⁹ Op cit. at 646.

²⁸⁰ Op cit. at 646.

²⁸¹ *Ex parte Judy M. Haney*, (1992) 603 So.2d 412, 418 (Sup. Ct. Ala.); *People v. Yaklich*, (1991) 833 P.2d 758 (Ct. Apps Co.); *State v. Martin*, (1984) 666 SW2d 895 (Ct. Apps. Mo.); *State v. Leaphart*, (1983) 673 SW2d 870 (Ct. Crim. App. Tenn.).

²⁸² *Yaklich* supra note 281.

²⁸³ The Women Who Kill in Self-Defence Campaign supra note 98 at page 5 of printout.

²⁸⁴ Self-Defence Act 2001, Schedule 1, s. 418.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ See section [6.1.1](#) for a description of the theory.

²⁸⁸ *Osland* supra note 27 at ¶108.

²⁸⁹ Op cit. at ¶60.

²⁹⁰ Op cit. at ¶169.

²⁹¹ Op cit. at ¶172.

²⁹² *R v. Secretary*, (1996) 107 Northern Territory Reports 1, Pages 3 and 8 of Printout (Sup Ct. of Northern Territory).

²⁹³ Op cit. at pages 3 and 8 of Printout.

²⁹⁴ *R v. MacKenzie*, [2000] QCA 324 (Sup. Ct. Q.).

²⁹⁵ *R v. Hayward*, [2001] EWJ No. 6404 (Ct. App. Crim.).

²⁹⁶ *R v. SR*, [1995] EWJ No. 3375 (Ct App. Crim.).

²⁹⁷ Crimes Act 1961, s. 48.

²⁹⁸ New Zealand Law Commission supra note 145 at p. x.

²⁹⁹ Dubin supra note 36 at 252.

³⁰⁰ Jeremy Horder 'Self-defence, Necessity and Duress: Understanding the Relationship' (1998) 11 Can. J. L. & Juris. 143, 150.

³⁰¹ CR Snyman, Criminal Law, 3rd Ed. (1995) 111-13.

³⁰² Horder supra note 300 at 151.

³⁰³ Veinsredideris supra note 86 at 622-23.

³⁰⁴ Dubin supra note 36 at 252.

³⁰⁵ Ripstein supra note 39 at 723.

³⁰⁶ Op cit. at 685-86.

³⁰⁷ Shaffer supra note 53 at ¶23.

³⁰⁸ Evan Stark 'Symposium on Reconceptualising Violence Against Women by Intimate Partners' (1995) 58 Albany Law Review 973, 998; Allard supra note 50 at 192.

³⁰⁹ Stark supra note 308 at 998.

³¹⁰ Allard supra note 50 at 192; Stark supra note 308 at 998.

³¹¹ Melanie Frager Griffith 'Battered Woman Syndrome: A Tool for Batterers?' (1995) 64 Fordham L. Rev. 141, 172; Stark supra note 308 at 998; Allard supra note 50 at 192.

³¹² Allard supra note 50 at 192.

³¹³ Griffith supra note 311 at 173.

³¹⁴ Stark supra note 308 at 998.

³¹⁵ David L. Faigman and Amy J. Wright 'The Battered Woman Syndrome in the Age of Science' (1997) 39 Arizona Law Review 67, 82-88.

³¹⁶ *Osland* supra note 27 at ¶169 (Kirby J concur); Mallot supra note 215 at ¶20; Stark supra note 308 at 999; Schopp, Sturgis and Sullivan supra note 136 at 52; Faigman and Wright supra note 315 at 82-88.

³¹⁷ *Osland* supra note 27 at ¶169 (Kirby J concur); Mallot supra note 215 at ¶20; Lavallee supra note 27 at 125; Nourse supra note 33 at 1282-83.

³¹⁸ *Lavallee* supra note 27 at 121; Alexandra L. Wannop 'Battered Woman Syndrome and the Defence of Battered Women in Canada and England' (1995) 19 *Suffolk Transnational Law Review* 251, 268; Stark supra note 308 at 999.

³¹⁹ *Osland* supra note 27 at ¶169 (Kirby J concur); Mallot supra note 215 at ¶20; *Lavallee* supra note 27 at 125; Wannop supra note 318 at 268; Faigman and Wright supra note 315 at 82-88.

³²⁰ *Lavallee* supra note 27 at 125; Nourse supra note 33 at 1288.

³²¹ In the American case *Commonwealth v. Stonehouse*, (1989) 521 Pa. 41 (Sup. Ct. Pa.), the Supreme Court of Pennsylvania overturned a lower court decision in part because the lower court had agreed with the prosecutor's argument that if the defendant truly was an innocent victim, she would have ended the relationship. At 62-63. The lower court wrote: "[t]he continued relationship between appellant and the victim further points to how unreasonable appellant's assertion of self-defence is." *Commonwealth v. Stonehouse*, (1986) 358 Pa. Super. 270, 277-78 (Superior Court of Pennsylvania) (overruled). In fact, the defendant had ended the relationship years before, but the deceased would not stop harassing and abusing her, a fact the lower court overlooked. See also, *Lavallee* supra note 27 at 113; Nourse supra note 33 at 1288; Coughlin supra note 7 at 50; Griffith supra note 311 at 161-2.

³²² Griffith supra note 311 at 161-2.

³²³ *Lavallee* supra note 27 at 113; Schopp, Sturgis and Sullivan supra note 136 at 52; Griffith supra note 311 at 161-2; Nourse supra note 33 at 1288.

³²⁴ Shaffer supra note 53 at ¶22; Griffith supra note 311 at 161-2.

³²⁵ Griffith supra note 311 at 161-2. Also in the *Stonehouse* case, the Supreme Court of Pennsylvania noted that the lower court based its decision on the belief that as a trained police officer, the defendant could not be a battered woman. *Stonehouse* supra note 259 at 63.

³²⁶ Many of these arguments were taken from arguments specific to a BWS defence but are applicable generally to a victim's defence.

³²⁷ Coughlin supra note 7 at 7.

³²⁸ *Osland* supra note 27 at ¶164; Margulies supra note 134 at 63.

³²⁹ Elizabeth M. Schneider 'Self-defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Resistance to Equality' (1996) 57 *University of Pittsburgh Law Review* 477, 506.

³³⁰ Downs supra note 26 at 8; Shaffer supra note 53 at ¶126. Shaffer argued that the

problem is that deviance is measured from a male perspective – courts and juries view women's different experiences as deviant. Unless women's experiences are treated as reasonable, they cannot be accommodated by the legal system. *Ibid.* See also, Coughlin *supra* note 7 at 91; Taylor *supra* note 7 at 1732.

³³¹ *Mallot* *supra* note 215 at ¶41; Tim Quicley 'Battered Women and the Defence of Provocation' (1991) 55 *Saskatchewan Law Review* 223, page 6 of printout.

³³² Coughlin *supra* note 7 at 5. See also, Griffith *supra* note 311 at 179-80.

³³³ At 567. The court allowed the defendant to argue self-defence after she killed her partner in a non-confrontational setting. This decision was later overruled by *State v. Stewart*, (1988) 243 *Kansas* 639 (Sup. Ct. Kan.) in which the Supreme Court refused to allow battered women who kill their abusers in non-confrontational settings to claim self-defence.

³³⁴ Kazan *supra* note 21 at ¶24.

³³⁵ *Ibid.*

³³⁶ Shaffer *supra* note 53 at ¶26.

³³⁷ Coughlin *supra* note 7 at 55; Krause *supra* note 34 at 716.

³³⁸ Kazan *supra* note 21 at ¶14.

³³⁹ Coughlin *supra* note 7 at 6; Kazan *supra* note 21 at ¶¶17, 18 and 20.

³⁴⁰ *Osland* *supra* note 27 at ¶158.

³⁴¹ Illustrating this point, English courts tend to use BWS towards a defence of diminished capacity; while Australian courts use it to bolster a self-defence claim. Wannop *supra* note 318 at 269; Shaffer *supra* note 53 at ¶¶24 and 29.

³⁴² Stark *supra* note 308 at 1007.

³⁴³ Margulies *supra* note 134 at 64-65; Griffith *supra* note 311 at 180-81.

³⁴⁴ Veinsredideris *supra* note 86 at 638; Stephen J. Morse 'Excusing and the New Excuse Defences: A legal and Conceptual Review' (1998) 23 *Crime and Justice* 329, 385.

³⁴⁵ Dubin *supra* note 36 at 256.

³⁴⁶ Kazan *supra* note 21 at ¶20.

³⁴⁷ Ibid.

³⁴⁸ Coughlin supra note 7 at 7.

³⁴⁹ Shaffer supra note 53 at ¶26; Schneider supra note 329 at 497-98.

³⁵⁰ Coughlin supra note 7 at 7. See also, Kazan supra note 21 at ¶21. ("Whether you regard women suffering from learned helplessness as incapable of recognizing more adaptive alternatives to continued participation in an abusive relationship, or you see them as suffering from a dysfunction that renders them incapable of acting on these alternatives, learned helplessness constitutes a form of psychological impairment").

³⁵¹ Allard supra note 50 at 195-96; Margulies supra note 134 at 47-48; MacDonald supra note 15 at Page 18 of printout.

³⁵² Mallot supra note 215 at ¶41.

³⁵³ Wilson supra note 157 at 53; Krause supra note 34 at 716-17.

³⁵⁴ Stonehouse supra note 259 at footnote 10.

³⁵⁵ Op cit. at note 10.

³⁵⁶ Kazan supra note 21 at ¶26; Schopp, Sturgis and Sullivan supra note 136 at 70.

³⁵⁷ Maguigan supra note 34 at 444-45.

³⁵⁸ The Women Who Kill in Self-Defence Campaign supra note 98 at page 8 of printout; Allard supra note 50 at 194. Taylor supra note 7 at 1732.

³⁵⁹ *Griffin v. State*, (1988) 749 P.2d 246, 249 (Sup. Ct. Wy.).

³⁶⁰ *Osland* supra note 27 at ¶161; Allard supra note 50 at 199.

³⁶¹ Stark supra note 308 at 1007; Allard supra note 50 at 194; Margulies supra note 134 at 48.

³⁶² *Osland* supra note 27 at ¶161; Wilson supra note 157 at 58; Stark supra note 308 at 1019; Maguigan supra note 34 at 444-45; Krause supra note 34 at 717.

³⁶³ *Osland* supra note 27 at ¶161; Schneider supra note 229 at 508; Griffith supra note 311 at 179-80.

³⁶⁴ Kazan supra note 21 at ¶24.

³⁶⁵ Wilson supra note 157 at 55; Schopp, Sturgis and Sullivan supra note 136 at 64.

³⁶⁶ *Osland* supra note 27 at ¶164.

³⁶⁷ Schneider supra note 329 at 497-98; *Osland* supra note 27 at ¶161.

³⁶⁸ As described in section [6.1.1](#), battered women's syndrome is one theory on the effects of battering on a domestic violence victim's perceptions.

³⁶⁹ *Springer v. Kentucky*, (1999) 998 SW2d 439, 455 (Sup. Ct. Ky).

³⁷⁰ But see Cohen supra note 6. Maslow argues for a specific self-defence for abused women who kill based on the concept of a regime of private tyranny. The regime is based on coercive control and the elements would include: (1) proof of a regime of private tyranny; (2) killing a tyrant must be reasonably necessary (3) to the achievement of liberation of one or more of those subject to the tyranny; (4) reasonableness is determined from the circumstances and the defendant sees them. At 802.

³⁷¹ Stark supra note 308 at 1024.

³⁷² Cohen supra note 6 at 763-64 and 768.

³⁷³ Op cit. at 784.

³⁷⁴ Stark supra note 308 at 986.

³⁷⁵ Op cit. at 1023.

³⁷⁶ Cohen supra note 6 at 774.

³⁷⁷ Ibid.

³⁷⁸ Op cit. at 774-75. Stark labels this hostage taking as 'tangential spouse abuse.' Stark supra note 308 at 1017.

³⁷⁹ Cohen supra note 6 at 784-85.

³⁸⁰ Op cit. at 779.

³⁸¹ Zipursky supra note 14 at 611.

³⁸² Op cit. at 609-10.

³⁸³ Downs supra note 26 at 247.

³⁸⁴ Griffith supra note 311 at 192.

³⁸⁵ Op cit. at 192-3.

³⁸⁶ Ibid.

³⁸⁷ Cohen supra note 6 at 772.

³⁸⁸ Rathus supra note 139 at 126 (based on the recommendations of the Western Australian Task Force).

³⁸⁹ Op cit. 130.

³⁹⁰ Stark supra note 308 at 976.

³⁹¹ Elizabeth Fry Societies supra note 6 at E8.

³⁹² Stark supra note 308 at 1021.

³⁹³ Op cit. at 981.

³⁹⁴ Op cit. at 986; Elizabeth Fry Societies supra note 6 at E8.

³⁹⁵ New Zealand Law Commission supra note 145 at p. 29.

³⁹⁶ Ibid.

³⁹⁷ Taylor supra note 7 at 1710.

³⁹⁸ Fletcher supra note 30 at 572; Lauren E. Goldman 'Note: Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defence and the Merits of Partial Excuse' (1994) 45 Case Western Reserve Law Review 185, 225.

³⁹⁹ Kansas Statutes, s. 21-3403.

⁴⁰⁰ See section [7.4](#).

⁴⁰¹ Fletcher supra note 30 at 577.

⁴⁰² Taylor supra note 7 at 1712-13.

⁴⁰³ The seven states are Delaware, Kansas, Kentucky, Maine, North Dakota, Pennsylvania, and Wisconsin.

⁴⁰⁴ Delaware Code, s. 470; Kentucky Revised Statutes Annotated, s. 503.120; North Dakota Century Code, s. 12.05.08.

⁴⁰⁵ Kansas Statute, s. 31-3403; Pennsylvania Consolidated Statutes s. 2503; and Wisconsin Statutes, s. 940.01(2)(b).

⁴⁰⁶ Maine Criminal Code, s. 101.

⁴⁰⁷ *People v. Erickson*, (1997) 57 Cal App 4th 1391 (Ct of App. Calif.) (Sup. Ct. denied appeal)

⁴⁰⁸ Norman supra note 30 at 260. See also, Aris supra note 131(overruled).

⁴⁰⁹ Criminal Law Consolidation Act 1935, s. 15(2) (South Australia); New South Wales Crimes Act 1900, Schedule 1, s. 421.

⁴¹⁰ New Zealand Law Commission supra note 145 at 20.

⁴¹¹ Op cit. at 20-21.

⁴¹² Op cit. at 22.

⁴¹³ Ibid.

⁴¹⁴ Op cit. 35.

⁴¹⁵ New Zealand Law Commission supra note 145 at 25.

⁴¹⁶ Ibid.

⁴¹⁷ Nourse supra note 15 at 1390.

⁴¹⁸ Dan Kahan and Martha Nussbaum 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia Law Review 269, 305-306.

⁴¹⁹ Taylor supra note 7 at 1679.

⁴²⁰ Alexander Reilly 'The Heart of the Matter: Emotion in Criminal Defences' (1997-98) 29 Ottawa Law Review 117, ¶59.

⁴²¹ Miller supra note 6 at 686.

⁴²² Taylor supra note 7 at 1716-17.

⁴²³ Kahan and Nussbaum, supra note 418 at 306.

⁴²⁴ Taylor supra note 7 at 1687.

⁴²⁵ Op cit. at 1716; Quicley, supra note 331at page 23 of printout.

⁴²⁶ Wannop supra note 318 at 256-7.

⁴²⁷ Taylor supra note 7 at 1729.

⁴²⁸ In Australia, the Australian Capital Territory and New South Wales statutes allow a provocation defence even when there has been a lapse of time between the provocation and the action in response. See section [8.4.3](#). Canada, England and some jurisdictions in the United States have accepted the concept of a slow burn of emotions, which allows more battered women access to the defence. See sections [8.4.1](#), [8.4.2](#) and [8.4.4](#).

⁴²⁹ An objective test asks whether an ordinary, unfamiliar person would have been provoked by the act, while the subjective test asks simply whether the defendant was provoked by the act. The first option of the mixed objective-subjective standard asks whether a reasonable person in the same circumstances would have been provoked by the act. The particularising standard asks whether a person with certain of defendant's characteristics would have been provoked by the deceased's act.

⁴³⁰ The Women Who Kill in Self-Defence Campaign supra note 98 at page 4 of printout.

⁴³¹ Elizabeth Fry Societies supra note 6 at G Option 1.

⁴³² Taylor supra note 7 at 1714-15.

⁴³³ Op cit. at 1714.

⁴³⁴ Op cit. at 1679 and 1714.

⁴³⁵ Miller supra note 6 at 670.

⁴³⁶ Op cit. at 685

⁴³⁷ Ibid.

⁴³⁸ Elizabeth Fry Societies supra note 6 at G Option 1.

⁴³⁹ Quicley supra note 331at page 2 of printout; The Women Who Kill in Self-Defence Campaign supra note 98 at page 12 of printout.

⁴⁴⁰ Reilly supra note 420 at ¶60; Quicley supra note 331at page 2 of printout; The Women Who Kill in Self-Defence Campaign supra note 98 at page 12 of printout.

⁴⁴¹ Taylor supra note 7 at 1729.

⁴⁴² Rathus supra note 139 at 109; Reilly supra note 420 at ¶64; The Women Who Kill in Self-Defence Campaign supra note 98 at page 13 of printout.

⁴⁴³ Victoria Nourse 'Book Review: The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law' (1998) 50 Stanford Law Review 1435, 1454-55.

⁴⁴⁴ Reilly supra note 420 at ¶59.

⁴⁴⁵ Kahan and Nussbaum supra note 418 at 307-08; The Women Who Kill in Self-Defence Campaign supra note 98 at page 12 of printout.

⁴⁴⁶ Reilly supra note 420 at ¶55.

⁴⁴⁷ Department of Justice supra note 83 at Section 2, Option 1.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ The Women Who Kill in Self-Defence Campaign supra note 98 at page 17 of printout.

⁴⁵¹ Nourse supra note 14 at 1396; Reilly supra note 420 at ¶61.

⁴⁵² See section [8.4.2](#).

⁴⁵³ Elizabeth Fry Societies supra note 6 at G, Option 2(1).

⁴⁵⁴ Nourse supra note 14 at 1390. Nourse makes this argument as part of another proposed defence, warranted excuse, which will be described later. This argument, however, is equally pertinent to this reform option.

⁴⁵⁵ Elizabeth Fry Societies supra note 6 at G, Option 2(2); Nourse supra note 14 at 1396.

⁴⁵⁶ Rathus supra note 139 at 125.

⁴⁵⁷ Department of Justice supra note 83 at Section 2, Option 2, 2(b); Elizabeth Fry Societies supra note 6 at G, Option 2(2).

⁴⁵⁸ The Women Who Kill in Self-Defence Campaign supra note 98 at page 17 of printout.

⁴⁵⁹ Taylor supra note 7 at 1716.

⁴⁶⁰ Ibid.

⁴⁶¹ Reilly supra note 420 at ¶53.

⁴⁶² See section 6.4.

⁴⁶³ Elizabeth Fry Societies supra note 6 at G, Option 2(1)

⁴⁶⁴ Taylor supra note 7 at 1711.

⁴⁶⁵ Op cit. at 1712.

⁴⁶⁶ Ibid.

⁴⁶⁷ Reilly supra note 420 at ¶53.

⁴⁶⁸ Ibid. In the United States, Maine statutorily expanded the provocation defence to include extreme fear. See section [8.4.2](#).

⁴⁶⁹ Taylor supra note 7 at 1716.

⁴⁷⁰ Op cit. at 1716-17.

⁴⁷¹ Miller supra note 6 at 668.

⁴⁷² Op cit. at 670.

⁴⁷³ Op cit. at 676.

⁴⁷⁴ See section [8.4.2](#).

⁴⁷⁵ Miller supra note 6 at 668-69.

⁴⁷⁶ Op cit. at 669.

⁴⁷⁷ Op cit. at 677.

⁴⁷⁸ The Women Who Kill in Self-Defence Campaign supra note 98 at page 7 of printout.

⁴⁷⁹ Taylor supra note 7 at 1731.

⁴⁸⁰ Taylor supra note 7 at 1731.

⁴⁸¹ Department of Justice supra note 83 at Section 2, Option 2, 2(d).

⁴⁸² Elizabeth Fry Societies *supra* note 6 at G, Option 2(4).

⁴⁸³ By statute, the Australian Capital Territory and New South Wales in Australia accepts a slow burn as a legally understandable response to provocation. See section [8.4.3](#). Two states in the United States, Canada, Australia and England also accept this approach to the provocation defence. See sections [8.4.1](#), [8.4.2](#) and [8.4.4](#).

⁴⁸⁴ Criminal Code of Canada, R.S. 1985, C. c-46, s. 232.

⁴⁸⁵ See also, *R v. Bennett*, [1993] OJ No. 1011 (Ontario Ct. Justice) (granted post-conviction relief of a new trial for a battered woman claiming she acted while suffering from BWS; BWS considered new evidence).

⁴⁸⁶ Alaska Statutes, s. 11.41.115.

⁴⁸⁷ Maryland Code, s. 387A.

⁴⁸⁸ Oklahoma Statutes, Title 21, c. 24, s. 704; South Dakota Code, s. 22-16-6.

⁴⁸⁹ Maine Criminal Code, s. 201(3).

⁴⁹⁰ The eight states are Arkansas, Delaware, Hawaii, Kentucky, Montana, New York, North Dakota and Utah.

⁴⁹¹ North Dakota Century Code, s. 12.1.05.08.

⁴⁹² *Springer* *supra* note 369 at 452.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Stonehouse* *supra* note 259 at 51 and 60.

⁴⁹⁵ *Op cit.* at 60.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *State v. Reid*, (1987) 155 Arizona 399, 401 (Sup. Ct. Ariz.).

⁴⁹⁸ *Ibid.*

⁴⁹⁹ New South Wales Crimes Act 1900, s. 23 and Australian Capital Territory Crimes Act, s. 13.

⁵⁰⁰ *Osland* *supra* note 27 at ¶¶55 and 170.

⁵⁰¹ Op cit. at ¶55.

⁵⁰² *R v. Vandersee* [2000] NSWSC 916 (New South Wales Sup. Ct. 2000).

⁵⁰³ Op cit. at ¶¶145 and 153.

⁵⁰⁴ *R v. Thornton*, (1996) 2 All ER 1023, page 7 of printout (Ct. App. Crim.).

⁵⁰⁵ Ibid.

⁵⁰⁶ *R v. Ahluwalia*, (1992) 4 All ER 889, page 7 of printout (Ct. App. Crim.).

⁵⁰⁷ New Zealand Law Commission supra note 145 at 36 (citing the English decision *R v. Ahluwalia*, supra note 506.)

⁵⁰⁸ Ibid. (citing a NZ Court of Appeal unreported case, *R v. Ross*, CA 76/92 (July 1992), *R v. Pita*, (1989) 4 CZNR 660, 665666 (CA), along with English, Australian and Hong Kong decisions).

⁵⁰⁹ Op cit. at 42.

⁵¹⁰ *Galbraith v. Her Majesty's Advocate*, 2001 SCCR 551, ¶41 (High Court of Justiciary 2001).

⁵¹¹ Op cit. at ¶51.

⁵¹² Op cit. at ¶41.

⁵¹³ *Queen v. Falconer*, (1990) 171 CLR 30, ¶29 (High Ct. Australia 1990).

⁵¹⁴ Wannop supra note 318 at 261-62.

⁵¹⁵ Ibid.

⁵¹⁶ Queensland, Australian Capital Territory and the Northern Territory.

⁵¹⁷ *Falconer* supra note 513 at ¶25.

⁵¹⁸ Ibid.

⁵¹⁹ *R v. Yun Young Ko*, (2000) NSWSC 1130 (Sup. Ct. NSW).

⁵²⁰ Op cit. at ¶¶35 and 36.

⁵²¹ Based on an overview of case law. See also, Wannop supra note 318 at 255-56; Susan

Edwards 'From Victim to Defendant: The Life Sentence of British Women' (1994) Case Western Reserve Journal of International Law 261, 287.

⁵²² *Thornton* supra note 504 at page 7 of printout; and *Ahluwalia* supra note 506 at page 7 of printout.

⁵²³ *Thornton* supra note 504 at page 8 of printout; and *Ahluwalia* supra note 506 at page 11 of printout.

⁵²⁴ *SR* supra note 296 at ¶9.

⁵²⁵ *Hayward* supra note 295; *R v. Cutlan*, [1997] EWJ No. 4213 (Ct. App. Crim.); *R v. Sangha*, [1996] EWJ No. 3447 (Ct. App. Crim) and *R v. Higgins*, [1995] EWJ No. 970 (Ct. App. Crim.).

⁵²⁶ *Sangha* supra note 525 and *Higgins* supra note 525.

⁵²⁷ New Zealand Law Commission supra note 145 at 44.

⁵²⁸ New Zealand Law Commission supra note 145 at 47.

⁵²⁹ *Nourse* supra note 14 at 1397.

⁵³⁰ *Op cit.* at 1395.

⁵³¹ *Op cit.* at 1404-05.

⁵³² *Op cit.* at 1395-96.

⁵³³ *MacDonald* supra note 15 at page 18 of printout.

⁵³⁴ See *Shad* supra note 81 at 1174.

⁵³⁵ *Morse* supra note 344 at 382.

⁵³⁶ New Zealand Law Commission supra note 145 at 41.

⁵³⁷ *Op cit.* at 55.

⁵³⁸ *Op cit.* at 56.

⁵³⁹ *Op cit.* at 50.

⁵⁴⁰ *Op cit.* at 56.

⁵⁴¹ New Zealand Law Commission *supra* note 145 at 50.

⁵⁴² *Op cit.* at 56.

⁵⁴³ *Op cit.* at 55.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ Krause *supra* note 34 at 706.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Op cit.* at 743.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*

⁵⁵¹ Veinsredideris *supra* note 86 at 640.

⁵⁵² *Ibid.*

⁵⁵³ *Op cit.* at 643-44.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Veinsredideris *supra* note 86 at 643.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Maguigan *supra* note 34 at 422-23.

⁵⁵⁹ *Witt v. State*, (1995) 892 P.2d 132, 189 (Sup. Ct. Wy.)(quoting *State v. Richardson*, 189 Wis. 2d 418 (App. Ct. Wis. 1994)).

⁵⁶⁰ Downs *supra* note 26 at 236; Elizabeth M. Schneider and Susan B. Jordan 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault' (1978) 4 Women's Rights Law Reporter 148.

⁵⁶¹ Beecher-Moas *supra* note 13 at 127-28.

⁵⁶² Schneider supra note 329 at 511.

⁵⁶³ The Women Who Kill in Self-Defence Campaign supra note 98 at page 8 of printout.

⁵⁶⁴ Colorado, Georgia, Kentucky, Louisiana, Maryland, Oregon, South Carolina, Texas, and Virginia.

⁵⁶⁵ South Carolina.

⁵⁶⁶ South Carolina.

⁵⁶⁷ Oregon.

⁵⁶⁸ Colorado.

⁵⁶⁹ Georgia, Kentucky and Louisiana.

⁵⁷⁰ Maryland and Virginia.

⁵⁷¹ Texas.

⁵⁷² Louisiana.

⁵⁷³ Maryland.

⁵⁷⁴ See, e.g. Norman supra note 30 and *State v. Hernandez*, (1993) 253 Kan. 705 (Sup. Ct. Kan.).

⁵⁷⁵ Maguigan supra note 34 at 423-24.

⁵⁷⁶ Op cit. at 424.

⁵⁷⁷ *Osland* supra note 27 at ¶172.

⁵⁷⁸ Ibid.

⁵⁷⁹ *MacKenzie* supra note 294 at ¶3.

⁵⁸⁰ Maguigan supra note 34 at 422-23; Schneider and Jordan supra note 560.

⁵⁸¹ Maguigan supra note 34 at 423; Schneider and Jordan supra note 560.

⁵⁸² Colorado.

583 Texas.

584 *Torres* supra note 257.

585 *State v. Smith*, (1996) 198 W. Va. 441, 445 (Sup. Ct. Apps. W. Va.).

586 *State v. Nemeth*, (1998) 82 Ohio St. 3d 202, 208 (Sup. Ct. OH).

587 *Lavallee* supra note 27; Beecher-Moas supra note 13 at 127; The Women Who Kill in Self-Defence Campaign supra note 98 at page 8 of printout.

588 Julie Stubbs and Julia Tolmie 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 Melbourne University Law Review 709, 712.

589 See sections [6.1.3](#) and [6.1.4](#).

590 *Schneider* supra note 15 at 195.

591 *Reilly* supra note 420 at ¶68.

592 *Thornton* supra note 504 at page 8 of printout, *Ahluwalia* supra note 506 at page 11 of printout, and *SR* supra note 296 at ¶9.

593 *Schopp*, *Sturgis* and *Sullivan* supra note 136 at 71-73.

594 *Op cit.* at 71-72.

595 *Ibid.*

596 *Op cit.* at 71-75.

597 *Mallot* supra note 215 at ¶41.

598 *Lavallee* supra note 27 at 125.

599 California, Maryland, Missouri, Ohio, South Carolina and Wyoming.

600 Massachusetts, Nevada, Oklahoma, Oregon and Texas.

601 See *Selman v. State*, (1996) 267 GA 198, 200-201 (Sup. Ct. Ga.).

602 Georgia, Massachusetts, South Carolina and Texas.

603 Georgia, Louisiana, Maryland, Massachusetts, Nevada, Oklahoma and Wyoming.

⁶⁰⁴ Georgia, Massachusetts, Ohio and Wyoming.

⁶⁰⁵ Massachusetts, Texas and Oklahoma.

⁶⁰⁶ Missouri and Oregon.

⁶⁰⁷ Maryland.

⁶⁰⁸ Georgia, Louisiana, Missouri and Ohio.

⁶⁰⁹ Maryland.

⁶¹⁰ California, Nevada, South Carolina.

⁶¹¹ Oregon.

⁶¹² Ohio.

⁶¹³ Some jurisdictions will exclude the evidence if the woman is precluded from arguing a defence. See e.g. *State v. Anderson*, (1990) 785 SW2d 596 (Ct. Apps. Mo.).

⁶¹⁴ *Humphrey* supra note 251 at 9; *Chapman v. State*, (1988) 258 GA 214, 216 (Sup Ct. Ga.); *Kentucky v. Rose*, (1987) 725 SW2d 588 (Sup Ct. KY.); *Nemeth* supra note 586 at 207; *Furlough* supra note 264 at 651; *Walker* supra note 249 at 1172; Janet Parrish, Esq. 'Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases' (1996) <http://www.ojp.osdoj.gov/ocpa/94Guides/Trials/Trend>, page 19 of printout.

⁶¹⁵ *Humphrey* supra note 251 at 9; *Nemeth* supra note 586 at 208; *Stonehouse* supra note 259 at 62-63; *Parrish* supra note 614 at page 20 of printout. These myths were described in section [6.1.3](#) and [6.1.4](#) detailing a Battered Women's Syndrome defence.

⁶¹⁶ *Nemeth* supra note 586 at 207.

⁶¹⁷ *Humphrey* supra note 251 at 9; *Ibn-Tamas v. United States*, (1979) 407 A.2d 626, 634 (Ct. Apps. DC); *Parrish* supra note 614 at page 20 of printout.

⁶¹⁸ *Humphrey* supra note 251 at 9; *Rose* supra note 614; *Nemeth* supra note 586 at 208; *Stonehouse* supra note 259 at 64 ; *State v. Allery*, (1984) 682 P.2d 312, 316 (Sup. Ct. Wa.); *Parrish* supra note 614 at page 20 of printout.

⁶¹⁹ *Yaklich* supra note 281 at 761.

⁶²⁰ *Maguigan* supra note 34 at 429.

⁶²¹ *Anderson* supra note 613.

⁶²² Ibid.

⁶²³ Parrish supra note 614 at page 16 of printout.

⁶²⁴ Ibid. at page 17 of printout.

⁶²⁵ Stubbs and Tolmie supra note 588 at 711.

⁶²⁶ *Osland* supra note 27 at ¶¶54 and 169.

⁶²⁷ Ibid.

⁶²⁸ Ibid.

⁶²⁹ Op cit. at ¶169.

⁶³⁰ Op cit. at ¶158.

⁶³¹ *Osland* supra note 27 at ¶161 (quoting the Canadian decision in *R v. Mallott* supra note 215).

⁶³² Ibid.

⁶³³ Op cit. at ¶164.

⁶³⁴ Ibid.

⁶³⁵ *SR* supra note 296 at ¶9.

⁶³⁶ *Thornton* supra note 504 at page 8 of printout.

⁶³⁷ *Ahluwalia* supra note 506 at page 7 of printout.

⁶³⁸ Wannop supra note 318 at 261-61.

⁶³⁹ New Zealand Law Commission supra note 145 at 15-19.

⁶⁴⁰ Op cit. at 2.

⁶⁴¹ Op cit. at 4 (citing *R v. Oakes*, (1995) 2 NZLR 673, 680 (CA)).

⁶⁴² Op cit. at 6.

⁶⁴³ Massachusetts and Oregon.

644 Nevada and Texas.