A WOMAN'S CRY FOR HELP: WHY THE UNITED STATES SHOULD APPLY GERMANY'S MODEL OF SELF-DEFENSE FOR THE BATTERED WOMAN

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I. INTRODUCTION

Domestic violence cuts across all social, economical, and political strata. In the United States a woman is beaten every fifteen seconds in her own home.[1] In 1988, 1075 women were murdered by their spouses.[2]

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1. CONSTANCE A. BEAN, WOMEN MURDERED BY THE MEN THEY LOVED 38 (1992).

2. *Id.* at 38.

Domestic violence accounts for more emergency room visits by women than muggings, car accidents, and rapes combined.[3] Former Surgeon General C. Everett Koop cited domestic violence as the single greatest health hazard for women in the United States.[4]

The focus of this article is on the failure of American law to accept the reality facing battered woman. This failure consequently renders the existing paradigms of self-defense and necessity inapplicable to her. The author argues that the inception of the battered woman syndrome (BWS) is superfluous. Such superfluity is evidenced by Germany's innovative interpretation of the imminency requirement which accommodates the unique situation of battered women who kill in nonconfrontational settings.[5]

Part II of this article examines the historical treatment of women's legal rights in the United States and then narrates the experiences of a battered woman. Part III analyzes the problems associated with accommodating the battered woman within the existing laws of the United States. Part IV discusses the birth of the BWS and its legal and societal repercussions. Part V suggests that the BWS, advocated by feminists, is potentially detrimental to the battered woman within the legal context because it depicts them as sick or crazy rather than legally justified. Finally, part VI delves into German law and discusses how it utilizes a more flexible definition of imminency and then uses this definition in its defense of necessity for battered women who kill their mates in non-confrontational settings.

II. BATTERED WOMEN IN AMERICA

In order to fully understand the legal and social implications of BWS, one must first understand the social context in which battered women live. The United States patterns most of its law on the English Common Law, which in the seventeenth century openly permitted husbands to physically abuse their wives.[6] At one time, the only restriction

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3. *Fact Sheet on: Gender Violence, A Statistics for Action Fact Sheet*, (Int'l Women's Trib. Ctr./United Nations Dev. Fund for Women Res. Ctr., New York, N.Y.), Oct. 1992, at 1-2.

4. BEAN, *supra* note 1, at 137.

5. *See* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 194-95 (1991).

6. *See* Schuler v. Henry, 94 P. 360, 368 (Colo. 1908) (at common law "[t]he husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner"); *see also* Queen v. Jackson, 1 Q.B. 671 (1891) (stating that the law recognized a husband's right to chastise his wife physically).

placed on the beating a woman received from her husband was that the weapon he used be no thicker than his thumb.[7]

At common law, it was legally impossible for husbands to rape their wives.[8] The marital rape exemption allowed husbands to force sexual intercourse upon their wives, at any time, for the duration of their marriage. The exemption was premised on any one of the following four common law theories: (1) the marriage contract or implied consent theory;[9] (2) the chattel theory;[10] (3) the unity principle;[11] or (4) the marriage doctrine.[12]

These theories were premised on the notion that should the wife be "tempted to assert rights in opposition to her husband, the law humanely divests her of [these] rights."[13] Such subjugating doctrines illustrate the history from which American law was born. As of 1978, the marital rape exemption remained intact and was applicable so long as there existed a valid marriage.[14] Today, approximately forty states continue to employ some form of marital rape exemption.[15] Because the 19th Amendment[16] conferred upon women the right to vote and rendered such theories

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7. *See* Hampton v. North Carolina Pulp Co., 49 F. Supp. 625, 632 (E.D.N.C. 1943) (stating in dicta that historically "a husband had a right to whip his wife, provided he used a switch no larger than his thumb").

8. In the seventeenth century, Lord Matthew Hale theorized husbands as being legally incapable of raping their wives. "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed., 1778). *See* People v. Meli, 193 N.Y.S. 365, 366 (N.Y. Sup. Ct. 1922) (citing to the New York Penal Law and concluding that the exemption existed "on account of the matrimonial consent which [the wife] has given, and which she cannot retract"). This theory is broadly titled the marital rape exemption. *See generally* Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 307 (1977) (commenting that it was Hale's proclamation which introduced the marital rape exemption to the United States).

9. By marrying, the woman irrevocably consented to sexual intercourse and had no legal right to refuse sex.. *Hampton*, 49 F. Supp. at 632.

10. Wives were considered chattel; property which the husband could treat as he deemed fit.

11. Husbands and wives were considered one person and the wife's identity was completely merged into her husband's. The legal rationale was that one could not rape oneself.

12. The man, by marrying his victim, could escape rape charges. *See* SUSAN BROWNMILLER, AGAINST OUR WILL 8 (1975).

13. *Schuler*, 94 P. at 360.

14. People v. Liberta, 474 N.E.2d 567 (N.Y. 1984).

15. STEPHEN J. SCHULHOFER & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 393 (5th ed. 1989).

16. U.S. CONST. amend. XIX.

obsolete, legal scholars invented new theories to justify the marital rape exemption. These scholars contended that a marital rape would be very difficult to prove and could lead to falsified stories fabricated by vindictive wives.[17] It is particularly telling that in no other area of American jurisprudence has the potential for perjured testimony or a fabricated complaint led to the preclusion of a cause of action *in toto*.

Although these theories were abolished many years ago, one still ponders if the philosophies that fostered their birth are still at work today. This glimpse into America's history of blatant female subjugation and man's legal right to physically abuse "his woman" provides insight into the legal and social battle that battered women have had to fight. One battered woman, in particular, suffered such cruel violence at the hands of her husband that she came close to dying on several occasions. Ultimately, she felt the only way to save herself was to kill her husband.

For example, Betty and Carl Hundley had been married for ten years.[18] Betty's accounts of the marriage sound more like that of a prisoner of war than a blissful wedlock. During their marriage, Carl knocked several of Betty's teeth loose, broke her nose many times, and threatened to cut her eyes out and cut off her head.[19] Betty suffered from diabetes which laid a fertile ground for Carl to play his sadistic games.[20] He would often hide her insulin or, if he was feeling particularly playful, would dilute it with water.[21] Needless to say, Betty drifted into diabetic comas on numerous occasions.[22]

Six weeks before Carl's death, Betty moved to a local motel in an attempt to escape the abuse.[23] Carl immediately began harassing her with death threats directed at her and her family.[24] Betty, fearing for her life, began carrying a gun.[25] On the day of the shooting, Carl warned Betty he was going to kill her that night.[26] That evening, he broke into Betty's motel room while she was in the bathroom.[27] He forced her into the shower with him where he proceeded to shave her pubic hair in a rough

17. *See* SCHULHOFER & KADISH, *supra* note 15, at 394.
18. State v. Hundley, 693 P.2d 475 (Kan. 1985).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Hundley*, 693 P.2d at 475.
24. *Id.* at 476.
25. *Id.*
26. *Id.*
27. *Id.*

and brutal manner, severely cutting her.[28] This sadistic gesture was followed by a brutal rape.[29] Afterward, Carl threw a dollar bill at her and while holding a beer bottle in his hand, demanded she go fetch him some cigarettes.[30] In the past, Carl had severely beaten Betty with a beer bottle.[31] She retrieved the gun from her purse believing another beating, or worse, was forthcoming.[32] Carl responded, "You are dead, bitch, now!"[33] As he reached for the beer bottle, Betty closed her eyes and slowly squeezed the trigger.[34]

Betty is now serving two to five years in prison for an involuntary manslaughter conviction. Although the sentence may appear quite lenient for the crime of murder, it also appears particularly harsh for a person who justifiably kills in self-defense or out of necessity. Betty's case was appealed to the Kansas Supreme Court on the issue of whether the jury's instructions constituted reversible error regarding use of the word "immediate" rather than "imminent."[35] The Kansas Supreme Court reversed and remanded the case. Quite disturbing, however, is the language of the dissent. The dissent noted that the couple was not in an isolated area where help was unattainable. "At the very least, defendant would have had a five minute head start on the defendant had she failed to return with the cigarettes."[36] Unfortunately, this false perception that a battered woman is free to leave safely undermines her credibility and ultimately her chances of successfully pleading self-defense.

III. MURDER DEFENSES IN THE UNITED STATES

Legally, the syndrome is used to assist the jury in determining whether the woman acted in self-defense with respect to the elements of imminency and reasonableness.[37] The syndrome is seen as necessary to explain these elements to a jury. Most states require that the defendant

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28. *Hundley*, 693 P.2d at 476.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Hundley*, 693 P.2d at 476.

34. *Id.*

35. *Id.*

36. *Id.* at 481.

37. *See, e.g.*, Smith v. State, 277 S.E.2d 678, 683 (Ga. 1981) (stating that expert testimony was offered to assist the jury in determining the credibility of the defendant's testimony that she believed she was in imminent danger when she shot her husband allegedly in self-defense).

reasonably believe that the perpetrator's violence is imminent. The present United States interpretation of imminency effectively excludes women from asserting self-defense when they kill in non-confrontational situations. For example, the situation where the man is asleep and the women kills him is not considered self-defense. This exclusion is based on the premise that if the man is asleep, or has his back turned, the force used by the woman could not be "immediately necessary" and is thus excessive. Furthermore, a woman was not in immediate danger and could have escaped any violence she believed to be forthcoming. "Criminal homicide constitutes murder when: a) it is committed purposely or knowingly; or b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[38] Self-defense is defined as: "[t]he use of force upon or toward another person [that] is justifiable when [she] believes that such force is immediately necessary for the purpose of protecting [her]self against the use of unlawful force by such other person on the present occasion."[39] As will be discussed below, several problems arise when the law of self-defense in the United States is applied to battered women who kill their mates in non-confrontational settings.[40]

The Model Penal Code uses a subjective test of reasonableness rather than an objective standard. The subjective standard allows the jury to evaluate whether the defendant's reaction was reasonable in light of her experiences with the deceased. The standard enables the jury to see, hear, and feel through the eyes of the battered woman and to understand how the systematic abuse influenced her. In most jurisdictions, the defendant must prove the following four elements to establish a defense of self-defense: (1) the defendant was not at fault in provoking the difficulty which resulted in the killing;[41] (2) the defendant reasonably believed she was in imminent danger of death, great bodily harm, or some felony;[42] (3) the killing was

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38. MODEL PENAL CODE § 210.2 (1994).

39. *Id.* § 3.04(1); *see* Kinard v. United States, 96 F.2d 522 (D.C. Cir. 1938) (holding that the essence of self-defense is the reasonable belief of the imminence of death or great bodily harm); *see also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) (holding that the danger must be imminent and the resistance necessary to avoid the danger).

40. In marital and inter-relationship homicides, self-defense motivates women seven times as often as it motivates the men, the latter being typically motivated by jealousy. DEL MARTIN, BATTERED WIVES 14 (1976).

41. *See* United States v. Hart, 162 F. 192 (C.C.D. Fla. 1908) (holding that where a defendant is responsible for instigating the danger, the defendant cannot raise the defense of self-defense).

42. *See* United States v. Outerbridge, 27 F. Cas. 390 (C.C.D. Cal. 1868) (No. 15,978) (holding that imminent danger is the equivalent to immediate danger).

necessary to save herself from the danger;[43] and (4) the defendant did not violate any duty to retreat or avoid the danger.[44] These requirements of self-defense raise several issues that are critical to a battered woman accused of murdering her spouse. As described below, the inadequacy of traditional defenses in this context have led to the use of BWS.

IV. IMMINENCY

Perhaps the most significant hurdle the battered woman has to overcome is proving that the danger she perceived was imminent. Often, the battered woman is forced to attack while her mate is off guard, typically while he is asleep.[45] The woman logically concludes, based on the disparity of size and strength and her husband's violent history, that the only way she will survive is to kill him while he is sleeping or otherwise unaware. However logical it may seem, it is legally impossible to conclusively establish that the man, upon awakening, would have resumed the beating.

Despite the testimony to neighbors, police, attending hospital physicians, family members, and the battered woman herself, with regards to the beatings that she repeatedly sustained and undoubtedly would sustain again, none of these credible witnesses has psychic abilities enabling them to inform a jury that the battered woman was justified in "reasonably" believing that she was in "imminent" danger of death or serious bodily harm. The thoughts of the dissent in *State v. Hundley* are representative of many people and do possess some validity. That is, if the battered woman's mate was sleeping, why could she not simply leave? In an attempt to overcome this obstacle, some defense attorneys, in an effort to secure an acquittal for their client (a battered woman), attempt to prove that the words "imminent" and "immediate" are not synonyms; they in fact have two very different meanings.[46] Defense attorneys argue that "imminent," rather than "immediate," should be used in the jury

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43. *See Wiltberger*, 18 U.S. at 76 (holding that the danger must be imminent and necessary).

44. *See* United States v. Herbert, 2 Hay. & Haz. 210 (Crim. Ct. D.C. 1856) (No. 15,354a) (holding that from the moment danger becomes evident a person is required to retreat unless she is prevented from doing so).

45. *See* State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989) (wife shot husband in the back of the head while he lay asleep); *see also Hundley*, 693 P.2d at 476 (wife shot husband in the back during a lull in a violent confrontation).

46. Imminent refers to an event which is "mediate rather than immediate; close rather than touching; impending; on the [verge] of happening." *Hundley*, 693 P.2d at 515. Immediate is defined as "[p]resent; at once; without delay; not delayed by any interval of time." BLACK'S LAW DICTIONARY 514-15 (6th ed. 1991).

instructions[47] because the former allows for some flexibility with regard to the time requirement.[48] The Model Penal Code diverges from the "imminent" syntax and instead describes the use of force in self-protection as such force that is "immediately necessary . . . on the present occasion."[49]

There has been conflicting commentary as to whether the Model Penal Code language actually alters the time element. For example, one commentator noted that there was essentially little difference between the Model Penal Code formulation and the traditional "imminence" requirement,[50] while other scholars have argued that the Model Penal Code does liberalize the durational requirement.[51] Regardless of which term is applicable,[52] all United States jurisdictions require that in order for self-defense to be operable, the defensive action must be in response to an attack which is present, thereby precluding any preemptive attacks.[53] The time gap permitted between the provoking attack and the defensive action is minimal. The jury's belief ultimately turns on the element of reasonableness. Simply put, the jury must believe that the woman faced an impending danger.

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47. *See* Commonwealth v. Grove, 526 A.2d 369, 373-74 (Pa. Super. Ct. 1987) (stating that the defendant "attempts to cloud [the] issue with a semantical smoke screen regarding alleged differences between the time frames encompassed by the terms 'immediate' and 'imminent'"). *See also* State v. Hodges, 716 P.2d 563, 571 (Kan. 1986) (asserting that "[t]he word 'immediate' places undue emphasis on the decedent's immediate conduct and obliterates" the sheer terror that the decedent invoked in the heart of the defendant during years of systematic abuse).

48. *Hodges*, 716 P.2d at 570-71; *contra Grove*, 526 A.2d at 373-74 (stating that the defense attorney arguing that use of the word "imminent" gleaned from case law rather than the statutory phrase "immediately necessary . . . on the present occasion" in the jury instructions constituted reversible error because the statutory phrase is more lenient with regard to duration than the case law term "imminent").

49. MODEL PENAL CODE § 3.04(1) (1994).

50. *See* Sarah B. Vandenbraak, Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. L.J. 643, 650-53 (1979); *see also Grove*, 526 A.2d at 374 (holding that the Model Penal Code's formulation of "immediately necessary" was not an expansion of time frame encompassed by the case law term "imminent").

51. Nancy Fiora-Gormally, Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 159 (1978) (contending that the Model Penal Code version permits a defense for battered women that would be precluded by the rigid requirements of the traditional approach).

52. For a complete list of jurisdictions which only allow self-defense where the threat is "imminent," *see* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(2) n.27 (1984).

53. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §5.7(d) (2d ed. 1986).

V. REASONABLENESS

A second obstacle the battered woman has to overcome is convincing a jury she was in imminent danger and her belief in that danger was reasonable.[54] This obstacle is compounded by the test typically employed to determine whether the battered woman's belief was reasonable. Many states apply an objective rather than a subjective standard.[55] The test requires the jury to find that a "reasonable man" would have acted in the same way as the defendant, had he been confronted with the same circumstances, and that the force used was reasonable in those circumstances.

The application of an objective standard would be appropriate, in order to determine whether the battered woman's actions were culpable, if the determination were being made in a vacuum. However, her life and the cyclical events which precipitated her actions should provide the context for which her actions are to be judged. In order for the jury to be equipped to decide whether a "reasonable man" would have acted similarly, that "reasonable man" would have to have been subjected to the same inhumane treatment as the battered woman. As soon as the jury instructions are uttered, the battered woman is at a distinct disadvantage if she is in a jurisdiction which employs the objective test of reasonableness.[56] The existing legal doctrines of justifiable self-defense simply are not designed for the special circumstances surrounding the battered woman.[57] Consequently, women are typically forced to seek alternative defenses such as incapacity.[58]

Battered women have been likened to hostages and prisoners of war.[59] When the woman eventually resorts to homicide, one cannot equitably make a determination that she was acting unreasonably unless the

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54. *Kinard*, 96 F.2d at 522 (asserting that the essence of self-defense is that the defendant's belief that he is in imminent danger be reasonable and bona fide).

55. The majority of American courts have not adopted a subjective view of reasonableness in self-defense cases. 40 AM. JUR. 2D *Homicide* § 154 (1968); *see generally* Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

56. *See generally* ELIZABETH M. SCHNEIDER, DESCRIBING AND CHANGING WOMEN'S SELF-DEFENSE WORK AND THE PROBLEM OF EXPERT TESTIMONY ON BATTERING (1986).

57. *Id.*

58. *Id.*

59. *Hundley*, 693 P.2d at 477; *see also* Suzanne Steinmetz, *Wife Beating: A Critique and Reformulation of Existing Theory*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 322, 327 (1978). Dr. Steinmetz likens being systematically battered over a long period of time to brainwashing which is made possible by extreme isolation. Furthermore, the woman's only means of validation is through that of her abuser. *Id.*

person understands the context from which she acts. The fact finder must look through the eyes of the battered woman, know what she knows and feel what she feels. The woman, because of her long history with the decedent, possesses a unique knowledge about his temperament and violent propensities which the jury does not possess. In order to mitigate the obvious harshness that an omission of such evidence would produce, some courts have admitted the decedent's prior bad acts with regard to the defendant.[60]

The reason why the element of reasonableness is so problematic is that often the battered woman kills in a non-confrontational setting; for example, while the man is sleeping.[61] The argument follows that if the decedent was asleep, how could the defendant's belief that she was in imminent danger be reasonable. Some courts have gone further and held that if the decedent was attacking but unarmed, the defendant's belief that her use of deadly force was reasonable will almost always be deemed unreasonable.[62] It is crucial that the battered woman establish that, although the man was not presently attacking her when she killed him, she nevertheless was certain that if she failed to take action the abuse would resume or that she would be killed.[63] Without this evidence, the jury is left to ask the obvious but difficult question, "Why didn't she just leave?"

VI. DUTY TO RETREAT

The self-defense laws in America have long recognized the duty of a defendant to retreat rather than resort to killing her assailant. The retreat rule falls into two basic categories. First, the duty to retreat where the attack is made outside of the victim's home. The majority of jurisdictions have adopted a "true men stand their ground" rule which places no requirement for the person to retreat but rather allows her to stand her ground and retaliate if she has been attacked.[64] However, in a minority of jurisdictions, if the assailant manifests an intent to cause seriously bodily injury or kill, then the person must retreat, if she can do so with complete safety, before resorting to killing her assailant.[65]

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60. People v. Bush, 84 Cal. App. 3d 294, 302-03 (Cal. Ct. App. 1978).

61. *See, e.g.*, State v. Nunn, 356 N.W.2d 601 (Iowa Ct. App. 1984) (holding that the killing was not justified because the argument between the woman and the decedent had ended a few minutes prior to the killing and the decedent was unarmed at the time).

62. Commonwealth v. Jones, 332 A.2d 464, 466 (Pa. 1974).

63. *See generally* People v. Emick, 103 A.D.2d 643 (N.Y. App. Div. 1984); State v. Felton, 329 N.W.2d 161, 163-64 (Wis. 1983).

64. Brown v. United States, 256 U.S. 335, 337 (1921).

65. *Id.*

The second category of the retreat rule is the defense of habitation which is an exception to the general duty to retreat. The defense is premised on the common law concept that a man's home is his castle and that requiring a person to flee the very place where he feels safest[66] is tantamount to legalizing burglary. Since the assailant is attacking in the victim's home, the victim is allowed slightly more latitude to defend himself.[67] Typically, the elements necessary to prove the defense are the following: "1) an aggressor unjustifiably threatens [the actor's] habitation or premises; and 2) the actor engages in conduct harmful to the aggressor, a) when and to the extent necessary to protect [his] habitation or premises, b) that is reasonable in relation to the harm threatened."[68] Additionally, where the assailant and the defendant are both habitants of the same premises, the defendant still need not retreat.[69] This situation arises in the case of roommates, business partners sharing the same office,[70] or husbands and wives cohabitating.[71]

Recall the Kansas couple, Betty and Carl Hundley. Prior to the night of the shooting, Carl had issued repeated death threats to Betty, and fearing for her life, she began carrying a gun. The night of the killing, Carl stalked his wife Betty and then followed her to her hotel room and broke down the locked door. A person's place of dwelling is broadly defined for purposes of the retreat rule.[72] Practically any place that a person uses as her temporary or permanent abode can qualify as a place of dwelling. Betty's hotel room was her home, for purposes of the retreat rule, however temporary the living arrangement may have appeared. As a consequence, she had no duty to retreat (flee the hotel room). As a result of the continuous and systematic abuse she had sustained, coupled with the

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66. *See, e.g.* COLO. REV. STAT. § 18-1-704.5(1) (1994) ("The citizens of Colorado have a right to expect absolute safety within their own homes.").

67. *See* State v. Bissonnette, 76 A. 288, 290 (Conn. 1890) (reiterating the general rule "that where he, without fault himself, is assaulted in his dwelling house, he need not retreat from his assailant," but may kill his assailant); Brinkley v. State, 8 So. 22 (Ala. 1890) ("An assailed person is not bound to retreat from his own house to avoid killing his assailant even though a retreat could be safely made.").

68. ROBINSON, *supra* note 52, § 135.

69. *See* Hutcheson v. State, 54 So. 119, 120 (Ala. 1910) (holding that a party who is forcibly attacked in their own home is under no obligation to retreat).

70. *See* State v. Gordon, 122 S.E. 501, 503 (S.C. 1924) (holding that where business partners jointly occupy the same premises, each being equally entitled to possession, and where one is attacked by the other, retreat is not necessary).

71. *See* Eversole v. Commonwealth, 163 S.W. 496, 499 (Ky. 1914) (holding that where a husband threatens to kill his wife if she does not leave the home, the wife is entitled to remain).

72. *See* Rowe v. United States, 164 U.S. 546, 550 (1896) (explaining that "the hotel or temporary stopping place of a man may be regarded as his dwelling place").

death threats she and her family had received from Carl,[73] Betty logically concluded that in order to save her life she had no choice but to kill the intruder that had just broken into her "home" and raped her. Ironically, this burglar and rapist was none other than her husband.

The facts of Betty's case can be analogized to those of *Brown v. United States*.[74] In *Brown*, the defendant, a male, shot and killed another man, Hermis, whom he had had trouble with for some time.[75] There was testimony that Hermis had assaulted Brown with a knife on two prior occasions and issued death threats to Brown declaring "that the next time, one of them would go off in a black box."[76] Frightened by the death threats, Brown began to carry a pistol. On the day of the killing, Brown and Hermis, while working at an excavation cite, began to argue. Hermis, once again, advanced toward Brown wielding a knife. Brown retrieved his pistol and, while Hermis continued to attack, Brown fired four shots and killed him.

The judge instructed the jury as follows: "[I]t is necessary to remember, in considering the question of self-defense, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm."[77] Furthermore, "[u]nless retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm the defendant was not entitled to stand his ground."[78] The duty to retreat was operable because the attack was not commenced at the defendant's home.[79]

Notwithstanding the foregoing instructions, Justice Holmes perceptively posited that "the failure to retreat is a circumstance to be considered *with all the others* in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."[80] To summarize, a person being attacked may stand their ground if they reasonably believe that they are in jeopardy of serious bodily harm or death. However, this privilege to stand ones ground must be considered within the totality of circumstances.

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73. *See Hundley*, 693 P.2d at 477 (describing Betty's brother-in-law's testimony that Carl threatened everyone in the family and that "his threats were to be taken seriously").

74. *Brown*, 256 U.S. at 335.

75. *Id.* at 342.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Brown*, 256 U.S. at 335.

80. *Id.* at 343 (emphasis added).

The two cases differ in that Betty was in her "home" and Brown was at his place of employment. Also, Brown was presently being attacked when he defended himself. Betty, however, according to the self-defense laws as presently drafted, was not presently under attack. Recall that Carl had his back turned to Betty and the beating had temporarily lulled. Another distinguishing factor, although not greatly significant, is that Betty's assailant was her husband whereas Brown's assailant was an associate. More significant, however, is that Brown and Hermis were both men, thus potentially being of approximately equal stature; whereas, Betty, a diabetic female worn from years of abuse, was clearly more frail than her assailant. Accepting that Betty's hotel room was her "home," she was under no duty to retreat.[81] Brown, however, did have a duty to retreat when the assailant manifested an intent to cause him serious bodily harm because Brown was not in his home. Betty received a sentence of two to five years in prison. Brown's conviction of second degree murder was reversed,[82] as Justice Holmes revealed that "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[83]

Although Carl Hundley did not have a gun or a knife, in Betty's eyes the uplifted beer bottle was the source of prior brutal beatings and was thus the functional equivalent to a deadly weapon. To take this illustration one step farther, suppose that after Carl raped Betty he took a nap, rather than demanding that she go fetch him some cigarettes. Further, suppose that Carl had a history of initiating further rounds of beatings upon awakening from drunken slumbers. Would the law require Betty to stand idly by and patiently await her next beating? Would the law require her to leave her own home that had been broken into by a rapist? Or, would the law recognize what Justice Holmes recognized in 1921? That is, "the failure to retreat . . . is not a categorical proof of guilt."[84] Rather, it must be considered along with all the other circumstances peculiar to that defendant.

This example is offered to illustrate the seemingly inequitable treatment that men and women receive with regard to the fundamentally same crime: killing their assailant who has a history of assaulting and threatening them.[85] These crimes are fundamentally and not legally the

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81. *Id.* at 344 (asserting that although Brown's place of work was outside, it was his place of work nonetheless, thus allowing the retreat rule to apply).

82. *Id.*

83. *Id.* at 343.

84. *Brown*, 256 U.S. at 335.

85. Historically, self-defense theories were created by, and developed for, men to allow them to legally defend themselves, their family, and their home from the aggression of other men

same, because the two crimes are legally disparate. In the eyes of the law, Betty did not kill in self-defense because Carl had his back turned away from her at the time of the attack. The law in the United States interprets any lapse of time between the provocation and the killing as a cooling off period, thereby giving the defendant time to reflect. This time for reflection is seen as running counter to the spontaneity required by the law of self-defense. In *Brown*, there was no time to reflect because the defendant killed while he was actually being attacked by the victim. In contrast, Betty killed her husband after the attack had ended. However Betty believed that the uplifted beer bottle was just as threatening as a knife and that at any moment the beating would resume.

The imminency of the danger should not be discounted merely because it had briefly subsided. This brief interval of tranquillity is typically nothing more than a lull in the ongoing beating.[86] Furthermore, the woman continues to experience a sense of impending danger during these lulls because of the cyclical nature of the physical and emotional abuse she has sustained over the years.[87] The traditional rules of self-defense in the United States are unjust when applied to battered women because they do not accommodate this lull.[88] The subsequent sections will discuss other defenses available under U.S. law and how they are applied within the BWS context.

VII. PROVOCATION

The defense of provocation does not absolve the defendant from all criminal culpability; it merely reduces the charge from murder to manslaughter.[89] In order to successfully assert provocation as a defense, the defendant must prove that she acted while in the heat of passion, absent time for reflection or for her blood to cool, and that the killing was a result

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of equal size and strength. Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 635 (1980).

86. Lorraine P. Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 HASTINGS L.J. 895, 928-29 (1981).

87. *See* Fennel v. Goolsby, 630 F. Supp. 451, 456 (E.D. Pa. 1985) (stating "the battered woman lives with constant fear, coupled with a perceived [or actual] inability to escape."); *see also* Robinson v. State, 417 S.E.2d 88, 91 (S.C. 1992) (citing *Norman*, 378 S.E.2d at 16 (Martin, J., dissenting, stating that "often the terror does not wane, even when the batterer is absent or asleep")).

88. The force used to protect oneself from harm must be "immediately necessary." MODEL PENAL CODE § 3.04(1) (1994).

89. *See* United States v. Lewis, 111 F. 630, 633 (C.C. Tex. 1901) (holding that "to reduce the killing from murder to manslaughter, the provocation . . . must have been reasonable and recent, for no words or slight provocation will be sufficient; and, if the [defendant] has had time to cool, malice will be inferred, and the homicide will be murder").

of the decedent's provocations.[90] Also, the provocation cannot be slight in nature, such as mere words.[91]

This defense is not discussed in depth because it is merely a mitigating defense, rather than a complete exculpatory defense.[92] Furthermore, the time requirement becomes problematic once again. If the battered woman attacks while the man is sleeping, the law interprets this as time for her blood to cool after the provoking incident. Thus, the argument follows that if the decedent was asleep, the woman had time for reflection and the killing was thus committed out of malice, not out of heat of passion.

VIII. NECESSITY

The defense of necessity applies where the defendant was forced to break the law in order to protect herself or someone else from the harm that is sought to be avoided.[93] If compliance with the law would produce a greater harm than violation of the law the defendant is justified in violating the law for social policy reasons.[94] The defendant is said to be obligated to pick the lessor of two evils. The harm sought to be avoided must be created by natural forces in order for the defense of necessity to be

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90. *Id.*

91. *See* United States v. Wiltberger, 28 F. Cas. 727, 730 (C.C. Pa. 1819) (No. 16, 738) (holding that "[n]o words—no gestures, however insulting and irritating" will constitute sufficient provocation).

92. *See* Moran v. Ohio, 469 U.S. 948, 953 (1984) (explaining that the battered woman kills her husband and relies on self-defense rather than provocation "given the central place of self-defense in Anglo-American jurisprudence and the crucial role it can play in justifying-not merely mitigating-what would otherwise have been a criminal act").

93. MODEL PENAL CODE § 3.02 (1994).

> (1). Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
> (a). the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and that sought to be prevented by the law defining the offense charged; and . . .
> (2). When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Id.

94. *See generally* Edwards B. Arnolds & Normand F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); W. H. Hitchler, *Necessity as a Defense in Criminal Cases*, 33 DICK. L. REV. 138 (1929).

applicable. If, however, the harm sought to be avoided is created by human forces, then the applicable defense is duress.[95]

Although the catalyst for each defense seems quite distinct, contemporary cases have blurred the distinction between necessity and duress.[96] The majority of modern criminal statutes have followed the lead of the Model Penal Code and embraced a broader choice of evils defense. The broader version does not limit the evil to any particular source, be it natural or human. Such a broadening is logical because a limit on the applicability of necessity based on the fortuity of the source of the evil (natural or human) is completely irrelevant in determining why the defendant acted in the first place.[97] However, one distinction between the two defenses has remained intact. The defense of necessity voids the existence of the requisite *mens rea* for the crime at issue, whereas duress voids the existence of the requisite *actus reus* because the defendant was not acting of his own free will.[98]

IX. REQUIREMENTS OF THE BROADER CHOICE OF EVILS DEFENSE

The harm avoided need not be death or great bodily harm, destruction of property may suffice. The harm avoided may be physical harm to either the defendant himself, or someone else. It is not a requirement that the defendant's actions "promote the general welfare."[99] The harm done is not limited exclusively to intentional homicide but also includes unintentional homicides.[100] Furthermore, a reasonably anticipated

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95. MODEL PENAL CODE § 2.09 (1994).

> (1). It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> (2). The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged . . . .

Id.

96. United States v. Bailey, 444 U.S. 394, 410 (1980); United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984).

97. ROBINSON, *supra* note, 52 at §124(e)(1).

98. United States v. Micklus, 581 F.2d 612, 615 (7th Cir. 1978).

99. LAFAVE & SCOTT, *supra* note 53, at 446. Although case law reveals the mistaken belief that such a promotion is a requirement, see *Contento-Pachon* which states that "[t]he defense of necessity is usually invoked when the defendant acted in the interest of the general welfare. 723 F.2d at 695.

100. LAFAVE & SCOTT, *supra* note 53, at 446.

connection between the defendant's conduct and the harm avoided must exist. In order to assert the defense of necessity, the actor must be aware that his actions were necessary to avoid the evil.[101]

The test used to determine the relativeness of the harm avoided and the harm done is objective. This is logical because the defendant may consider, for example, her dog's life to be more valuable than a stranger's life and thus kill the stranger in order to preserve the life of her cherished pet. However, the dog's life is *objectively* less valuable than the human life thereby precluding the defense of necessity. Simply put, the harm sought to be avoided must be greater than the harm done.[102]

The defense of necessity will not apply where the defendant could have taken legal alternative action[103] or where the defendant acted to prevent harm which was not imminent. Although the Model Penal Code does not speak in terms of imminency,[104] many jurisdictions have adopted this as a requirement for the defense of necessity. For example, if the defendant were to prevent a police officer from delivering radioactive waste on the basis that such waste was a danger to his community, the defendant could not assert necessity as a defense. The mere possibility that the containers filled with the radioactive waste would deteriorate over time, leaking the waste into the environment, does not constitute an immediate threat.[105] This requirement is critical for the battered woman because if the jury believes that leaving just prior to the killing was a viable option, then the defense becomes inapplicable to her.

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101. *Id.*

102. MODEL PENAL CODE § 3.02(1)(a) (1994).

103. *See generally Bailey*, 444 U.S. at 394 (explaining a defense of necessity could not be used for a prisoner who escaped because legal alternatives to alleged intolerable conditions had not been exhausted); Bice v. State, 34 S.E. 202 (Ga. 1899) (explaining that a defendant who violated criminal statute prohibiting the use of alcohol in church by bringing whisky into church claiming such usage was for medicinal purposes was precluded from asserting necessity because defendant could have stayed home); Nelson v. State, 597 P.2d 977 (Alaska 1979) (explaining that the defendants could have beckoned a tow truck, therefore, there was no necessity to steal equipment to free their truck from the mud).

104. MODEL PENAL CODE § 3.02 (1994).

105. *See* State v. Chisholm, 882 P.2d 974, 977 (Idaho Ct. App. 1994) (stating that necessity may only be asserted to prevent a harm that is reasonably perceived as immediately dangerous and that "it may not be used to foreclose speculative, debatable or long-term risks"); *see also* State v. Baker, 598 S.W.2d 540, 545 (Mo. Ct. App. 1980) (stating that one of the elements of the defense of necessity is "a present and imminent danger"); People v. Heath, 207 Cal. App. 3d 892, 901 (1989) (stating that "the necessity defense . . . contemplates a threat in the immediate future").

X. APPLICATION OF NECESSITY TO BATTERED WOMAN SYNDROME

The defense of necessity does not apply to the battered woman in the United States for several reasons. First, killing one life to save another cannot necessarily be deemed to be picking the lessor of two lives. All lives are equally valuable in the eyes of the law. Second, the law recognizes a legal alternative: society feels she could have safely left. Finally, there is the problem of imminency, or lack thereof. If the decedent was sleeping at the time of the killing, it cannot be said that the defendant acted to prevent imminent harm. Due to the significant problems battered women have had in asserting self-defense, feminist psychologists have recognized the need to explain to juries why she was forced to ultimately kill her spouse.

XI. THE SYNDROME

In the late 1970's, American psychologists developed a theory known as the "battered woman syndrome" (BWS) in an effort to explain the reactionary behavior of women who are exposed to repeated and prolonged abuse.[106] BWS is most identified with the work of Dr. Lenore Walker, a renowned psychologist who has dedicated her life to the treatment of battered women.[107] The phrase "battered woman" has become so commonplace that in 1979 it was added to the International Classification of Diseases Clinical Modification Scheme.[108] Dr. Walker applied a theory, hypothesized by Dr. Segilman, known as "learned helplessness."[109] This theory was developed by issuing a series of electric shocks to dogs and documenting their responses over a period of time.[110] Interestingly, after repeatedly attempting to escape the pain to no avail, the dogs were conditioned to stop trying. This "learned helplessness" is used by Dr. Walker to help explain the seemingly passive and complacent attitude women adopt after years of abuse.

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106. *See* LENORE E. WALKER, THE BATTERED WOMAN (1979).

107. The following is a list of Dr. Walker's most popular works: LENORE E. WALKER, THE BATTERED WOMAN (1979); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE E. WALKER, THE PSYCHOLOGICAL IMPACT OF THE CRIMINALIZATION OF DOMESTIC VIOLENCE ON VICTIMS (1985); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1987); LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989).

108. Alison Young, *Conjugal Homicide and Legal Violence: A Comparative Analysis*, 31 OSGOODE HALL L.J. 761, 774 (1994).

109. *Id.* (citing M. Segilman, *Alleviation of Learned Helplessness in the Dog*, 256 J. ABNORMAL PSYCHOL. 265 (1965)).

110. *Id.*

BWS involves three distinct phases.[111] Phase one, the "tension-building phase," can be described as one in which the woman senses that her husband is becoming progressively sensitive to any minor irritation.[112] Phase two is characterized as the "explosion" phase. Here, the man physically and emotionally abuses his mate.[113] The beating could last anywhere from fifteen minutes to several days. The third phase is titled the "calm, loving, respite" phase. Here, the husband promises emphatically to never hurt her again. She believes him.[114] The cycle then repeats itself.[115]

XII. BWS: LEGAL RECOGNITION OR PSYCHOLOGICAL VICTIMIZATION?

By way of expert testimony many feminist psychologists and researchers, such as Walker, feel their contribution has navigated the judiciary toward a legally recognizable defense.[116] However, there is a considerable faction who feel that the tidy label has stigmatized the battered woman as sick or crazy and has further alienated the jury.[117] This faction further posits that the battered woman is perfectly sane. Proponents of the syndrome portray her psychological experience as distinctive and akin only to Segilman's dogs.[118] This contention of distinctiveness is critical to the notion of a syndrome which is aberrant in its nature. Critics of the syndrome, however, suggest that the battered woman's behavior is neither sick nor atypical, but rather very analogous to that of her non-battered cohorts who also attempt to separate from their mates.[119]

Loseke and Cahill have termed couples who are attempting to separate as "uncoupling."[120] They assert that the prolonged "leaving and

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111. WALKER, *supra* note 106, at 65-66.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* Margaret M. Prendergast, *Evidence—The Admissibility of Expert Testimony on Battered Woman Syndrome Under the Federal Rules of Evidence*, 65 TEMP. L. REV. 341 (1992).

117. E.M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986).

118. Young, *supra* note 108.

119. *Id.* at 804 (*citing* ELIZABETH COMACK, *Legal Recognition of the 'Battered Wife syndrome': A Victory for Women?*, Address to the American Society of Criminology Meetings (Nov. 1991)).

120. *Id.*

returning" cycle, which is alleged to be unique to the battered woman, is in fact common to all couples attempting to sever ties from one another.[121] Furthermore, the gamut of emotions, such as guilt, fear, depression, and lowered self-esteem, that are purported to be unique to the battered woman, are also characteristic of many men and women undergoing the uncoupling process.[122] Thus, it is possible that the battered woman remains not because of "learned helplessness," but because she is afraid to be alone or because there is a part of her that still loves the father of her children, or even still because a part of her believes she can change him.

But is this attitude necessarily a gender specific syndrome? Or is it indicative of the majority of men and women who experience difficulties breaking off a relationship? Estrich questions the necessity for a gender-specific defense.[123] She asserts there should not be a need for such a syndrome.[124] Furthermore, legal practitioners and scholars would be more beneficial to their clients if they worked at changing existing law to accommodate the battered woman rather than using a syndrome which titles her as sick or crazy. These altruistic motives, however, take time to be effectuated. The legislature does not redraft laws overnight. Proponents of the syndrome reasoned that it would be much simpler to introduce key evidence of the turbulent relationship via expert testimony explaining a psychological syndrome than to have the legislature redraft long-existing definitions of imminency and reasonableness.[125] Meanwhile, the battered woman finds herself in the midst of a legal sea of rigid confines of which her behavior does not fit.[126] Consequently, in order to save her from a life sentence, her attorney does whatever is necessary, however shortsighted, to preserve her freedom.

Is the battered woman crazy to think that her husband will murder her if she attempts to leave the marital home? Numerous accounts of battered women warn that she,[127] and possibly her children,[128] have a far

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121. *Id.*

122. *Id.*

123. Young, *supra* note 108, at 805 (citing Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430 (1990)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See Hodges*, 716 P.2d at 566 (describing how husband beat defendant wife, breaking her jaw, until she was unconscious because she left him and warned that if she ever left again he would kill her); State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) (stating that husband beat defendant wife threatening to dismember her if she ever left him again); State v. Gallegos, 719 P.2d 1269, 1272 (N.M. Ct. App. 1986) (describing how husband held loaded gun to defendant wife head while threatening to kill her if she ever left him again).

greater chance of being murdered if they attempt to leave the marital home.[129] The misconception that the battered woman is able to freely and safely escape the abuse without resorting to murder is prevalent. The statistics, however, simply do not support this contention.[130]

Labeling a woman who is beaten as a victim of a syndrome allows the court to acquit her without conceding that the woman was legally justified in killing her tormentor. Admittedly, it provides an explanation to the jury as to why she did not leave.[131] However, the syndrome arguably has the potential for alienating the jury[132] rather than providing them with an intelligible explanation couched in cryptic psychological jargon telling them why she stayed. Juries often "tune out" as soon as they hear psychological jargon. Also, Americans are understandably becoming more and more irritated with the abuse excuse.[133] Somehow they feel that allowing women who have killed their spouse to use BWS as a justification for their actions would be tantamount to giving women a license to kill.[134] In reality, however, this fear is completely unwarranted. In 1990, out of approximately 100 Ohio women who were serving prison sentences for killing their battering spouses and who had their cases reviewed, only

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128. There is a strong correlation between spousal abuse and child abuse. WALKER, *supra* note 106, at 61.

129. In 1987, researchers analyzed the results of the American homicide statistics compiled by the Centers for Disease Control in Atlanta, Georgia and discovered that, in 35 states, the number of women being murdered by their male partners had increased. In 25 of the 35 states, most of the women were murdered *after* they divorced or separated from their mates. BEAN, *supra* note 1, at 6.

130. The majority of battered women who are killed are killed after they separate from their mate. BEAN, *supra* note 1.

131. *See* Cara Yates, *Self-Defense and the Battered Woman's Syndrome*, 45 S.C. L. REV. 127 (1993).

132. Daniel Wolfe, head of the jury consulting firm Litigation Sciences, warns that labeling the defendants as victims could backfire. Jurors tend to engage in a behavior known as the "defensive attribution." Jurors distance themselves from the violent behavior exhibited by the defendant by asserting that they are incapable of such violence. Gail Appleson, *Figure Skating-Harding, Bobbitt, Menendez Share Victim Strategy*, Feb. 4, 1994, *available in* LEXIS, World Library, Allwld File.

133. "The 'He made me do it' defense is now expanding. We have the Menendez boys, Erik and Lyle, from Beverly Hills arguing that they had no choice but to gun down their wealthy parents." Rush Limbaugh, *No tears for the Bobbitts—only for America*, VANCOUVER SUN, Jan. 22, 1994, at 2.

134. BEAN, *supra* note 1, at 165. Some Americans feel that allowing women who kill their mates to use self-defense will result in "an open season on men." Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 NAT'L J. CRIM. DEF. 141, 142 n.4 (1978).

twenty-five were pardoned.[135] Clearly, the American legal system is not sending a message to society that it is "open season" on men.

With violent crimes exceeding manageable proportions, society feels obligated to force perpetrators to take responsibility for their actions rather than absolving them of all culpability by labeling them as victims. The conservative argument is that the syndrome, along with all abuse excuse types of defenses, is the equivalent to legalizing revenge.[136] In the final analysis, the syndrome allows the court to benevolently bestow upon women the status of insanity while simultaneously taking away her power in the courtroom. One wonders how it is that the woman's husband has been raping and brutally beating her and she is the one who is labeled sick. Is he the perfect picture of cognitive and emotional health void of any psychological pathology? One can almost hear the jury deliberating in the jury room, "He obviously had a really bad temper . . . but her, she must have been really sick to stay in a sadistic relationship like that!" The question is not why didn't she leave, but rather why he did not let her go.

Some jurisdictions have, in fact, chosen not to accept the battered woman's syndrome as a self-defense.[137] Instead, they reasoned that the syndrome does not involve insanity, emotional disability, or any other kind of psychological pathology.[138] Rather, the syndrome, like any other experience peculiar to the defendant, relates to the issue of the defendant's honesty and reasonableness[139] of her belief that she was in imminent danger of serious bodily harm or death.[140] Therefore, there is no need for evidence of the syndrome per se. Evidence of the woman's history is admissible for its bearing on the defendant's reasonableness of her belief that she was in imminent danger. Such jurisdictions, however, further reasoned that while a woman's history of spousal abuse is a factor to be considered when determining if her fear was reasonable, this consideration does not negate the requirement of proving that the threat of injury was imminent.[141] The problems associated with this requirement of imminency has caused some legal scholars to look to other countries to see how their legal systems have dealt with domestic violence.

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135. BEAN, *supra* note 1, at 165.

136. *Id.* at 1.

137. Commonwealth v. Ely, 578 A.2d 540, 541 (Pa. Super. Ct. 1990).

138. State v. Myers, 570 A.2d 1260, 1266 (N.J. Super. Ct. App. Div. 1990).

139. Reasonableness is the standard used in objective tests.

140. *Meyers*, 570 A.2d at 1266.

141. *Grove*, 526 A.2d at 373

XIII. GERMAN LAW

While the law in the United States has provided the battered woman with defenses such as self-defense, provocation, or temporary insanity, Germany has taken a more progressive legal approach. Germany has acknowledged the difficulties with the battered woman asserting self-defense in non-confrontational settings because of the apparent lack of imminency. Although Germany, like the United States, traditionally applied necessity to civil violations, its applicability in the criminal context has been discussed extensively in scholarly German literature. Germany has codified two classes of necessity: defensive and aggressive. The governing German civil code, Burgerliches Gesetzbuch (BGB) section 904, defines necessity as follows:

> [T]he owner of property is not justified in prohibiting another person from interfering with that property if that interference is necessary to avoid a present danger and the harm avoided thereby is disproportionately large in relation to the damage suffered by the owner of the property. The owner can demand restitution for the damage suffered.[142]

The foregoing section accommodates aggressive necessity. Under aggressive necessity, as opposed to defensive necessity, the defendant is permitted to damage another's property in an effort to protect herself or her property from harm. The harm that the defendant is seeking to avoid, however, does not stem from the property she is damaging; hence, the title aggressive necessity. The German counterpart to aggressive necessity is defensive necessity and is defined in BGB section 228 as follows:

> [O]ne who damages or destroys another's property in order to avert a danger emanating from it to oneself or another does not act wrongfully if the damage or destruction is necessary to avoid the danger and is not disproportionate thereto. If the actor is responsible for the danger, he is liable for the damages.[143]

Section 228 allows one to damage another's property in cases where the danger is specifically caused by that property. The United States does not distinguish between aggressive and defensive necessity; instead, it

142. Byrd, *supra* note 5, at 197 (citing Burgerliches Gesetzbuch [hereinafter BGB] § 904).

143. *Id.* at 198 (citing BGB § 228).

distinguishes between public and private necessity.[144] Where the act is for the public good (e.g. shooting a rabid dog), the defense is absolute.[145] Where, on the other hand, the act is solely to benefit a person or property from destruction or serious injury, the defense is justified by the existence of private necessity and is said to be qualified.[146] This distinction leads to monetary consequences. If the defense is private, it is qualified by the amount of damage the defendant was responsible for causing.[147] The actor must pay for any damage that he caused.[148] In the United States, the civil justification of necessity is based on the maxim, "*[n]ecessitas inducit privilegium quod jura privata* [necessity provides a privilege for private rights]."[149]

Although defensive necessity seems almost identical to defense of property, the two defenses are applied quite differently in Germany.[150] Self-defense is applicable where the attack is present; whereas, defensive necessity is applicable where the attack is imminent. Another key distinction is that with aggressive necessity, the actor may justifiably cause damage to another's property only where that property's value is less than the property being saved.[151] Defensive necessity, on the other hand, is

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144. *See generally* Ploof v. Putnam, 71 A. 188 (Vt. 1908); Newcomb v. Tisdale, 62 Cal. 575 (1881); Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910); RESTATEMENT (SECOND) OF TORTS §§ 197, 263 (1965).

145. Private necessity is defined as "[o]ne is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster." RESTATEMENT (SECOND) OF TORTS § 196 (1965).

146. Private Necessity

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to (a) the actor, or his land or chattels, or (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

(2) Where the entry is for the benefit of the actor or a third person, he is subject to liability for any harm done in the exercise of the privilege stated in Subsection (1) to any legally protected interest in the possessor in the land or connected with it, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor.

Id. § 197 (1965).

147. *Id.* § 197(2).

148. *Id.*

149. Surocco v. Geary, 3 Cal. 69 (1853).

150. Byrd, *supra* note 5, at 199 (explaining that the BGB provides separate defenses for defense of property in § 228 and self-defense in § 227).

151. *Id.*

justified in all situations so long as the property being damaged is not disproportionately greater than the property being saved.[152]

Germany's seemingly illogical application of defensive necessity within the criminal context can be explained by its approach to self-defense and excessive self-defense. Unlike the United States,[153] Germany allows for use of excessive force statutorily. Specifically, section thirty-three of the Strafgesetzbuch (StGB) states that "[i]f the actor exceeds the limits of self-defense because of confusion, fear, or fright [s]he is not to be punished."[154] Section thirty-three provides for complete acquittal. Although this law may appear vulnerable to abuse, it contains safeguards. The law still requires the defendant to be in a situation that would justify self-defense. It simply does not punish her for "overreacting." The rationale is fair, particularly in the case of a battered woman. There are often situations where the battered woman interprets any sign, however slight, as a signal that a beating is about to occur. In this situation, if the battered woman overreacts and kills her abuser, German law would not find this use of excessive force culpable or punishable.

In contrast, United States law would find such overreaction punishable and would deprive her from asserting self-defense, thus leaving her open to a charge of manslaughter. Germany's heat of passion statute is also much more amenable to battered women than the manslaughter statute in the United States. Section 213 of the StGB provides: "[i]f, through no fault of h[er] own, the manslaughterer was enraged through the victim's mistreatment or serious defamation of the defendant h[er]self or of a relative and thereby immediately aggravated to act . . . punishment of between six months and five years shall be imposed."[155] This statute specifically recognizes the decedent's responsibility in bringing about his own death due to his "mistreatment" of the defendant. In contrast, in the United States the manslaughter statute focuses on the "reasonableness" of

152. *Id.*

153. *See* State v. Bowens, 501 A.2d 577 (N.J. Super. Ct. App. Div. 1985) (holding that killing by excessive force in self-defense may constitute manslaughter, i.e., the defendant must plead imperfect self-defense rather than perfect self-defense).

154. Byrd, *supra* note 5, at 184.

155. *Id.*

the defendant's actions[156] and requires that the defendant acted out of provocation and had no time to cool.[157]

German laws enable the courts to react to three distinct types of battered women cases. The importance of the legal treatment is the message that the court is sending to society. First, if the court finds that the woman was in imminent danger and the force used was necessary, the court can acquit her.[158] Here, the court is sending a message that individuals, such as the defendant, may lawfully kill an aggressor.[159] Such a message has a powerful deterrent effect on would-be aggressors. Second, if it finds that she was in imminent danger, but used excessive force, the court can still acquit her.[160] Here, the court is suggesting that while the defendant's behavior is not condoned, it is nonetheless understandable and clearly not blameworthy. Third, if the court finds that she was not in imminent danger, but acted out of rage and hatred toward her abuser who provoked his own death, the court can mitigate her punishment from murder to manslaughter. Here, the court is conceding the blameworthiness of the defendant's action, but is also recognizing that the decedent played a role in provoking his own death.[161] This compassionate approach is a common theme throughout Germany's application and interpretation of its laws. The remainder of this section discusses why Germany's criminal laws, specifically defensive necessity, could more adequately accommodate battered women than the United States' model of self-defense.

XIV. THE NON-CONFRONTATIONAL ATTACK

In 1979, the Bundersgerichtshof (the German High Court) was confronted with a case which involved the following facts: For several consecutive nights, a family was awakened by an intruder who would break into their home and silently stand over them while they slept.[162] The parents reported the incidents to the police, but having insufficient leads, they were

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156. "[A] homicide . . . is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness . . . shall be determined from the viewpoint of a person in the actor's situation . . ." MODEL PENAL CODE § 210.3 (1994).

157. Commonwealth v. Rivers, 557 A.2d 5 (Pa. Super. Ct. 1989); Commonwealth v. Copeland, 554 A.2d 54 (Pa. Super. Ct. 1989).

158. Byrd, *supra* note 5, at 185.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 200.

unable to apprehend the intruder. Frustrated and frightened, the parents began keeping a loaded gun by their bedside.

On the night in question, the defendant discovered the intruder hauntingly peering at himself and his wife. The defendant quickly grabbed his gun and pursued the intruder out of the house and down the street. The defendant warned the intruder that if he did not stop, the defendant would shoot. The intruder refused to stop and the defendant shot and killed him.

The Bundesgerichtshof held that the defendant was justified in killing the intruder based on necessity.[163] The Court reasoned that the facts clearly did not lend themselves to self-defense because the intruder was fleeing and the confrontation had ended. Interestingly, the Court applied aggressive, rather than defensive, necessity.

The Court decided that defensive necessity was not applicable. It viewed the interests involved as the family's right to privacy versus the safety of the intruder.[164] Keep in mind that the intruder never threatened physical harm to any member of the family per se. Thus, the perceived interest being threatened was mere privacy. Recall that for aggressive necessity to be successfully plead, the harm sought to be avoided must be greater than the harm done. The right to privacy, however, is arguably less valuable than the right to live. In contrast, defensive necessity only requires that the damage to the danger causing property be of not *much* greater value than the property or interest being saved. Although the intruder's safety is more valuable than the family's privacy interest, his safety does not rise to the level of being "disproportionately" more valuable, thereby negating the applicability of defensive necessity.[165]

Nevertheless, the Bundesgerichtshof applied aggressive, rather than defensive, necessity. The exact theory employed is not significant. Significantly although the intruder was in the process of fleeing, and clearly did not present any imminent danger to the defendant or his family, the Court found the killing justified. The Bundesgerichtshof followed an interesting time requirement which was rendered in an earlier decision.[166] It held that an imminent danger can endure prolonged intervals, thereby accommodating a threat of danger which may linger, rather than only the instantaneous threat that is characteristic of confrontational attacks. Currently, this liberal translation of imminency is prevalent in Germany.[167]

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163. Byrd, *supra* note 5, at 200.

164. *Id.* at 201.

165. *Id.* at 198.

166. *Id.* at 201.

167. *See* KARL LACKNER, STRAFGESETZBUCH MIT ERLAUTERUNGEN § 34, at 214 (Beck, 18th ed. 1989) [hereinafter *StGB Erlauterungen*] (explaining that danger, particularly within the

This innovative interpretation is key for the battered woman. If the United States courts would employ this interpretation of imminency in its version of self-defense, the battered woman would stand a far better chance of being acquitted for killing her husband in a non-confrontational setting.

XV. PREEMPTIVE ACTION

Many battered women strike preemptively. That is, rather than waiting for the abuse to resume, they kill their assailant before he has the chance to recommence the beatings. Recall Betty Hundley killing her husband while his back was turned clutching the beer bottle. Her retaliation would be considered a preemptive action because there had been a lull, however brief, in the attack.[168] This lull is accommodated by German law and is treated as an ongoing danger created by the decedent.

Although Germany parallels the United States in disallowing self-defense in cases where the danger was not imminent, Germany does allow defensive necessity. Furthermore, Germany's liberal interpretation of imminency results in defensive necessity being successfully plead in a greater number of cases. In 1959, the Bundesgerichtshof was faced with an interesting case involving false imprisonment. The facts are as follows. A woman who was clinically diagnosed as a paranoid schizophrenic suffered from hallucinations.[169] She believed that she was being threatened by devils and that her daughter was trying to poison her.[170] In an effort to avoid the perceived danger, the woman would submerge portions of the family home with holy water and would often flee the home half naked.[171] The woman's husband and daughter, in an effort to prevent further property damage, confined the woman to her room against her will.[172] The lower court found the husband and daughter guilty of false imprisonment.[173] The Bundesgerichtshof, however, reversed their convictions holding that a situation of imminent danger can be ongoing; thereby, justifying preemptive attacks if done in an effort to prevent future harm.[174]

The result the Court reached was logical. The Court reasoned that rather than require the defendants to sit idly by awaiting future damage,

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BWS context, is subject to change at any time and is highly unpredictable), *reprinted in* Byrd, *supra* note 5, at 201.

168. KAN. CRIM. CODE ANN. §21-3214(3)(a) (Vernon 1993).

169. Byrd, *supra* note 5, at 204.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Byrd, *supra* note 5, at 204.

they should be empowered to prevent the damage.[175] The defendants were in a uniquely intimate relationship with the victim making them aware of her cycles of hysteria and hallucination. This insight and knowledge should not be forced to be suppressed in order to oblige the rigid time constraints of self-defense.

The Court stated that the defendant's actions were justified under a theory of defensive necessity because the victim was the source of danger.[176] The competing interests were the victim's right to move freely during her hallucinogenic episodes versus the defendant's right to prevent permanent property damage.[177] Arguably, the victim's rights during these episodes were not disproportionately greater than those of the defendant's. The rule to be extracted from this opinion is that the perceived danger need not be immediate, imminent, or present. It merely needs to be ongoing, intermittent, or cyclical in nature. This common sense approach allows for preemptive action.

Although the foregoing case did not involve self-defense, it did involve the requirement of imminency. The same logic that was employed there, can be employed in cases involving battered women. An individual who is certain that she is about to incur great harm, whether such harm be the flooding of one's home or a beating, should not be forced to stand idly by and watch it take place. Arguably, the two interests being compared are quite disproportionate: life versus property. However, the rationale is the same and should not be discounted merely because of the disparity in the interests involved.

If one were to apply this logic to the typical battered woman who strikes in a non-confrontational setting, the result would be that she, in the proverbial sense, no longer has her hands tied. She need not wait in frightful anticipation for her mate to resume the abuse or, worse yet, to kill her. Consider the absurd result if, in the above case, the Bundesgerichtshof would have only considered necessity with its traditional requirements of imminency. The victim's husband and daughter, to avoid criminal charges of false imprisonment, would be forced to stand idly by and watch the woman literally inundate their home. Or, perhaps the woman might receive a spontaneous bulletin from her hallucinated companions and feel convinced that the only way to be free of the demons is to set the house on fire. Clearly, this result is illogical.

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175. *Id.* at 205.

176. *Id.*

177. *Id.*

XVI. GERMANY'S INTERPRETATION OF IMMINENCY: IDEAL FOR THE BATTERED WOMAN

Germany's interpretation of imminency is ideal for the battered woman who kills her husband in a nonconfrontational setting, i.e., while he lay asleep. This definition need not be applied to the United States law of necessity, but rather to the United States law of self-defense. As currently drafted and interpreted, the United States self-defense law, while conceptually appealing, is legally inappropriate because of the requirement that the attack be imminent. Arguably, however, legislation may not be necessary. The term "imminency" could remain intact and all that would be needed is a new interpretation of the word to include lulls. On the other hand, this interpretation could be viewed by the judiciary as too radical of a departure from the traditional concepts of imminency; thereby, requiring legislation. If legislation were to be enacted, it should reflect the German interpretation of imminency which lengthens the time requirement so that the attack need not be present, but rather ongoing.

With such a statue in place, a woman who knows that her husband upon wakening usually initiates a beating would be justified in preventing the beating and defending herself by using deadly force. The husband's slumber would be seen as a lull in the attack, rather than a complete cessation. The entire relationship could be viewed as one cyclical, violent, and ongoing attack. Since his slumber was merely a lull in an ongoing attack, her defensive action would be completely justified using the more liberal definition of imminency. This assumes, of course, that the woman possesses the requisite evidence to establish that she had been abused and that she had reason to believe that upon awakening, her husband would resume or begin a cycle of violence. Furthermore, with such a new interpretation of imminency in place, BWS would be unnecessary. Rather than requiring an expert witness to take the stand and explain the syndrome, the jury instructions could simply include the new definition of imminency.

Although Betty Hundley's husband was not asleep when she killed him, the circumstance would still technically be classified as one that was nonconfrontational because there had been a lull in the violence, i.e., his back was turned and the beating had stopped.[178] Thus, the same analysis would apply. The few calm moments after the rape, but preceding the killing, were merely a lull in the ongoing attack. If the United States employed such an interpretation, the defensive conduct would be deemed necessary.[179]

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178. *Hundley*, 693 P.2d at 476.

179. MODEL PENAL CODE § 3.04(1) (1994).

XVII. CONCLUSION

In the United States, women were historically viewed as the equivalent of chattel whose primary role was that of a care taker. The laws reflected this attitude. Slowly, certain laws evolved to reflect a modernized society which acknowledged women's rights. Unfortunately, criminal law has not mirrored this evolution. Germany has managed to craft the flexible interpretation of imminency which accommodates the unique situation of the battered woman. The adoption of such an interpretation seems long overdue for the United States. With only minor alteration, or simply enlightened interpretation, the United States law of self-defense could also accommodate the special circumstances of the battered woman.

Fortunately, women's rights advocates are aggressively pursuing enactment of legislation precisely aimed at eradicating violence against women. The United States Congress recently enacted the Violence Against Women Act[180] which addresses violence against women in various settings, particularly in the home. It is the first United States federal law to be exclusively devoted to the abolition and prevention of violence against women. One can only hope that this is indicative of a new and enlightened trend which recognizes women not as victims, but as equal beings.

This article suggests that American courts could employ defensive necessity without having to resort to the battered woman syndrome. The reluctance to employ such a defense, and instead, resort to invoking a psychological syndrome, is motivated by faulty and biased perceptions of battered women. Violence against women is a pervasive and critical problem which requires international attention. Betty Hundley is but one of millions who are beaten and raped every day by their mates. If she is not legally justified in killing her tormentor, who is?

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180. 42 U.S.C. § 14013 (1994).