1994

A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute

Margaret C. Hobday

Note

A Constitutional Response to the Realities of Intimate Violence: Minnesota's Domestic Homicide Statute

Margaret C. Hobday

The overwhelming problem of domestic violence in the United States demands a vigorous response.[1] Throughout history, society has largely ignored domestic abuse due to the traditional view that violence in the home constitutes a "private matter."[2] The feminist movement of the early 1970s challenged

1. Estimates vary as to the frequency of incidents of domestic abuse, but all reports indicate pervasive violence. Police reports document that in 1991, 21,000 women reported domestic crimes each week. Senator Joseph R. Biden, Jr., Chairman, *Introduction* to MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, 102D CONG., 2D SESS., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA ii, ix (1992) [hereinafter A WEEK IN THE LIFE]. A woman has between a one-in-five and a one-in-three chance of being physically assaulted by a partner or ex-partner during her lifetime. Surgeon General Antonio Novello, *From the Surgeon General, U.S. Public Health Services*, 267 JAMA 3132, 3185 (1992). Due to numerous factors, including poor record-keeping and failure to report, the number of officially reported domestic abuse incidents falls short of the actual number of incidents. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 20-22 (1991). Experts estimate that domestic violence, both reported and unreported, affects as many as four million women a year. *Women and Violence, Hearings on S. 2754 Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess., 117 (1990) (testimony of Dr. Angela Browne, Professor, Dep't of Psychiatry, Univ. of Massachusetts). Many domestic assaults involve extreme violence. According to one estimate, 39% of all violent attacks on wives were serious, involving punching, kicking, biting, beatings, and attacks with knives and guns. BUZAWA & BUZAWA, *supra* at 20 (citing M.A. STRAUS & R.J. GELLES, THE NATIONAL FAMILY VIOLENCE RESURVEY (1988)).

2. *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 121-22 (1991); *see also* Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 983-97 (1989) (commenting that wife-beating was legally acceptable until the nineteenth century). Sewell concludes that wife-beating continues despite reform because "the historical abuse of women is ingrained in contemporary social attitudes and reflected in institutional responses to battered women." *Id.* at 984;

the official neglect of domestic violence[3] and exposed its devastating effects.[4] In recent years, heightened awareness of domestic violence has inspired significant legislative proposals and reform.[5] Unfortunately, the epidemic of violence has not abated—abusive partners continue to beat their "loved ones" to death.[6]

This Note examines a unique legislative response to domestic violence—Minnesota's new first degree murder statute, which does not require either premeditation or specific intent to kill.[7] Instead, the new statute, commonly referred to as the "domestic homicide statute," presumes intent based on a number of

---

see also BUZAWA & BUZAWA, *supra* note 1, at 23-26 (summarizing the criminal justice system's historical responses, or lack thereof, to domestic violence).

3. For an in-depth examination of the battered women's movement in this country, see SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 214 (1982).

4. Not only does domestic violence affect its immediate targets, but it also affects those who witness it, particularly the children of abusive partners: domestic violence "leave[s] a legacy of violence in children that will be replayed in their lives and relationships." A WEEK IN THE LIFE, *supra* note 1, at 9; *see* BUZAWA & BUZAWA, *supra* note 1, at 17-18 (presenting the "violence-begets-violence" theory of domestic abuse).

5. For a detailed discussion of recent changes in the criminal justice system, see BUZAWA & BUZAWA, *supra* note 1. Legislative reform has primarily concentrated on three areas: police response, handling of reported cases, and public education. *Id.* at 12; *see Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1506-20 (1993) [hereinafter *Legal Responses*] (discussing common governmental responses to woman battering: shelters and other support services, civil protection orders, and criminal prosecution).

In 1984, Congress approved federal legislation to aid victims of domestic violence. Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-10412 (1988); Victims of Crime Act, 42 U.S.C. §§ 10601-10605 (1988). Both the Senate and the House of Representatives recently passed versions of the Violence Against Women Act of 1993. H.R. 1133, 103d Cong., 2d Sess. (1993); H.R. 3355 103d Cong., 2d Sess. (1993). Minnesota maintains a progressive statutory scheme in the area of domestic violence. *See* Asmus et al., *supra* note 2, at 124-30 (discussing "Minnesota's Response"); *id.* at 126-27 n. 63 (listing specific Minnesota statutes relating to domestic abuse).

6. One study indicates that of the 12,582 women age eighteen or older killed in one-on-one homicides during 1980-1984, 52% were killed by either a husband, ex-husband, common law husband, or boyfriend. BUZAWA & BUZAWA, *supra* note 1, at 20 (citing D.C. Carmody & K.R. Williams, *Wife Assault and Perception of Sanctions*, 2(1) VIOLENCE AND VICTIMS 25-39 (1987)). Federal Bureau of Investigation statistics indicate that at least 1,430 women were killed in 1991 by either their husbands or their boyfriends. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 19 (1991); *see also* LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE 212-46 (1992) (discussing what he calls the "chronic cases" of domestic abuse, in which the abuse ends in death).

7. MINN. STAT. § 609.185(6) (Supp. 1994).

factors, including the victim-defendant relationship and the defendant's repeated abuse of the victim.[8] Although "domestic abuse" encompasses a broad range of abusive relationships,[9] this Note focuses primarily on the abuse men inflict on their female intimate partners. This Note's limited focus does not intend to perpetuate gender stereotypes; rather, its gender specificity reflects the disproportionate amount of violence against women in intimate relationships.[10]

Since the domestic homicide statute's enactment in 1990, Minnesota has charged very few defendants under it, perhaps because its constitutionality remains unsettled.[11] In fact, in every case prosecuted under the statute thus far, the defense has requested dismissal of the charge and challenged, albeit un-

8. *Id.*; *see infra* text accompanying note 20 (outlining the statute's four elements).

9. "Domestic abuse" includes parental abuse of a child, abuse of an elderly relative or abuse of an intimate heterosexual or homosexual partner. *See, e.g.*, DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE (1991) (discussing abuse between male homosexuals); JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT (1992) (examining child abuse); KARL A. PILLEMER & ROSALIE S. WOLF, ELDER ABUSE: CONFLICT IN THE FAMILY (1986) (examining elder abuse); CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS (Diane S. Foster, ed., 1992) (positing that violence in lesbian relationships occurs at approximately the same frequency as violence in heterosexual relationships).

10. Women are six times more likely than men to be the victim of a violent crime committed by an intimate partner. A WEEK IN THE LIFE, *supra* note 1, at ix. Violence presents the greatest public health risk to adult women—greater than automobile accidents, muggings, and cancer deaths combined. Novello, *supra* note 1, at 3132. Nationally, more than ninety women were murdered each week in 1991; men murdered nine out of ten of these women. A WEEK IN THE LIFE, *supra* note 1, at ix. This Note's deliberate gender focus also comports with the legislature's intent and policy concerns in enacting the new domestic homicide statute. *See* Senator Mike Freeman, Remarks at the Meeting of the Minnesota Senate Judiciary Committee Meeting (April 12, 1990) (available on tape at the Minnesota Legislative Library, SF No. 1860) (stating that in 1989, eighteen women died at the hands of their abusive partners in Minnesota).

11. As of the date of this Note, the State of Minnesota had charged six defendants with first degree domestic homicide. *See* State v. Grube, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); State v. Miranda-Alonso, 4th Jud. Dist., Hennepin County, SIP 93-047664 (indicted June 24, 1993); State v. Freeman, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993; State v. Auchampach, 1st Jud. Dist., Goodhue County, Ct. File No. K9-93-469 (indicted March 1, 1993); State v. Davis, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); State v. Yach, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992).

successfully, the statute's constitutionality.[12] Adding further uncertainty to the question of the statute's constitutionality, in three states defendants have challenged nearly identical child abuse homicide statutes, with varying results.[13] Two recent

12. Defendant's Memorandum of Law, Dec. 20, 1993, *Grube*, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Defendant's Memorandum in Support of Motion to Dismiss, Aug. 19, 1993, *Miranda-Alonso*, 4th Jud. Dist., Hennepin County, SIP 93-047664 (indicted June 24, 1993); Memorandum of Law, July 16, 1993 at 10-14, *Freeman*, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993); Notice of Motion and Motion at 7-10, *Auchampach*, 1st Jud. Dist., Goodhue County, Ct. File No. K9-93-469 (indicted March 1, 1993); Notice of Motion and Motion to Dismiss as Unconstitutional, April 23, 1993, *Davis*, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); Memorandum in Support of Motion to Declare Unconstitutional, August 23, 1993, *Davis*, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); Defendant's Brief Challenging Constitutionality, Dec. 2, 1992, *Yach*, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992). The courts denied requests by the defenses for dismissal in each of these cases. Order on Omnibus Hearing of B.W. Christopherson, Dec. 23, 1993 at 10, *Grube*, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Trial Transcript, Marilyn Brown Rosenbaum, Sept. 24, 1993 at 21, *Miranda-Alonso*, 4th Jud. Dist., Hennepin County, SIP 93-047664 (indicted June 24, 1993); Order of Judge John T. Oswald, August 11, 1993 at 2, *Freeman*, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993); Guilty Verdict Form, Dec. 1, 1993, *Auchampach*, 1st Jud. Dist., Goodhue County, Ct. File No. K9-93-469 (indicted March 1, 1993); Order and Memorandum of Judge John J. Sommerville, July 6, 1993, *Davis*, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); Initial Omnibus Order and Bench Memorandum of Judge Lawrence T. Collins, Feb. 3, 1993, *Yach*, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992). The constitutionality of the statute remains unsettled, however, because the trial courts based their decisions on different grounds. Goodhue, Lac Qui Parle, St. Louis, and Hennepin County courts held the statute constitutional without issuing an opinion. Trial Transcript, Marilyn Brown Rosenbaum, Sept. 24, 1993 at 21, *Miranda-Alonso*, 4th Jud. Dist., Hennepin County, SIP 93-047664 (indicted June 24, 1993); Order of Judge John T. Oswald, August 11, 1993, *Freeman*, 26th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993). Winona and Hennepin County courts held the constitutionality of the statute unripe for decision. Order and Memorandum of John J. Sommerville, July 6, 1993, *Davis*, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); Initial Omnibus Order and Bench Memorandum of Judge Lawrence T. Collins, Feb. 3, 1993, *Yach*, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992).

13. In 1993, the Washington Court of Appeals upheld its homicide by abuse statute, WASH. REV. CODE § 9A.32.055 (1988), against a constitutional challenge. State v. Russell, 848 P.2d 743, 750 (Wash. Ct. App. 1993). In 1992, the Tennessee Supreme Court struck down its statute, TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993), on state constitutional grounds. State v. Hale, 840 S.W.2d 307, 308 (Tenn. 1992). The Tennessee Legislature responded to the *Hale* decision by amending its child-abuse murder statute. TENN. CODE ANN. § 39-13-202(a)(4) (Supp. 1993). That same year, the Minnesota Court of Appeals held that a pre-trial constitutional challenge to Minnesota's child

convictions under the domestic homicide statute[14] provide the Minnesota appellate courts with an opportunity to rule on the statute's constitutionality.[15]

Section I of this Note introduces Minnesota's new domestic homicide statute, discusses its limited legislative history, and compares it to three similar first degree child abuse murder statutes.[16] Section II discusses the strengths of the new statute, particularly the direction it takes in criminal jurisprudence. The statute significantly transforms the legal analysis of killings between intimates, reflecting important aspects of feminist legal theory and addressing present gender inequities in homicide law. In light of the pending challenges of the statute, Section III argues that the Minnesota appellate courts should uphold the statute's constitutionality in order to facilitate the use of the statute. Finally, this Note concludes that Minnesota has enacted a theoretically sound and legally acceptable statute and that other states should adopt similar legislation.

I. MINNESOTA'S DOMESTIC HOMICIDE STATUTE

In 1990, in response to the growing number of reported domestic homicides,[17] Minnesota enacted the "domestic homicide statute."[18] This statute expands the traditional *mens rea* evaluation in murder cases—that of the defendant's state of mind at

abuse murder statute was unripe for decision. State v. Jennings, 487 N.W.2d 536, 539 (Minn. Ct. App. 1992).

14. Guilty Verdict Form, Jan. 15, 1994, *Grube*, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Guilty Verdict Form, Dec. 1, 1993, *Auchampach*, 1st Jud. Dist., Goodhue County, Ct. File No. K9-93-469 (indicted March 1, 1993).

15. The defendants will challenge the statute on constitutional grounds. Interview with Scott Swanson, Minnesota State Public Defender, in Minneapolis, Minnesota (Feb. 11, 1994).

16. MINN. STAT. § 609.185(5) (Supp. 1994); WASH. REV. CODE § 9A.32.055 (1988); TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993).

17. In Minnesota, in 1991, "[a]t least [twelve] women . . . were murdered in cases where the suspected, alleged or convicted perpetrator was a current or former husband, boyfriend, intimate partner, household or family member, or acquaintance of the woman." MINNESOTA COALITION FOR BATTERED WOMEN, WOMEN AND THEIR CHILDREN MURDERED IN MINNESOTA 1991 (1991). In 1992, this number increased to 32. MINNESOTA COALITION FOR BATTERED WOMEN, WOMEN AND CHILDREN MURDERED IN MINNESOTA IN 1992 (1992). By mid-1993, at least nineteen women had already been similarly killed. MINNESOTA COALITION FOR BATTERED WOMEN, WOMEN AND CHILDREN MURDERED IN MINNESOTA (TO DATE: AUGUST 31, 1993) (1993).

18. MINN. STAT. § 609.185(6) (Supp. 1994).

the time of the killing[19]—to include several characteristics of the defendant's offense. The statute classifies a killing as first degree murder if the defendant was closely related to the victim, repeatedly abused the victim in the past, was abusing the victim at the time of her death, and killed the victim "under circumstances manifesting an extreme indifference to human life."[20]

Although the domestic homicide statute lacks significant legislative history, the legislature modeled the statute after similar approaches to the problem in the area of child abuse.[21] The Minnesota legislature copied the language of its domestic homicide statute almost entirely from its 1988 child abuse first degree murder statute.[22] In turn, the legislature modeled its child abuse murder provision after a 1987 Washington homicide by abuse statute.[23] The Tennessee legislature also enacted a similar child abuse murder statute in 1988.[24]

These statutes do not conform to conventional murder classifications.[25] Unlike traditional first degree murder,[26] they do not require the state to prove either premeditation or that the

19. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW, §§ 7.1-7.13 (2d ed. 1986) (discussing traditional murder classifications); *see also* MODEL PENAL CODE § 210.2, cmt. 1 (Proposed Official Draft 1962) (explaining the requisite mental state for criminal homicide).

20. MINN. STAT. § 609.185(6) (Supp. 1994).

21. The Senate Judiciary Committee discussed the statute for about fifteen minutes on two separate days. Meeting of Minnesota Senate Judiciary Committee (March 8, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192); Meeting of Minnesota Senate Judiciary Committee (March 9, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192).

22. MINN. STAT. § 609.185(5) (Supp. 1994).

23. Telephone Interview with Jean Wagenius, Minnesota State Representative (Sept. 15, 1993); *see* WASH. REV. CODE § 9A.32.055 (1988). The Washington legislature enacted its statute in response to a highly publicized child abuse case in its community in which an abusive father killed his three-year-old son. State v. Russell, 848 P.2d 743, 748 (Wash. Ct. App. 1993) (citing State v. Creekmore, 783 P.2d 1068 (Wash. Ct. App. 1989)).

24. TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993). The Tennessee legislature enacted the statute in response to the brutal killing of a twenty-one-month-old baby by his mother's boyfriend. State v. Hale, 840 S.W.2d 307, 310 n.3 (Tenn. 1992) (citing State v. Bowers, 1989 WL 86576, (Tenn. Crim. App. 1989)). The boyfriend had committed a series of brutal and sadistic assaults against his girlfriend's twenty-one-month-old son, ultimately killing the child. *Bowers*, 1989 WL 86576, at *1.

25. Historically, lawmakers have only classified certain types of homicides as "murder": intent to kill murder, felony murder, "depraved heart" murder, intent to do serious bodily injury murder, and homicides committed in an unreasonable passion. *See* LAFAVE & SCOTT, *supra* note 19, § 7.1(a).

26. *See generally* LAFAVE & SCOTT, *supra* note 19, §§ 7.2, 7.5, 7.7 (discussing intent to kill murder, felony murder, and other traditional first degree murder classifications).

defendant specifically intended the victim's death.[27] The statutes also differ from the typical felony-murder rule, which provides for first degree murder when a foreseeable death occurs during the commission of a felony.[28] The abuse murder statutes do not focus on felonious conduct, but rather on the ongoing abusive relationship that ultimately directly caused the victim's death.[29]

The domestic homicide statute contains four main elements, each of which the state must prove beyond a reasonable doubt.[30] First, the state must establish that the defendant previously abused the homicide victim.[31] The statute describes this element as a "past pattern of domestic abuse."[32] Although the statute defines the term "domestic abuse" in detail,[33] it leaves the

27. The domestic homicide statute provides that the killing occur "under circumstances *other* than those described in [the premeditation and intent clause]." MINN. STAT. § 609.185(6) (Supp. 1994) (emphasis added).

28. For a succinct discussion of the felony murder rule, see LAFAVE & SCOTT, *supra* note 19, § 7.5. In Minnesota, the first degree felony murder statute also requires that the defendant entertain an intent to kill. MINN. STAT. § 609.185(3) (1992).

29. *See* MINN. STAT. § 609.185(5)-(6) (Supp. 1994); WASH. REV. CODE § 9A.32.055 (1988); TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993).

30. In a criminal prosecution, due process requires the state to prove every essential element beyond a reasonable doubt. McMillan v. Pennsylvania, 477 U.S. 79, 84-85 (1986); In re Winship, 397 U.S. 358, 361-64 (1970).

31. MINN. STAT. § 609.185(6) (Supp. 1994).

32. *Id.* All three child abuse statutes contain a similar prior acts element. The language of Minnesota's child abuse statute is nearly identical to its domestic homicide statute, requiring a "past pattern of child abuse." *Id.* § 609.185(5). The Washington statute provides that the defendant must have "previously engaged in a pattern or practice of assault or torture" of the homicide victim. WASH. REV. CODE § 9A.32.055 (1988). In Tennessee, the statute required the state to prove that the "death result[ed] from one or more incidents of a protracted pattern or multiple incidents" of abuse. TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993). As amended, Tennessee's statute requires that the defendant commit aggravated child abuse against the homicide victim. TENN. CODE ANN. § 39-13-202(a)(4) (Supp. 1993).

33. MINN. STAT. § 609.185(6) (Supp. 1994. The statute originally defined "domestic abuse" as an act of first, second, or third degree assault. MINN. STAT. § 609.185(6) (Supp. 1991). All three types of assault are felony offenses. *See* MINN. STAT. §§ 609.221, 609.222, 609.223 (1991 & Supp. 1994) (statutes for first, second and third degree assault, respectively). In 1992, the legislature significantly expanded the definition to include the additional acts of fifth degree assault, first through fourth degree criminal sexual conduct and terroristic threats. *See* MINN. STAT. §§ 609.224, 609.342, 609.343, 609.344, 609.345, 609.713 (1991 & Supp. 1994) (statutes for fifth degree assault, first through fourth degree criminal sexual conduct and terroristic threats, respectively). This amendment extended the criminal sexual conduct provisions to adult victims, a protection previously given only to minors under the domestic abuse

term "pattern" undefined.[34] For example, the statute does not specify how many incidents of prior abuse the state must prove, or for how long a period the abuse must have occurred, nor does it explain what type or quantum of evidence the state needs to prove the pattern of abuse.[35]

Second, the domestic homicide statute requires proof that defendant was committing "domestic abuse" against the homicide victim at the time of her death.[36] The statute uses the same definition of "domestic abuse" for this element as it does for the "past pattern" element.[37] The definition incorporates intentional criminal offenses, including all levels of assault, criminal sexual conduct, and terroristic threats[38]—although an act of "domestic abuse" that kills will likely be a high level assault. This element ensures that the defendant intended to at least harm the victim at the time of her death.

The third element of the statute requires that the killing occur under "circumstances manifesting an extreme indifference to human life."[39] Although the meaning of this element invites some confusion,[40] it appears to signify an aggravated form of

---

definition of the Domestic Abuse Act. *See* MINN. STAT. § 518B.01, subd. 2(a)(ii) (1992 & Supp. 1994) (definition under Domestic Abuse Act). Moreover, with the addition of fifth degree assault, the underlying conduct grew to include misdemeanor offenses. MINN. STAT. § 609.224 (1991 & Supp. 1994). In support of this amendment, Senator Jane Ranum testified that the changes reflect the type of conduct prosecutors often see in the abusive relationships. Senator Jane Ranum, Remarks to the Minnesota Senate Judiciary Committee, March 13, 1992 (available on tape at the Minnesota Legislative Library, SF No. 1687).

34. MINN. STAT. § 609.185(6) (Supp. 1994).

35. *Id.*; *see infra* Part III.B.1 (discussing this aspect of the statute as it relates to its constitutional specificity).

36. MINN. STAT. § 609.185(6) (Supp. 1994).

37. *Id.*; *see supra* note 33 (explaining the statute's definition of "domestic abuse").

38. *See supra* note 33 (describing the criminal offenses that constitute "domestic abuse" under the statute).

39. MINN. STAT. § 609.185(6) (Supp. 1994). Both Minnesota and Washington's child abuse murder statutes contain the identical element. *Compare* MINN. STAT. § 609.185(5) (Supp. 1994) *with* MINN. STAT. § 609.185(6) (Supp. 1994); WASH. REV. CODE § 9A.32.055 (1988). Tennessee's statute lacked any *mens rea* requirement. TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993).

40. In *State v. Pitt* the court expressed its difficulty in defining this phrase, stating that "[t]here is no legal definition [the Court] can go to and say this is how the law defines it. It is really a question of fact . . . [t]he term in and of itself is the ordinary meaning of the words put together." 612 A.2d 60, 63 (Conn. App. Ct. 1992). Some courts interpret this phrase to exclude conduct intentionally directed at a particular individual—a meaning at odds with the domestic homicide statute. *See, e.g.*, Haney v. State, 603 So.2d 368, 399 (Ala. Crim. App. 1991); State v. Anderson, 616 P.2d 612, 618 (Wash. 1982) (en banc).

recklessness.[41] The legislative history indicates that while a defendant need not specifically intend to kill, his conduct toward the victim must be more than accidental.[42] This requirement thus guards against a first degree murder conviction in a purely accidental death.

The fourth element requires that the defendant be closely related to the victim. Although patterned after the child abuse murder statute,[43] this element substantially departs from its predecessors. While the child abuse murder legislation is applicable only to young victims or other narrowly defined dependents,[44] the domestic homicide statute extends to a relatively broad class of victims of domestic abuse: any "family or household member."[45] Recognizing that not only children suffer from domestic violence, this definition includes spouses, former

41. According to the Model Penal Code, this phrase signifies extreme recklessness, greater than a "gross deviation from the standard of conduct that a law-abiding person would observe." MODEL PENAL CODE § 210.2(1)(b) cmt. 4 (Proposed Official Draft 1962) (citing to § 2.02(2)(c) of the MPC). Some courts construe this phrase to mean recklessness directed at a specific individual. *See, e.g.*, State v. Jimenez, 608 A.2d. 996, 1004 (N.J. 1992); Kruse v. Commonwealth, 704 S.W.2d. 192, 194 (Ky. 1985).

42. Senator Mike Freeman, Remarks at the Minnesota Judiciary Committee Meeting (April 12, 1990) (SF 2192, available on tape at the Minnesota Legislative Library).

43. *See supra* note 22 and accompanying text (noting that the Minnesota legislature generally patterned its domestic homicide statute after its child abuse murder statute).

44. Minnesota's child abuse murder statute applies only to minor victims. MINN. STAT. § 609.185(5) (Supp. 1994). The Tennessee statute covered the death of any child under the age of thirteen. TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993). The Washington statute applies to the death of "a child, a developmentally disabled person, or a dependent adult," yet it narrowly defines "dependent adult" to include only elderly individuals and persons with severe physical or mental disabilities who rely on others to provide "basic necessities." WASH. REV. CODE 9A.32.055(2) (1988).

45. The statute incorporates the definition of "family or household member" from the Domestic Abuse Act. *See* MINN. STAT. § 518B.01, subd. 2(b) (Supp. 1994) (definition in Domestic Abuse Act). Although proponents of Minnesota's statute seemed most concerned with the violence against women by their male intimate partners, the expansive definition includes the following categories:

> spouses, former spouses, parents and children, persons related by blood, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or have lived together at any time . . . [including] a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time.

Id. The definition does not include, however, an intimate partner if the relationship has not involved having a child or living together.

spouses, parents and cohabitants, and persons having a child in common.[46]

II. EXPANDING TRADITIONAL NOTION OF *MENS REA*

The domestic homicide statute's unique elements provide a new approach to evaluating the defendant's culpability in homicides between intimates, reflective of modern trends in feminist jurisprudence.[47] In particular, two of the elements combine to create a fundamentally different analysis of the violence—the defendant-victim relationship and the "past pattern of domestic

---

46. The Minnesota legislature lifted the language almost entirely from its child abuse statute, but did not discuss the ramifications of changing the class of victims covered in the domestic homicide statute. *See* Minnesota Senate Legislative Session, 89th Day (April 12, 1990) (available on tape at the Minnesota Legislative Library, SF No. 1860); Meeting of Minnesota Senate Judiciary Committee (March 8, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192); Meeting of Minnesota Senate Judiciary Committee (March 9, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192).

Across the country, states are noticeably ready to recognize the need for protection of young children from their abusers. For example, the following state statutes include the death of minor as an aggravating factor for a capital sentencing hearing: Arizona (ARIZ. REV. STAT. ANN. § 13-703(F)(9) (1989 & Supp. 1993)); Illinois (ILL. ANN. STAT. Chap. 720, para. 5/9-1(b)(7) (Smith-Hurd 1993)); Louisiana (LA. CODE CRIM. PROC. ANN. art. 905.4(A)(10) (West Supp. 1993)); Mississippi (MISS. CODE ANN. § 99-19-101(5)(d) (1988)); and South Carolina (S.C. CODE ANN § 16-3-20(C)(a)(10) (Law. Co-op. Supp. 1993)). Utah recognizes the *intentional* killing of a child under the age of 14 years as a capital offense, if the offender killed while committing child abuse. UTAH CODE ANN. § 76-5-202(1)(d) (1990 & Supp. 1993). In Minnesota, recent statutory changes facilitate the prosecution of child abuse cases by creating various confidential privileges and exceptions to certain hearsay rules, in order to grant the state easier access to incriminating evidence. *See* MINN. STAT. § 595.02, subds. 2-4 (1988 & Supp. 1994).

Similar legislation in the area of domestic abuse faces greater opposition. Some legal scholars will likely argue that including mature, able-bodied women in the class of victims protected by statutes such as the domestic homicide statute contributes to the already-existing patriarchal and protectionist treatment of women, and therefore bolsters the pervasive stereotype of women as "victims." *See* Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1147-52 (1993) (positing that anti-pornography measures perpetuate "demeaning stereotypes about women" and the "disempowering notion that women are essentially victims").

47. Nothing in its legislative history indicates that feminist groups had any direct influence on this statute. *See* Minnesota Senate Legislative Session, 89th Day (April 12, 1990) (available on tape at the Minnesota Legislative Library, SF No. 1860); Meeting of Minnesota Senate Judiciary Committee (March 8, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192); Meeting of Minnesota Senate Judiciary Committee (March 9, 1990) (available on tape at the Minnesota Legislative Library, SF No. 2192).

abuse" requirement.[48] These elements direct courts to expand the evaluation of the defendant's culpability beyond his state of mind at the time of the killing to include the defendant's ongoing abusive relationship with the victim. Although not specifically required by the statute, the courts can further strengthen the statute's underlying purpose by permitting the state to introduce expert testimony on battered women's syndrome in its case-in-chief. In addition, the new legislation will help to address the present inequity in the treatment of male and female defendants in spousal murder cases.[49] By both expanding the traditional *mens rea* analysis in homicides and balancing the inequities in spousal murder cases, Minnesota's new statute significantly improves the law's treatment of domestic killings.

A. Learning From Feminist Jurisprudence

Although not a direct product of feminist reform,[50] the "family or household member" and "past pattern of domestic abuse" elements, in light of general feminist legal methods,[51] provide valuable insight into the value of the new statute. The domestic homicide statute reflects feminist jurisprudence by taking the experiences of women and children in abusive relationships seriously[52] and by more adequately addressing the underlying harm of intimate killings.

---

48. *See* Minn. Stat. § 609.185(6) (Supp. 1994).

49. According to one expert, the average sentence for a woman who kills her spouse or companion is fifteen to twenty years, compared to an average sentence of two to six years for a man who kills his spouse. Nancy Gibbs, *'Til Death Do Us Part*, Time, Jan. 18, 1993, at 38, 42 (quoting Michael Dowd, Director, Pace University Battered Women's Justice Center); *see infra* notes 79-93 and accompanying text (discussing the disparate impact of the traditional murder classifications on male and female defendants).

50. This Note uses the term "feminist" in its broadest sense, and does not intend to obscure the important differences among feminists and their approaches. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 833-36 (1990) (arguing that the important differences among feminist perspectives should not be overlooked). For examples of several different feminist perspectives, see Sharon Angella Allard, *Rethinking Battered Woman Syndrome, A Black Feminist Perspective*, 1 UCLA Women's L.J. 191 (1991); Patricia A. Cain, *Feminist Jurisprudence, Grounding the Theories*, 4 Berkeley Women's L. J. 191 (1989-1990); Angela Harris, *Race & Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990).

51. Feminist legal methods "reflect the status of women as 'outsiders,' who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions which take better account of women's experiences and needs." Bartlett, *supra* note 50, at 831.

52. "Feminist method starts with the very radical act of taking women seriously, believing what we say about ourselves and our experience is important

The statute's expansive class of victims, any "family or household member,"[53] highlights the importance of the relationship between the perpetrator and the victim in evaluating the homicide's severity. Several feminist critiques of criminal law advocate looking to the underlying relationship and asking, based on that relationship, what responsibility the defendant owes the victim.[54] The statute recognizes that violence between intimates constitutes a different, graver harm to society than random, violent killing, and penalizes the killing accordingly.[55]

Feminist groups espouse several different characterizations of the relationship between parties in abusive relationships, at least two of which help explain why women remain in these relationships and support the implementation of severe penalties in intimate killings.[56] Cultural feminists posit that women, due largely to the traditional role as mothers and caretakers, are essentially "connected" with others.[57] This "connection" creates

---

and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said *about* us." Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 764 (1989) (book review).

53. *See supra* note 45 (discussing the definition of "family or household member" in the domestic homicide statute).

54. For example, two feminist academics argue that courts should apply the common law confidential relationship doctrine to non-stranger rape cases, thus imposing a heightened duty of care to the victim. Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 602-11 (1991).

55. In a feminist critique of the United States' capital sentencing scheme, Elizabeth Rappaport questions why killing a family member is not an aggravating factor for a capital offense. Elizabeth Rappaport, *Some Questions About Gender and the Death Penalty*, 20 GOLDEN GATE U. L. REV. 501 (1990). She argues that adding this factor would "bring the criminal law into alignment with emerging awareness of the gravity and magnitude of the problem of family violence." *Id.* at 560. She also comments that currently "[o]ur law of homicide reveals a moral outlook in which greater opprobrium normally attaches to the killing of strangers than to the killing of intimates"—unless the defendant killed the family member for pecuniary gain. *Id.* at 559.

56. Patricia A. Cain identifies four schools of feminist thought: liberal, radical, cultural, and postmodern. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 827-41 (1990). This Note focuses on two of these schools, radical and cultural feminism, and the different ways in which these schools characterize the relationship between parties in abusive relationships.

57. Women have a "different voice," which informs their moral judgement. Cain, *supra* note 56, at 836 (discussing CAROL GILLIGAN, IN A DIFFERENT VOICE (1982)). An example of cultural feminist methodology, Robin West's "connection thesis" captures the idea that women place a high value on relationships and the accompanying responsibility to care for their partner. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 18 (1988).

for women a strong sense of duty and responsibility,[58] which in turn explains why they often remain in abusive relationships.[59] Cultural feminists encourage the law to recognize that violence between members of the same family or household constitutes a breach of trust,[60] deserving of severe punishment. Radical feminists argue that the combination of an abusive relationship and society's systemic structure of power and dominance force women to be "connected," or tied, to their partners.[61] This combination creates a physical dependence and vulnerability which prevent victims from escaping an abusive relationship.[62] An intimate killing represents the ultimate exploitation of this vulnerability, likewise deserving of a harsh penalty. The intimate relationship, cast in either light, provides significant justification for aggravating the punishment.

The statute's "past pattern of domestic abuse" element also reflects feminist jurisprudence,[63] by forcing an evaluation of a particular act of violence within its context. The statute expands the traditional focus on the defendant's state of mind at the precise time of the killing to include the defendant's history of violence against the victim.[64] Instead of using traditional

58. West, *supra* note 57, at 14-21 (discussing and citing CAROL GILLIGAN, IN A DIFFERENT VOICE (1982)).

59. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19-23 (1991) (noting that motherhood and women's dedication to family often conflict with the need to leave an abusive environment).

60. As a central premise of her "connection thesis," West argues that "[w]omen view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others." West, *supra* note 57, at 18.

61. *Cf.* Cain, *supra* note 56, at 832-35 (citing Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) and CATHERINE MACKINNON, FEMINISM UNMODIFIED (1987)) (emphasizing that radical feminism focuses on male domination of women as a class).

62. *See* Mahoney, *supra* note 56, at 5-6 (noting that "at the moment of separation or attempted separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal"). Although many believe that economic necessity is the reason women do not leave their batterers, it is apparent that women often economically support their abusers. Margaret Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 62 (1992) (citing Ann Jones, *Family Matters*, *in* THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 61, 63 (Dorchen Leidholdt & Janice Raymond eds., 1990).

63. For a discussion of feminist jurisprudence, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 603 (1986). Schneider writes that "[f]or feminists, theory is not 'out there,' but rather is based on the concrete, daily, and 'trivial' experiences of individuals." *Id.*

64. *See* MINN. STAT. § 609.185(6) (Supp. 1994).

mens rea analysis to freeze-frame the violent killing and evaluate its degree of harm based on the isolated event,[65] the new law treats the killing as the culmination of the defendant's abusive conduct which the homicide victim has endured.

Feminist legal scholars have long encouraged the courts to look more carefully at the particular circumstances and history surrounding a violent act to evaluate the harm.[66] For example, feminist reform in the area of self-defense has led to a contextual analysis in cases in which a battered spouse kills her abusive partner.[67] Courts have increasingly permitted expert testimony on the "battered woman's syndrome"[68] to assist in the female defendant's self-defense claim.[69] This movement seeks to include an expansive picture of what a battered woman confronts both in her abusive relationship and in the greater society that fails to offer her social recognition, support, and material alternatives.[70]

---

65. *See* LAFAVE & SCOTT, *supra* note 19, §§ 7.2(b), 7.7(a).

66. *See* Schneider, *supra* note 63, at 606-08 (discussing State v. Wanrow, 559 P.2d 548 (Wash. 1977) (en banc), a case in which the author was actively involved). The female defendant in *State v. Wanrow* was a 5'4" Native American woman with a broken leg, who had reason to believe that the decedent had tried to molest one of her children. 559 P.2d 548, 550-51 (Wash. 1977). The jury convicted Wanrow of second-degree murder. *Id.* The Supreme Court of Washington reversed the conviction in a pivotal decision in the area of self-defense. A plurality held that the trial court's jury instructions regarding the defendant's self-defense claim violated Washington law. *Id.* at 556-59. In essence, the plurality held that the trial court must instruct the jury to consider the female defendant's self-defense claim from her perspective, placing her actions within the context of her experience and her knowledge at the time of the killing. *Id.*

67. *See, e.g.*, 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, 639-44 (1980) (arguing, from her experience in the *Wanrow* case and her involvement in the feminist movement of the 1970s, that the law should move toward application of a sex-neutral, individualized examination of each defendant's circumstances in order to have equal treatment of all defendant's claiming self-defense); *see also Legal Responses*, *supra* note 5, at 1574-85 (discussing the defense of battered women who kill).

68. For a general explanation of this syndrome, see LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

69. Across the country, the trend continues toward general acceptance of expert testimony on the battered woman syndrome. *See* James O. Pearson, Jr., Annotation, *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R. 4TH 1153 (1982 & Supp. 1993) (and cases cited therein); Cynthia L. Coffee, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome* 25 J. FAM. L. 373, 396 (1986).

70. Baldwin, *supra* note 62 at 71 (citing LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 114-15 (1979); *see* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989)). Some wo-

Minnesota's domestic homicide statute follows the lead of feminist reform, and its application may lead to additional developments. Just as the battered woman syndrome defense places the "desperate killing" into the context of an ongoing abusive relationship, the domestic homicide statute provides a similar framework for evaluating the violent killing. Courts should recognize this important contribution to homicide law and further strengthen it by allowing the state, if necessary, to introduce expert testimony on the battered woman's syndrome[71] in its case-in-chief. Although expert testimony on battered woman's syndrome is widely accepted in the defense of abuse victims who kill,[72] the law is just beginning to permit its use in prosecution.[73] In many domestic homicide cases, due to the loss

---

men who show evidence of the battered woman syndrome are able to mitigate their first degree murder charges. Unfortunately, our legal system continues to blame a defendant who, "without legally enforceable means to escape abuse," is forced to "choose" between killing or being killed. Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 390 (1984-85). Although the battered woman defense is becoming increasingly accepted, many urge that it should be strengthened to completely exonerate the defendant rather than just mitigating the first degree murder charge. *See* Alene Kristal, *You've Come a Long Way Baby: The Battered Woman's Syndrome Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 111 (1991); *see also* Richard A. Rosen, *On Self Defense, Imminence and Women Who Kill Their Batterers*, 71 N.C. L. REV 371 (1993) (arguing that if defendant can produce sufficient evidence that killing was necessary, though lacking a showing of imminent danger, the jury should be instructed solely on necessity).

71. Pursuant to Rule 702 of the Minnesota Rules of Evidence, courts may permit expert testimony if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." MINN. R. EVID. 702 (1993).

72. *See supra* note 69 and accompanying text. In Minnesota, the Supreme Court has held expert testimony on the battered woman syndrome admissible for the defense. State v. Hennum, 441 N.W.2d 793 (Minn. 1989). The court recognized the syndrome as scientifically accepted and commented that the syndrome goes "beyond the understanding of the average juror." *Id.* at 798. The court placed limitations on the use of the testimony, however, to prevent the expert from testifying to the ultimate issue of whether the particular defendant actually suffers from battered woman syndrome. *Id.*

73. As of this date, the appellate courts in Minnesota have not ruled on the admissibility of expert testimony in the state's case-in-chief. Other jurisdictions, however, have addressed this specific issue and have admitted the testimony. *See* Arcoren v. U.S., 929 F.2d 1235, 1240 (8th Cir. 1991) (using battered woman syndrome to assist jury in explaining victim's recanting of grand jury testimony); State v. Borrelli, 629 A.2d 1105, 1114 (Conn. 1993) (admitting testimony of battered women's syndrome to explain victim's recanting statements); State v. Baker, 424 A.2d 171, 173 (N.H. 1980) (admitting battered woman syndrome to rebut insanity defense); State v. Frost, 577 A.2d 1282, 1288 (N.J. Super. Ct. App. Div. 1990) (introducing battered woman syndrome to explain victim's behavior and bolster her credibility); State v. Ciskie, 751 P.2d 1165, 1173 (Wash. 1988) (en banc) (using battered woman syndrome to rebut defense

of the primary source of evidence, the introduction of expert testimony on battered women would help the state to re-construct the "past pattern" and to rebut defenses such as insanity, intoxication, or self-defense.[74] The admission of this evidence would also help the trier of fact to place the killing into its context.

B. Balancing Inequities in the Treatment of Intimate Violence

The domestic homicide statute advances the law governing intimate violence by changing the point of discussion surrounding intimate violence and by addressing present inequities in spousal murder cases.[75] The new statute re-directs the focus of the legal and popular discussion surrounding domestic violence from battered women who kill to those who are killed. In contrast to society's indifferent treatment of cases in which men kill their wives, law and popular culture create a spectacle out of the spousal murder cases in which a "battered woman" kills her husband.[76] The media's treatment of cases in which an abused wife kills her husband creates a false impression that such cases frequently occur.[77] In reality, out of the 1.6 to 4 million women who suffer from domestic abuse each year, the state will charge only 800 to 1,000 women with the death of their abusive part-

---

claim that victim's behavior is inconsistent with rape claim); *see also* Joan M. Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer*, 76 Iowa L. Rev. 553 (1991) (discussing several reasons why courts have admitted expert testimony in the prosecution of a batterer). In Minnesota, a Hennepin County trial court recently admitted expert testimony on the battered woman syndrome to assist the state in explaining a rape victim's recantation and refusal to testify against the defendant at trial. Telephone Interview with Anne M. Taylor, Hennepin County Attorney, in Minneapolis, Minnesota (April 4, 1994) (State v. Thompson, 4th Jud. Dist., Hennepin County, SIP No. 93013570).

74. The testimony on battered woman syndrome will illuminate the relationship between the defendant and his partner and provide an alternative explanation for the defendant's conduct. *See, e.g.*, *Baker*, 424 A.2d at 173 (admitting a "past pattern" of domestic violence to prove attempted murder was not caused by mental illness); *Frost*, 577 A.2d at 1288 (explaining victim's behavior); *Ciskie*, 751 P.2d at 1173 (rebutting defense).

75. *See supra* note 49 and accompanying text.

76. For example, after Francine Hughes' killed her abusive husband by burning the bed on which he had passed out, her story became overwhelmingly public through both a novel by Faith McNulty. *See* Faith McNulty, The Burning Bed (1980) (which also became a made-for-television movie, "The Burning Bed.")

77. Martha Mahoney points out the irony of the enormous attention that society gives domestic violence at the point it finally harms men. Mahoney, *supra* note 59, at 35.

ner.[78] Use of Minnesota's new statute gives voice to the silenced violence—the violence that ultimately kills its victims.

Close examination of the domestic homicide statute reveals that it also helps to balance gender inequities in homicide law, by altering the traditional framework for determining culpability in spousal murder cases.[79] Traditional homicide law focuses primarily on the defendant's state of mind at the specific time of the killing and classifies the killing based on whether the defendant acted with an intent to kill, a knowledge or awareness of the probable result of his actions, recklessness, or negligence.[80] The law treats the homicidal incident as an isolated act of violence, determining under what "state of mind" the killing occurred, and only reluctantly examines the violence within the context of past events.[81] This framework effectively disadvantages female defendants by failing to take account of the general differences between male and female violence.[82]

A comparison of the treatment of male and female defendants intimate homicides illustrates this inequity. On the one hand, when a woman kills her partner, she will likely face first degree murder charges due to the characteristically non-confrontational setting in these killings.[83] These women seek to

78. *See* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L. J. 363, 366 n. 16 (1992) (citations omitted).

79. *See supra* note 49.

80. LAFAVE & SCOTT, *supra* note 19, § 3.4(c).

81. Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53, 57-58 (1991) (noting that battered woman syndrome, postpartum disorders, and rape trauma syndrome reflect the reality of a woman's life, but do not fit into traditional substantive criminal law).

82. Considering the different circumstances under which male and female homicides occur, commentators often contend that men and women live in two different cultures of violence. *See, e.g.*, Laurie J. Taylor, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self Defense*, 33 UCLA L. REV. 1679, 1725 (1986) (concluding that "[a]n understanding of sex differences in criminal behavior . . . clearly shows that a law based on the behavior of men will make it difficult to judge women fairly").

83. Some studies, however, suggest that it is the exception, and not the rule, that women kill their abusive partners in a non-confrontational setting. *See, e.g.*, Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384 (1991) (citing estimates that between 70% and 90% of all battered women who kill do so when faced with either an ongoing attack or the imminent threat of death or serious bodily harm). Nonetheless, if physically weaker than her abusive partner, a woman may resort to surprise tactics and the use of weapons to "fight back" before a confrontation occurs. Under current law, this type of calculative conduct lends more easily to a first degree murder charge than to traditional

mitigate the charges with a self-defense instruction, arguing that their actions were in response to a history of abuse inflicted upon them.[84] The defendants in these cases, however, face the difficulty of proving to the court that self-defense applies to their situation.[85] Despite vast improvements in the defense of a female defendant,[86] the criminal justice system continues to presumptively treat her as a first degree murderer rather than looking first to her relationship and experiences with the deceased.[87]

On the other hand, when an abusive man kills his wife while beating her, traditional standards render first degree murder prosecution very difficult.[88] For example, if the homicide occurs in the context of a violent and explosive rage, the state must charge the defendant with second degree murder for lack of premeditation.[89] Under current law, the defendant typically has a strong argument for the mitigation of his offense to

---

self defense. *See* Taylor, *supra* note 82, at 1704-1711 (noting that battered women who kill find it difficult to prove self-defense).

84. *See Legal Responses*, *supra* note 5, at 1574-1597.

85. *See, e.g.*, Rogers v. State, 616 So.2d 1098 (Fla. Dist. Ct. App. 1993) (remanding a case in which the trial court convicted the female defendant of first degree murder in the shooting death of her boyfriend); State v. Norman, 378 S.E.2d 8 (N.C. 1989) (holding it proper for the trial court not to instruct the jury on self-defense in the shooting death of the defendant's husband, despite the decedent's history of extreme physical and mental abuse of the defendant, including burning her with cigarettes and forcing her to eat pet food out of pet bowls and to bark like a dog); Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992) (overturning a trial court's first degree murder conviction of a woman who produced evidence of approximately twenty-three prior acts of abuse against her and described the violent encounter in which she ultimately killed her husband).

86. *See supra* notes 67-70 and accompanying text (discussing recent reforms, such as the battered woman's syndrome).

87. Buda & Butler, *supra* note 70, at 368 (noting that "[m]uch literature points out the irony of a legal system which chooses a posture of non-intervention and subsequently prosecutes women for murder that they would not have committed but for the absence of legally acceptable alternatives").

88. The circumstances of the killing present the state with the challenge of demonstrating premeditation and intent to kill as required by MINN. STAT. § 609.185(1) (1991 & Suppp. 1994). *See, e.g.*, State v. Falvey, 1993 WL 276883 (Minn. Ct. App. 1993) (affirming the defendant's acquittal of both first and second degree attempted murder for shooting his estranged wife and his conviction of attempted heat-of-passion manslaughter, despite his history of abusive behavior toward her and the fact that he had driven over to see her with a gun in his car).

89. MINN. STAT. § 609.19(1) (1991 & Supp. 1994).

first degree manslaughter[90] if he can persuade the trier of fact that the victim somehow "provoked" him into the violent rage.[91]

The traditional framework for evaluating homicide, although seemingly gender-neutral, provides a mitigation defense that benefits the violent rages more characteristic of men.[92] The legal standards that define "adequate provocation" reflect a male-centered view of "understandable" violence.[93] For example, the most "reasonable" provocation defense occurs when a man catches his wife in the act of adultery, or even merely suspects she is committing adultery.[94]

The Minnesota statute effectively limits the possibility of a repeat-abuser successfully arguing mitigating defenses, such as "heat of passion," because once the state establishes the defendant's history of abuse against the homicide victim, a provocation defense loses its relevance—an uncontrollable rage no longer excuses the violence.[95] The statute correctly recognizes that the killing does not constitute an isolated, uncontrollable rage, but rather the culmination of harmful, violent conduct that merits a first degree murder classification.

III. BEYOND TRADITION, YET WITHIN THE CONSTITUTION

Minnesota's domestic homicide statute, a new approach to evaluating the defendant's culpability in a homicide, finds

90. In Minnesota, whoever "intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances" is guilty of manslaughter in the first degree. *Id.* § 609.20(1).

91. A California case provides a disturbing example of such an argument. *See* People v. Berry, 556 P.2d 777 (Cal. 1976). The defendant in *Berry* strangled his wife to death with a telephone cord. *Id.* at 779. His defense was that he was provoked into killing her because of a sudden and uncontrollable rage, which reduced the offense to voluntary manslaughter. Evidence at trial lead the court to conclude, "Defendant's testimony chronicles a two week period of provocatory conduct by his wife Rachel that could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion." *Id.* at 780-81.

92. Reece, *supra* note 81, at 56-57.

93. *See* Taylor, *supra* note 82, at 1725.

94. LAFAVE & SCOTT, *supra* note 19, § 7.10(b). As Taylor writes in response to this phenomenon, "[t]he law of provocation endorses men's ownership of women's sexuality by expressly sanctioning violent reaction by husbands to their wives' infidelity." Taylor, *supra* note 82, at 1696.

95. Even if the state cannot prove a "past pattern" of domestic abuse, if the defendant violated an order for protection in the killing, the state can charge him under a new second degree murder statute. *See* MINN. STAT. § 609.19(3) (Supp. 1994).

strong support from feminist jurisprudence and takes an important step in combatting domestic violence. The non-traditional statute has provoked controversy, however, surrounding primarily two constitutional due process issues: whether the statute is unconstitutionally vague and whether its application violates the defendant's Fourteenth Amendment right to a fair trial. Minnesota defendants argue that the new statute, and specifically the term "pattern," is unconstitutionally vague.[96] In addition, defendants argue that application of the statute will deprive them of their due process right to a fair trial because its "past pattern of domestic abuse" element presumptively permits the introduction of prejudicial prior acts evidence without regard to appropriate evidentiary standards.[97] The statute overcomes both of these challenges.

On a practical level, a Minnesota defendant challenging the statute's constitutionality faces formidable obstacles, primarily because the legislature has the power and broad discretion to define criminal behavior.[98] In deference to the legislature, courts presume a statute's constitutionality.[99] Moreover, the

96. Defendant's Memorandum of Law, Dec. 20, 1993, at 2-5, State v. Grube, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Order on Omnibus Hearing by Judge B.W. Christopherson at 10, State v. Grube, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Defendant's Memorandum in Support of Motion to Dismiss, Aug. 19, 1993 at 17-19, 33-40, State v. Miranda-Alonso, 4th Jud. Dist., Hennepin County, SIP 93-047664 (indicted June 24, 1993); Memorandum of Law, July 16, 1993 at 10-14, State v. Freeman, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993); Notice of Motion and Motion at 7-10, State v. Auchampach, 1st Jud. Dist., Goodhue County, Ct. File No. K9-93-469 (indicted March 1, 1993); Notice of Motion and Motion to Dismiss as Unconstitutional and for Lack of Probable Cause, May 18, 1993 at 5-9, State v. Davis, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); Defendant's Brief Challenging Constitutionality, Dec. 2, 1992, State v. Yach, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992). The arguments are similar to those made in connection with the child abuse murder statutes. *See, e.g.* State v. Jennings, 487 N.W.2d 536, 536 (Minn. Ct. App. 1992); State v. Russell, 848 P.2d 743, 748 (Wash. Ct. App. 1993).

97. Memorandum of Law, July 16, 1993 at 13-14, *Freeman*, 6th Jud. Dist., St. Louis County, Ct. File No. KG-93-600188 (indicted March 26, 1993); Notice of Motion and Motion to Dismiss as Unconstitutional and for Lack of Probable Cause, May 18, 1993 at 4-5, *Davis*, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicted Dec. 22, 1992); *see* State v. Hale, 840 S.W.2d at 313 (holding that the provisions of the statute that require the state to establish prior instances of misdemeanor child abuse to prove the elements of first-degree murder are fundamentally unfair).

98. State v. Witt, 245 N.W.2d 612, 615 (Minn. 1976).

99. Minnesota has codified this interpretive canon. *See* MINN. STAT. § 645.17(3) (1986); *see also* State v. Kimmons, 502 N.W.2d 391, 393 (Minn. Ct. App. 1993) (holding the dangerous offender enhancement statute not unconsti-

challenger bears the heavy burden of demonstrating the statute's constitutional violation beyond a reasonable doubt.[100] In light of these obstacles and in accordance with established constitutional principles, Minnesota courts should quickly declare the statute constitutional and other states should follow Minnesota's lead and enact similar statutes.

A. VOID-FOR-VAGUENESS

1. The Vagueness Challenge

Under principles of due process, the Supreme Court has stated that a criminal statute is void-for-vagueness when "[persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[101] The doctrine basically safeguards two important principles: statutes must give ordinary people notice as to what conduct the law prohibits, and they must also provide adequate standards of application to discourage arbitrary and discriminatory enforcement.[102] The void-for-vagueness doctrine does not, however, require that a layperson understand all statutory terms.[103] Seemingly vague terms may offer sufficient clarity if they have a well-settled meaning in the common law[104] or if they are used in other legislation.[105]

---

tutionally vague as applied to the defendant); State v. Willenbring, 454 N.W.2d 268, 270 (Minn. Ct. App. 1990) (upholding the constitutionality of the third degree criminal sexual conduct statute); State v. Dutton, 450 N.W.2d 189, 194 (Minn. Ct. App. 1990) (determining statutes proscribing psychotherapist-patient criminal sexual conduct constitutional).

100. *See, e.g.*, State v. Merrill, 450 N.W.2d 318, 321 (Minn.), *cert. denied*, 496 U.S. 931 (1990) (upholding the constitutionality of Minnesota's murder-of-an-unborn-child statute); Wegan v. Village of Lexington, 309 N.W.2d 273, 279 (Minn. 1981) (challenging the constitutionality of Minnesota liquor laws); Contos v. Herbst, 278 N.W.2d 732, 736 (Minn. 1979) (discussing the constitutionality of the Mineral Registration Act); *Kimmons*, 502 N.W.2d at 393; *Willenbring*, 454 N.W.2d at 270.

101. *See* Connally v. General Construction Co, 269 U.S. 385, 391 (1926); *see also* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (applying the standard set forth in *Connally*); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (same); United States v. Harriss, 347 U.S. 612, 617 (1954) (same).

102. *See, e.g., Kolender*, 461 U.S. at 357; *Village of Hoffman Estate*, 455 U.S. at 498; Smith v. Goguen, 415 U.S. 566, 572-573 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Connally*, 269 U.S. at 391; State v. Davidson, 481 N.W.2d 51, 55-56 (Minn. 1992); *Merrill*, 450 N.W.2d at 323; State v. Becker, 351 N.W.2d 923, 925 (Minn. 1984).

103. LAFAVE & SCOTT, *supra* note 19, § 2.3(b).

104. *See, e.g., Connally*, 269 U.S. at 391.

105. *See, e.g.*, Omaechevarria v. Idaho, 246 U.S. 343, 110 (1918).

The Supreme Court does not require "mathematical certainty" in statutory language due largely to the inherent limitations of language[106] and to the necessity of effectuating the purpose of the legislation.[107]

The most flagrant vagueness violations occur when statutes fail to draw a reasonably clear line between lawful and unlawful conduct.[108] Concerned that a defendant may commit a crime without an awareness of the act's criminality, the Supreme Court has held that the constitutionality of a vague statutory standard closely relates to whether that standard incorporates a requirement of *mens rea*.[109] Crimes, such as loitering or vagrancy, which create criminal liability for seemingly innocuous conduct, most often violate this principle.[110] Such statutes are also more susceptible to discriminatory enforcement because they place "unfettered discretion" in the hands of police officers.[111]

Defendants' void-for-vagueness challenge to the domestic homicide statute's constitutionality focuses primarily on the

106. *See, e.g., Grayned*, 408 U.S. at 110 ("condemned to the use of words, we can never expect mathematical certainty from our language"); Colten v. Kentucky, 407 U.S. 104, 110 (1972) ("[the vagueness doctrine] is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning").

107. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 498 ("[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment"); U.S. v. Petrillo, 332 U.S. 1, 7 (1947) (stating "[t]he Constitution does not require impossible standards"); *see also* LAFAVE & SCOTT *supra* note 19, § 2.3(a).

108. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 574-578 (1974); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

109. Colautti v. Franklin, 439 U.S. 379, 395 (1979); *see* Boyce Motor Lines Inc., v. United States, 342 U.S. 337, 342-43 (1952) (expressing concern that a defendant may be unaware of an act's criminality); Screws v. United States, 325 U.S. 91, 101-102 (1945) (same).

110. *See, e.g. Kolender*, 461 U.S. 352 (holding a California statute that required "credible and reliable" identification from anyone the police approached unconstitutionally vague); *Lanzetta*, 306 U.S. 451 (striking down a vagrancy statute as unconstitutionally vague); People v. Berck, 300 N.E.2d 411 (N.Y.), *cert. denied sub nom*, 414 U.S. 1093 (1973) (holding a New York loitering statute void for vagueness because it failed to distinguish between harmful and innocent conduct).

111. *See Smith*, 415 U.S. at 575. The court opined that statutory language that fails to provide minimal guidelines permits "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Papachristou*, 405 U.S. at 169-70.

term "pattern," which the statute does not specifically define.[112] To support this point, defendants compare the statute to two other Minnesota statutes that use the same term: Minnesota's Racketeering Influenced and Corrupt Organizations Act (RICO)[113] and Minnesota's stalking statute.[114] Unlike the domestic homicide statute, these statutes specify the requisite number of incidents that must occur within a limited time period in order to establish a "pattern."[115]

This distinction does not affect the domestic homicide statute's constitutionality and should not, therefore, persuade Minnesota courts to strike down the statute. In a Federal RICO case, the Supreme Court clearly defined the phrase "pattern of criminal conduct" in a manner consistent with the domestic homicide statute's use of the term "pattern."[116] The statute's specificity also finds support from the Washington case, *State v. Russell*, upholding a nearly identical homicide statute[117] against

112. Defendant's Memorandum of Law, Dec. 20, 1993, at 2-5, State v. Grube, 8th Jud. Dist., Lac Qui Parle County, Ct. File No. K7-93-214 (indicted Nov. 19, 1993); Defendant's Memorandum in Support of Motion to Dismiss, Aug. 19, 1993, State v. Miranda-Alondso, 4th Jud. Dist. Hennysin County SIP 93-047664 (indicted June 24, 1993); Memorandum of Law, July 16, 1993, at 10-14, State v. Freeman, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993); Notice of Motion and Motion at Part III, State v. Auchampach, 1st Jud. Dist., Goodhue County, Ct. File No., K9-93-469 (indicted March 1, 1993); Defendant's Memo, State v. Davis, 4th Jud. Dist., Hennepin County, SIP 92-088020 (indicated Dec. 22, 1992); Defendant's Brief Challenging Constitutionality, Dec. 2, 1992, State v. Yach, 3d Jud. Dist., Winona County, Ct. File No. K4-92-1325 (indicted Nov. 5, 1992).

113. MINN. STAT. § 609.902 (Supp. 1994). The statute defines "pattern of criminal activity" as "conduct constituting three or more criminal acts that were committed within ten years of the commencement of the criminal proceeding." *Id.* The federal RICO statute similarly requires "at least two acts of racketeering activity within a ten year period" to establish a "pattern." 18 U.S.C. §§ 1961-1968 (1988).

114. Minnesota's stalking statute defines "pattern of harassing conduct" as two or more criminal acts within a five-year period against the same victim or one or more members of a single household. MINN. STAT. § 609.749, subd. 5(b) (Supp. 1994).

115. MINN. STAT. §§ 609.902, 609.749, subd. 5(b) (Supp. 1994).

116. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238 (1989). For the text of the Court's definition, see *infra* text accompanying note 128. The Court, in another Federal RICO case, also specifically addressed the language "constitutes a violation of" and held that such language does not require criminal convictions. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985) (citing U.S. v. Ward, 448 U.S. 242, 249-50 (1980)); *see infra* notes 148-150 and accompanying text (discussing this definition as consistent with the underlying purpose of the domestic homicide statute).

117. WASH. REV. CODE § 9A.32.055(1) (1988). Minnesota modeled both its domestic and child abuse murder statutes after the Washington statute. *See supra* note 23 and accompanying text.

a void-for-vagueness challenge in the conviction of a defendant's fatal abuse of a young child.[118] Although the Tennessee Supreme Court struck down its child abuse murder statute, it did not do so on vagueness grounds.[119] Moreoever, it specifically noted the absence of a requisite mental state like "circumstances manifesting an extreme indifference to human life" in its statute,[120] an element the Minnesota statute includes. Finally, policy concerns surrounding domestic violence provide further support for the domestic homicide statute's language. Minnesota courts should uphold the statute as written.

2. The Statute's Constitutional Specificity

Minnesota's domestic homicide statute defines its terms sufficiently while permitting enough flexibility in its application to remain consistent with its underlying purpose.[121] The statute does not leave persons of common intelligence guessing at its meaning or its application.[122] The statute provides constitutionally specific notice of the conduct it prohibits.[123] Although the statute does not specifically define "pattern," the term is readily understood.[124] As its dictionary definition indicates, "pattern" signifies a special arrangement or relationship of component parts.[125] The Supreme Court defined "pattern," as used in the Federal RICO statute, stating "[a] 'pattern' is an 'arrangement

118. 848 P.2d 743 (Wash. Ct. App. 1993). In *State v. Russell*, the defendant challenged the constitutionality of the statute's phrase "pattern or practice of assault or torture" on vagueness grounds. *Id.* at 748. The court examined the phrase in the context of the entire statute and as it applied to the defendant's conduct. *Id.* at 749.

119. State v. Hale, 840 S.W.2d 307 (Tenn. 1992); *see infra* notes 161-166 and accompanying text (discussing the *Hale* decision in the context of a fairness challenge to Minnesota's statute).

120. *Id.* at 315; *see infra* text accompanying note 137 (discussing this distinction).

121. *See* U.S. v. Petrillo, 332 U.S. 1, 7 (1947). For a feminist perspective of the statute's purpose, see *supra* Part II.A.

122. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *see also* Kolender v. Larson, 461 U.S. 352, 357 (1983) (applying the standard set forth in *Connally*); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (same); United States v. Harriss, 347 U.S. 612, 617 (1954) (same); *supra* notes 103-106 and accompanying text.

123. One purpose of the void-for-vagueness doctrine is to ensure sufficient notice to defendants. *See supra* note 104 and accompanying text.

124. The Supreme Court has stated that we must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962).

125. *See* WEBSTER'S NINTH COLLEGIATE DICTIONARY 864 (1988) (defining "pattern" as "a discernible coherent system based on the intended interrelationship of component parts").

or order of things or activity,' . . . [i]t is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged.'"[126] Similarly, the Court defined a pattern of criminal conduct as "acts that have the same or similar purposes, results, participants, victims, or methods of commission."[127]

The statute's definition of "domestic abuse" clearly describes this necessary relationship or arrangement of a defendant's prior conduct by limiting it to listed criminal conduct[128] directed only at the homicide victim, a "family or household member."[129] The statute defines both the prior conduct and the defendant-victim relationship by directly incorporating well-accepted definitions from other statutes.[130]

Unlike loitering or vagrancy statutes, Minnesota's statute also does not make seemingly innocent conduct criminal;[131] rather it proscribes already unlawful conduct.[132] While an indigent may legitimately claim innocence in sitting on the sidewalk, no such claim exists in cases of domestic abuse. Moreover, the statute incorporates a *mens rea* requirement for each element of the offense:[133] both the underlying abuse and the abuse at the time of the killing must be intentional,[134] and the killing must occur under "circumstances manifesting an extreme indifference to human life."[135] In striking down its child abuse mur-

126. H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238 (1989) (citing 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)) (upholding the constitutionality of the statute's phrase, "pattern of racketeering activity").

127. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n. 14 (1985).

128. *See supra* note 33 (setting forth the criminal violations constituting "domestic abuse").

129. *See supra* note 45 (describing definition of "family or household member" in MINN. STAT. 518B.01, subd.2(b) (1992 & Supp. 1994)).

130. Prior conduct is defined by several criminal statutes, including assaults, criminal sexual conduct, and terroristic threats. *See supra* note 34.

131. *See supra* notes 108-111 and accompanying text (distinguishing the court's treatment of statutes that make otherwise innocent conduct, such as loitering, criminal).

132. For the criminal offenses listed under the definition of "domestic abuse," see *supra* note 33.

133. *See supra* note 109 and accompanying text (noting that the constitutionality of a vague standard closely relates to whether the standard incorporates a *mens rea* requirement).

134. *See supra* note 33 (listing the various criminal offenses that constitute "domestic abuse" under the statute, all of which are intentional crimes).

135. *See supra* note 39 and accompanying text. Although the statute does not define "circumstances manifesting an extreme indifference to human life" within its provisions, the phrase is a term of art in criminal statutes. *See, e.g.*, ALA. CODE § 13A-6-2(a)(2) (1975) (murder); ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (1989) (second degree murder); CONN. GEN. STAT. § 53a-55 (1985)

der statute,[136] the Tennessee Supreme Court specifically noted the absence of a requisite mental state like "circumstances manifesting an extreme indifference to human life."[137] In contrast, the *Russell* court upheld the constitutionality of Washington's statute, which includes this element.[138]

The statute's language also provides adequate standards of application to discourage arbitrary and discriminatory enforcement.[139] In *Russell*, the court noted that a statute need only provide minimal standards for enforcement[140] and the Supreme Court has stated that statutes need not be written with "mathematical certainty" to meet constitutional specificity.[141] Unlike loitering or vagrancy statutes, the domestic homicide statute does not place "unfettered discretion" in the hands of law enforcement officials.[142] The defendant must have intentionally engaged in conduct already considered unlawful—assaulting his wife as opposed to simply walking down the street. Moreover, the statute will not lead to discriminatory arrests because officers detain a homicide suspect regardless of possible charges.

The statute itself also sets precise standards for application in the court room. It uses terms readily understood in the legal profession,[143] including "pattern."[144] Indeed, Minnesota courts

---

(manslaughter in the first degree); KY. REV. STAT. ANN. § 507.020(1)(b) (Michie/Bobbs-Merrill 1992) (murder); N.J. REV. STAT. § 2C:11-4 (1982) (manslaughter); WASH. REV. CODE § 9A.32.030(1)(b) (1988) (murder in the first degree); MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft 1962).

136. TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993).

137. State v. Hale, 840 S.W.2d 307, 315 (Tenn. 1992).

138. State v. Russell, 848 P.2d 743, 749 (Wash. Ct. App. 1993) (citing Spokane v. Douglass, 795 P.2d 693 (1990)).

139. *See* cases cited *supra* note 102 and accompanying text (stating this void-for-vagueness principle).

140. 848 P.2d at 749-50 (citing *Douglas*, 795 P.2d 693).

141. *See* cases cited *supra* note 106.

142. *See supra* notes 110-115 and accompanying text (describing the constitutional problems often associated with loitering and vagrancy statutes, and contrasting the domestic homicide statute).

143. The offenses listed in the statute such as assault, terroristic threats, and criminal sexual conduct are frequently implemented in the courtroom. *See supra* note 33 (listing these offenses). Similarly, the courts should not find it difficult to apply the term of art, "circumstances manifesting extreme indifference to human life." For a list of statutes that use this language, see *supra* note 135.

144. The Minnesota Supreme court recently upheld the use of the term "pattern" in its patterned sex offender statute, MINN. STAT. § 609.1352 (Supp. 1994), against a vagueness challenge. State v. Christie, 506 N.W.2d 293, 300-01 (1993).

frequently use the term "pattern" in their decisions.[145] As long as judges do not add any requirements to the statute's use of "pattern," application of the statute will be consistent. In accordance with common usage and precedent, the court should require the state to provide evidence of at least two incidents[146] that fit the definition of "domestic abuse," and the fact-finder should then decide whether the state has proven a pattern of abuse beyond a reasonable doubt.[147]

The flexible statutory language is not only constitutional, but also necessary.[148] Indeed, a more specific definition of "pattern" may have destroyed the statute's underlying purpose. Since domestic abuse often occurs behind closed doors and without official documentation,[149] requiring a specific number of incidents to prove a pattern would often prevent prosecution. The statute, by incorporating lessons of feminist jurisprudence, works to expose the undocumented, yet real violence.[150] A specific number of incidents would also focus too heavily on each isolated act of violence rather than attacking the abusive pattern of conduct. The power and control typical in violent relationships does not manifest itself in nicely packaged incidents, but rather becomes a part of all interactions between the parties. A specific number of prior incidents requirement may contribute to perpetuating a controversial stereotype of the "worthy" battered woman by effectively saying that only in cases in which the victim endured the required number of abusive incidents will the legal system recognize the violent conduct as deserving of heightened punishment.

Similarly, the statute should not require prior convictions or even prior charges to establish a "past pattern" of abuse. The

145. *See, e.g.*, State v. Rainer, 411 N.W.2d 490, 497 (Minn. 1987) (using "repeating pattern of very similar conduct" to disprove accident); State v. Crocker, 409 N.W.2d 840, 843 (Minn. 1987) (admitting prior conduct as part of a "'pattern' of similar misconduct"); State v. DeBaere, 356 N.W.2d 301, 305 (Minn. 1984) (admitting evidence of other crimes to show a "pattern" of similar aggressive sexual behavior).

146. *See infra* text accompanying notes 151-156 (providing justifications for not adding a specific number of incidents).

147. In a criminal prosecution, due process requires the state to prove every essential element beyond a reasonable doubt. *E.g.*, McMillan v. Pennsylvania, 477 U.S. 79 (1986); In re Winship, 397 U.S. 358, 364 (1970).

148. *See supra* note 107 (stating that the statute's purpose is a valid consideration in constitutional analysis).

149. NATIONAL INSTITUTE OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: A GUIDE FOR CRIMINAL JUSTICE AGENCIES 55 (1986) (predicting that there will be better evidence available as reporting practices continue to improve).

150. *See supra* Part II.

language in the definition of domestic abuse, "constitutes a violation of," does not require a specific degree of proof for each predicate act of violence, the legislative history clearly notes the absence of a charge or conviction requirement.[151] Additionally, the Supreme Court, addressing a similar challenge to nearly identical statutory language in the federal RICO statute,[152] stated the term "violation" does not require a criminal conviction;[153] "[i]t refers only to a failure to adhere to legal requirements."[154] Furthermore, requiring convictions or charges would jeopardize the effectiveness of the statute's underlying purpose because such documented evidence of domestic violence does not often exist.[155] The better interpretation of "violation," therefore requires the state to prove only failure to adhere to the legal requirements in the listed offenses.[156]

Thus, the statute as written is constitutionally specific. It provides adequate notice of the conduct it prohibits as well as providing adequate standards for its application. In addition, the statute's flexible language finds support in its underlying purpose of providing of framework in which to expose the ongoing abusive relationship between the defendant and the victim. The Minnesota courts should uphold the statute's constitutionality against a vagueness challenge.

B. The Constitutional Right to a Fair Trial

1. Potential Fairness Challenges

In its due process jurisprudence, the Supreme Court has determined that individuals have a right to a fair adjudicatory process when their lives, liberty, or property are at stake.[157] At a minimum, due process requires that the law provide defendants with notice of the charges against them and an opportunity to be

151. Remarks of Representative Wagenius, Minnesota House Judiciary Committee Meeting, March 4, 1988 (available on tape at the Minnesota Legislative Library, HF No. 2104) (discussing statutory language in context of the child abuse murder statute).

152. 18 U.S.C. §§ 1961-1968 (1988).

153. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488-89 (1985) (citing U.S. v. Ward, 448 U.S. 242, 249-50 (1980)) (interpreting 18 U.S.C. § 1864(c) (1988).

154. *Id.* at 489. The court further held that absent specific mention of a conviction requirement in the statute or its legislative history, the courts should not read in such a requirement. *Id.* at 490.

155. National Institute of Justice, *supra* note 149.

156. *See supra* Part II.

157. Chambers v. Florida, 309 U.S. 227, 236-37 (1940) (stating that a "charge [must be] fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power").

heard.[158] In addition, it provides that the criminal trial must include the basic safeguards of the Bill of Rights.[159] Defendants may argue that the statute's "past pattern" of abuse element deprives them of basic due process protection because it does not require the state to provide notice of what prior acts evidence it will introduce at trial and an opportunity to challenge its sufficiency.[160] The Tennessee case, *State v. Hale*,[161] striking down its child abuse murder statute, noted that the defendant "may be seriously disadvantaged by not receiving sufficient notice of those instances of prior alleged abuse."[162] Lack of explicit mention of a notice requirement within the statute need not render it unconstitutional; the courts may quickly remedy this deficiency with a simple procedure.[163]

Defendants may also challenge the statute on fairness grounds, arguing that it operates to admit evidence so prejudicial to their case that the fact-finder can no longer function as a fair and neutral arbiter,[164] effectively depriving them of their right to a trial by an impartial jury.[165] This line of reasoning convinced the Tennessee Supreme Court that its child abuse murder statute violated due process.[166] By basing its decision on state constitutional grounds, however, the Tennessee court implicitly indicated that the Federal Constitution does not require such a result.[167] Moreover, recent decisions, including the

158. *See* Williams v. New York, 337 U.S. 241, 245 (1949); In Re Oliver, 333 U.S. 257, 275 (1948).

159. *See Chambers*, 309 U.S. at 236-37; JOHN E. NOWAK ET AL, CONSTITUTIONAL LAW § 13.1, at 452 (3d ed. 1986). The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly. Dowling v. U.S., 493 U.S. 342, 352 (1990). The Fourteenth Amendment incorporates to the states the provisions of the Bill of Rights that the Court considers "fundamental" to the system of law. NOWAK, *supra*, § 10.2.

160. *See supra* note 101 (noting basic due process requirements).

161. 840 S.W.2d 307 (Tenn. 1992).

162. *Id.* at 314.

163. *See infra* text accompanying notes 177-182.

164. Memorandum of Law, July 16, 1993 at 13, State v. Freeman, 6th Jud. Dist., St. Louis County, Ct. File No. KF-93-600188 (indicted March 26, 1993); *see Hale*, 840 S.W.2d at 313 (concluding that in the highly emotional setting of the murder trial for a young victim, the fact-finder cannot render an impartial decision on whether the defendant committed the prior acts of abuse).

165. The Fourteenth Amendment incorporates the Sixth Amendment's right to a trial by an impartial jury to the state courts. Duncan v. Louisiana, 391 U.S. 145 (1968).

166. *Hale*, 840 S.W.2d at 313.

167. *Id.* at 308. The Tennessee Legislature did not repeal the statute, but rather modified the prior abuse element. TENN. CODE ANN. 39-13-202(a)(4) (Supp. 1993).

Supreme Court case, *Estelle v. McGuire*, have held that admission of prior act evidence for a proper purpose and according to established procedures does not, itself, violate the defendant's right to a fair trial.[168]

Generally, two rules of evidence govern the admission of prior acts evidence at a trial for a current offense: Federal Rules of Evidence 404(b) and 403 and their state counterparts. Under rule 404(b), courts may introduce evidence of the defendant's prior "bad acts" if probative of an important issue of the case.[169] The introduction of the evidence is subject, however, to Rule 403, which excludes otherwise admissible evidence if the danger of unfair prejudice outweighs its probative value.[170] Defendants argue that the domestic homicide statute ignores these evidentiary tenets and presumptively admits prejudicial prior acts into evidence to the detriment of the defendant's due process rights. The statute is, however, consistent with, and not in opposition, to established rules of evidence. Properly applied, Minnesota's statute will not operate to deny a defendant of basic due process rights to a fair trial.

2. The Statute's Constitutional Fairness

Application of Minnesota's new statute does not violate the defendants basic due process rights nor does it deny them of their right to a fair trial.[171] The legislature, in enacting the domestic homicide statute, determined that evidence of a "past pattern of domestic abuse" is a necessary and relevant element of the offense.[172] This determination is consistent with a long-accepted practice already implemented in Minnesota courts. Under Minnesota Rule of Evidence 404(b), the courts, at their

168. 112 S.Ct. 475, 481 (1991); *see* State v. McCarty, 392 S.E.2d 359, 362 (N.C. 1990) (holding that where defendant had adequate notice of prior acts evidence and there was a rational connection between the prior act and the crime for which he was being tried, the court did not violate his due process rights).

169. FED. R. EVID. 404(b) (1988). Courts may not admit evidence of a defendant's prior bad acts merely to show action in conformity with a specific character trait, but they may admit prior acts evidence for such purposes as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

170. FED R. EVID. 403 (1988).

171. *See supra* notes 161-163 and accompanying text (stating the basic fairness requirements under due process).

172. *See* MINN. STAT. § 609.185(6) (Supp. 1994). The legislature has broad discretion in defining crimes. *See supra* notes 98-99 (indicating the deference courts give to the legislature); *supra* Part II (lending support to the legislature's determination).

discretion, admit evidence of prior acts of abuse in order to establish a common scheme or plan, to prove intent or absence of mistake, or to refute the defendant's claim of self defense.[173] Courts also can admit prior acts evidence under a Minnesota statute which creates a presumption of admissibility for prior acts of domestic abuse.[174] Minnesota courts also admit prior assaultive behavior in spousal murder cases to "illuminate" the victim-defendant relationship.[175] Although consistent with established practice, the new homicide statute goes one step further; it makes the evidence of prior domestic abuse not simply relevant, but rather *necessary* to properly evaluate the defendant's culpability.[176]

While neither the Tennessee statute nor the Minnesota statute explicitly include a notice requirement for the prior acts evidence needed to prove the requisite "pattern" element,[177] the courts can easily remedy the deficiency. For example, Minne-

173. *See, e.g.*, State v. Rainer, 411 N.W.2d 490, 497 (Minn. 1987) (using a "repeating pattern of very similar conduct" to disprove accident); State v. Langley, 354 N.W.2d 389, 397 (Minn. 1984) (holding that evidence of a prior assaultive relationship between husband and wife was not only admissible, but *necessary* to explain the victim's injuries when defendant claimed his wife's death was due to an accidental drowning); State v. Diamond, 241 N.W.2d 95, 99 (Minn. 1976) (admitting eight prior incidents in which the defendant-wife threatened her decedent-husband with various weapons under the intent and absence of mistake exceptions); State v. Waukazo, 374 N.W.2d 563, 565 (Minn. Ct. App. 1985) (upholding the admittance of four prior incidents of a husband's violent behavior toward his estranged wife).

174. MINN. STAT. § 634.20 (Supp. 1994). Although there are no published opinions using this new statute, it has the potential for expansive application since, unlike Rule 404(b), it does not require a separate specific purpose for the admissibility of prior conduct. *Compare* MINN. STAT. § 634.20 (1988) *with* MINN. R. EVID. 404(b) (Supp. 1994).

175. State v. Rediker, 8 N.W.2d 527, 533 (Minn. 1943) (holding that evidence of prior bruises and injuries on the victim were admissible in conjunction with the evidence of commotion and noises coming from the couple's apartment in order to show defendant's "course of conduct" and mental attitude toward his wife). The state may introduce evidence pertaining to the relationship between a defendant and a homicide victim, regardless of its reference to another crime. State v. King, 367 N.W.2d 599, 601 (Minn. Ct. App. 1985). The state may also introduce such evidence for the purpose of "illuminating the relationship" between the defendant and the victim in order to place the charged incident within a proper context. *See, e.g.*, State v. Volstad, 287 N.W.2d 660, 662 (Minn. 1980); State v. Currie, 400 N.W.2d 361, 362 (Minn. Ct. App. 1987). In addition, in order to reconstruct the victim's injuries, the state may introduce evidence of the defendant's frequent beating of the victim. State v. Broda, 318 N.W.2d 239, 240 (Minn. 1982).

176. *See supra* notes 63-65 and accompanying text (discussing the effect of the "past pattern" requirement).

177. *See* TENN. CODE ANN. § 39-13-202(a)(4) (1991) (amended in 1993); MINN. STAT. § 609.185(6) (Supp. 1994). The court in *State v. Hale* specifically

sota can apply its already well-established procedure for admitting prior acts evidence at trial.[178] Under this procedure, the state must submit an offer of proof to the court, detailing the "past pattern" evidence it intends to introduce at trial.[179] The court must then determine at a pre-trial hearing whether the state can prove the past incidents with clear and convincing evidence before giving the evidence to a jury.[180] Any evidence that does not meet the clear and convincing threshold will likely be excluded under Rule 403.[181] At a minimum, use of this procedure as applied to the "past pattern" evidence under the domestic homicide statute provides the defendant with notice and an opportunity to challenge the sufficiency of the evidence.[182]

As long as the courts apply a procedure similar to that outlined above, the admission of prior acts evidence also does not so severely prejudice defendants as to deny them of their basic rights to a fair trial.[183] The Supreme Court, in *Estelle v. McGuire*, recently addressed the issue of fairness surrounding prior acts evidence in a child abuse murder trial in California.[184] Although *Estelle* did not involve a statute like the domestic homicide statute, the trial court admitted prior injury evidence in order to show that the killing was intentional.[185] The Court upheld the admission of this evidence as probative of an important element of the case and held that it did not deny the defendant of a fair trial.[186] Minnesota's domestic homicide statute gives the defendant even more protection than most existing

noted the absence of a notice requirement in the Tennessee statute. 840 S.W.2d 307, 314 (1992).

178. The seminal Minnesota case, *State v. Spreigl*, established the procedure necessary for admitting prior acts evidence at trial so as to avoid the "patent unfairness which results to an innocent defendant who is confronted with charges against which he is not prepared to defend, which are inflammatory in the extreme." 139 N.W.2d 167, 169 (Minn. 1965); *see also* State v. Matteson, 287 N.W.2d 408, 410-11 (Minn. 1979) (listing six requirements that must be met to allow admission of prior acts evidence, including notice).

179. *See Spreigl*, 139 N.W.2d at 169. In *Spreigl*, the court decided that the state needs to provide written notice to the defendant, in writing and prior to the trial, of what offenses it intends to introduce. *Id.* at 173.

180. *E.g.*, State v. Volstad, 287 N.W.2d 660, 662 (1980); *Matteson*, 287 N.W.2d at 410-11.

181. *See supra* note 170 and accompanying text (stating Rule 403's test).

182. *See supra* note 160 and accompanying text.

183. Other states apply similar procedural safeguards in admitting prior acts evidence. *See* MCCORMICK ON EVIDENCE § 190, at 565 (Edward W. Cleary ed., 2d ed. 1984).

184. 112 S.Ct. 475 (1991).

185. *Id.* at 480.

186. *Id.* at 480-81.

prior acts evidence standards[187] because it requires the state to ultimately prove the "past pattern" of abuse beyond a reasonable doubt.[188]

The Tennessee Supreme Court, in *State v. Hale*, held its child abuse murder statute unconstitutional without discussing the statute's procedural application.[189] It simply opined that the highly emotional setting of a trial for the death of a helpless child would make it impossible for a fact-finder to render an impartial decision.[190] Minnesota, and any other states that adopt legislation similar to the domestic homicide statute, should not follow Tennessee's opinion. The Federal Constitution does not require,[191] and strong policy concerns advocate against,[192] such a decision.

CONCLUSION

Responding to the overwhelming societal problem of domestic violence, the Minnesota legislature enacted a powerful statute. The statute incorporates important feminist perspectives into the evaluation of criminal conduct, expanding traditional notions of *mens rea*. It recognizes the breach of care and moral responsibility that underlies a domestic killing and hones in on the particular experience of the victim and defendant in determining the severity of the conduct. Although this innovative statute will be subject to constitutional challenge, it satisfies specificity and fair trial requirements. Prosecutors should recognize the valuable contribution of this statute to the criminal law and begin to use it more aggressively. Moreover, other legislatures should look to Minnesota's statute as an example for similar legislation in their states.

187. MCCORMICK ON EVIDENCE § 190, at 564 (Edward W. Cleary ed., 2d ed. 1984) (noting that the state typically must prove other crimes evidence with "clear and convincing" evidence).

188. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986); In re Winship, 397 U.S. 358, 364 (1970).

189. 840 S.W.2d 307 (Tenn. 1992).

190. *Id.* at 313.

191. The *Hale* court based its decision on state constitutional grounds. *Id.* at 312-13.

192. *See supra* Part II (discussing the importance of Minnesota's statute).