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Battered By Men, Bruised by Injustice: The Plight of Women Who Fight Back and the Need for the Battered Women Defense in West Virginia

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BATTERED BY MEN, BRUISED BY INJUSTICE: THE PLIGHT OF WOMEN WHO FIGHT BACK AND THE NEED FOR A BATTERED WOMEN DEFENSE IN WEST VIRGINIA

I. INTRODUCTION

Domestic violence[1] is a serious problem in the United States that has devastating consequences for both women and men and their families and friends.[2] In 2001, there were 691,710 nonfatal incidents of domestic violence perpetrated by the victim's current or former husband/wife or boyfriend/girlfriend.[3] Domestic violence can also have deadly results. In 2000,

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1 Domestic violence is statutorily defined in West Virginia as follows:

> "Domestic violence" or "abuse" means the occurrence of one or more of the following acts between family or household members . . . :
> (1) Attempting to cause or intentionally, knowingly or recklessly causing physical harm to another with or without dangerous or deadly weapons;
> (2) Placing another in reasonable apprehension of physical harm;
> (3) Creating fear of physical harm by harassment, psychological abuse or threatening acts;
> (4) Committing either sexual assault or sexual abuse . . . ; and
> (5) Holding, confining, detaining or abducting another person against that person's will.

W. VA. CODE § 48-27-202 (2008). *See* NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1, http://www.ncadv.org/files/domesticviolencefacts.pdf (last visited Feb. 22, 2008) (Domestic violence is defined as "the willful intimidation, assault, battery, sexual assault, or other abusive behavior perpetrated by an intimate partner against another."). *See also* Jay B. Rosman, *The Battered Women Syndrome in Florida: Junk Science or Admissible Evidence?*, 15 ST. THOMAS L. REV. 807, 808 (2003).

2 *See* Rosman, *supra* note 1, at 807-08.

For a tragic example of how domestic violence impacts both the victim and the victim's family, see Tara Tuckwiller, *"A Living Death": Woman Hopes Her Daughter's Story Will Convince At Least One Person To Leave An Abuser Before It's Too Late*, CHARLESTON GAZETTE, Oct. 21, 2007, at P1A. In the article, a domestic violence victim's mother describes the abuse her daughter, Sonya Bailey, suffered at the hands of her daughter's husband, which ultimately resulted in severe permanent brain damage. *Id.* Sonya's husband, thirteen years ago, bashed in Sonya's skull, stuffed her into the trunk of her car, drove around West Virginia and two other states for five days, all while Sonya "slowly bled and suffocated." *Id.* Sonya, who now resides in a nursing home, is confined to a wheel chair. *Id.* As described in the article, "[Her] face is frozen in a smile. Her eyes are vacant. . . . She can't move. She can't speak. Her hands clench into permanent fists so hard the knucklebones look like they'll pop through the skin. Every four hours, somebody feeds her though a tube." *Id.* Her husband was convicted of both battery (under the Violence Against Women Act) and kidnapping and is serving a life sentence in a federal prison. *Id.* Sonya's mother, who visits her "motionless" daughter every day at the nursing home, "hopes [Sonya's] story will convince at least one person to leave an abuser before it's too late." *Id.* After describing the affects of domestic violence on Sonya's life, her mother concluded by stating, "If you're in that kind of situation, please get out. Just come to Riverside [Nursing Home] and let me show you Sonya." *Id.*

3 CALLIE MARIE RENNISON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

1,247 women and 440 men were killed by their intimate partner.[4] As a whole, however, women are subjected to domestic violence much more frequently than men. In 1999, women accounted for 1,218, or seventy-four percent, of the 1,642 persons murdered by an intimate partner.[5] In 2001, women accounted for eighty-five percent of domestic violence victims.[6] Shockingly, statistics show that one in every four women will face domestic violence sometime during her life.[7] This frequency of domestic violence across the country is not without its financial costs. Such violence exceeds $5.8 billion annually, which includes $4.1 billion in direct health-care expenses, $900 million in lifetime earnings, and $900 million in productivity loss.[8]

West Virginia is not excluded from the national epidemic of domestic violence. In 2005, over 12,803 domestic violence offenses occurred in West Virginia; thirty-four of those incidents resulted in death.[9] Domestic violence homicides should be a real concern for West Virginians, as two domestic violence homicides occur, on average, every month in the Mountain State.[10] Statistics show that this average of two-per-month has remained constant since the late 1970s.[11]

Given the serious and continuing nature of domestic abuse, existing public education and assistance programs must be expanded to address these problems before the violence occurs. What happens, however, when public education and assistance programs do not reach far enough to adequately address such violence? What happens when women who are physically and verbally abused are unable to reach out for assistance because of threats of violence and death if they do? The statutory and common law in West Virginia does not adequately address this dilemma. Women who fight back and attempt to free themselves of their abusive captors are forced to defend their actions on traditional self-defense grounds or even resort to psychological impairment defenses,

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4 *Id.*

5 CALLIE MARIE RENNISON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-1999 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipva99.pdf.

6 CALLIE MARIE RENNISON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf.

7 NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS 1, http://www.ncadv.org/files/domesticviolencefacts.pdf (last visited Feb. 22, 2008).

8 *Id.* (citing CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 8 (2003), *available at* http://www.cdc.gov/ncipc/pub-res/ipv_costs/IPVBook-Final-Feb18.pdf).

9 NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE FACTS: WEST VIRGINIA, http://www.ncadv.org/files/westvirginia.pdf (last visited Feb. 22, 2008).

10 West Virginia Coalition Against Domestic Violence, Statistics, http://www.wvcadv.org/statistics.htm (last visited Feb. 22, 2008).

11 *Id.*

such as insanity. As this Note will explain, West Virginia's traditional defense of self-defense is discriminatory toward women in domestic abuse situations and deprives them of the right to a fair trial. As such, West Virginia needs to adopt a new defense, entitled "Battered Women Defense," which is similar to, but entirely separate from, the traditional defense of self-defense. This Battered Women Defense should be a narrowly tailored version of self-defense for women in domestic violence situations.[12] As such, the Battered Women Defense should be codified by the West Virginia Legislature and should be recognized by the West Virginia Supreme Court of Appeals as a legitimate, separate defense available to battered women who protect themselves against their abusers.

In arguing for the adoption of the Battered Women Defense, this Note will first, in Part II, examine the defense of self-defense and accompanying law. Part III.A. of this Note will then examine the Battered Women Syndrome ("BWS") and the underlying cycle of abuse. Next, Part III.B. will examine each of the few West Virginia Supreme Court of Appeals cases involving a battered woman who claimed self-defense for her actions against her abuser and/or attempted to utilize evidence of the BWS in her defense. Part IV will argue for the adoption of the Battered Women Defense in West Virginia. This Part will argue that such an adoption is essential in West Virginia self-defense cases involving battered women. It will also address anticipated arguments that a Battered Women Defense condones or encourages homicide in domestic violence cases. This Part concludes with a close examination of a hypothetical situation involving a battered woman who kills her sleeping husband. It discusses the application of West Virginia's current law on self-defense to the facts of the hypothetical while citing to specific West Virginia cases that have either held or discussed each of the specific points at issue. The purpose of the hypothetical and resulting "trial" and "appeal" is to prove that the current law on self-defense in West Virginia is unfair, overly punitive, and discriminatory when applied to cases involving battered women who strike back against their abuser.

Lastly, this Note will examine *State v. Norman*, the well-known North Carolina battered woman case. This examination will draw a parallel between North Carolina and West Virginia in an attempt to show that, because both states have a similar law on self-defense, a completely unacceptable judicial decision such as *State v. Norman* is inevitable in West Virginia unless West Virginia's self-defense laws are immediately changed to specifically address the sensitive circumstances surrounding self-defense cases involving battered women.

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[12] As previously stated, domestic violence against women is greatly more prevalent than against men. The need for such a defense, therefore, is greater for abused and battered women than for men. Because of this prevalence, this author chooses to restrict the analysis of the need for a new defense to cases involving battered and abused women. A gender-neutral defense could be entitled "Battered Person Defense," which would account for both men and women who strike back in domestic violence situations.

II. THE DEFENSE OF SELF-DEFENSE

The defense of self-defense derives from the common law and is used as a justification by a non-aggressor in using force upon another if the non-aggressor reasonably believes that such force is "necessary to protect himself from imminent use of unlawful force by the other person."[13] The defense of self-defense is considered a justification defense and contains the following three elements: (1) the force must be "necessary," requiring an "imminent" threat; (2) the force must be "proportionate" to the threat; and (3) the non-aggressor must have a "reasonable belief" in the use of force.[14] Stated another way, for purposes of self-defense involving an intentional killing, such killing will be justified when the following four requirements are met:

> 1. An actor can only defend herself against what she reasonably believes is *unlawful force.*
>
> 2. The *amount of force* must be *proportionate* to the threatened force. Deadly force may not be used unless the actor reasonably believes that she is protecting herself against infliction of death or serious bodily harm.
>
> 3. The actor must reasonably believe that it is *necessary* to use force to prevent the threatened harm.
>
> 4. The actor must reasonably believe that the adversary's threatened use of force is *imminent.*[15]

The common law defense of self-defense in West Virginia is similarly written. The settled law on self-defense in West Virginia is as follows:

> [A] defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.[16]

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[13] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 237 (4th ed. 2006). *See* Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 49-50 (1994).

[14] DRESSLER, *supra* note 13, at 238; Schopp et al., *supra* note 13, at 49-50.

[15] Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting A Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 28-29 (1986).

[16] State v. Headley, 558 S.E.2d 324, 328 (W. Va. 2001) (citing State v. W.J.B., 276 S.E.2d 550, 553 (W. Va. 1981)).

Among the elements listed above, the "imminency" of the danger is crucial to a claim of self-defense.[17] The defendant has the burden of showing that the danger was in fact imminent.[18] Concerning the allowable time frame from the perceived danger to the alleged act of self-defense, the West Virginia Supreme Court of Appeals maintains, "[n]o apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot."[19]

Unfortunately, these traditional requirements do not adequately address the circumstances surrounding why a battered woman strikes back against her abuser. The traditional notion of self-defense and its corresponding requirements were originally developed for situations involving a man who kills another man of comparative size and strength during a threatened attack in order to protect himself or his family.[20] The defender against the threatened harm in these circumstances typically had only the single encounter with his aggressor.[21] The requirements of self-defense in these situations sufficiently protect the male defender from legal responsibility for his actions, but the same cannot be said for a battered woman who kills her abuser.

In a recent decision, the West Virginia Supreme Court of Appeals again set forth the elements of the traditional defense of self-defense as follows:

> When one without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances and without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out, that the appearances were false, and that there was in fact neither design to do him some serious injury nor danger, that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case.

Syl. Pt. 6, State v. Whittaker, 650 S.E.2d 216 (W. Va. 2007) (citing Syl. Pt. 7, State v. Cain, 20 W. Va. 679 (1882)). For an examination of the facts and court reasoning of the *Whittaker* case, see *infra* notes 166-199 and accompanying text.

17 *Whittaker*, 650 S.E.2d at 225.

18 *Id.* at Syl. Pt. 7 (citing Syl. Pt. 6, State v. McMillion, 138 S.E. 732 (W. Va. 1927)). Once the defendant puts forth "sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense," the burden then shifts to the prosecution to "prove beyond a reasonable doubt that the defendant did not act in self-defense." *Whittaker*, 650 S.E.2d at 226 (citing Syl. Pt. 4, State v. Kirtley, 252 S.E.2d 374 (1978)).

19 Syl. Pt. 7, *Whittaker*, 650 S.E.2d at 216 (citing Syl. Pt. 6, *McMillion*, 138 S.E. at 732).

20 Rosen, *supra* note 15, at 34.

21 *Id.*

The context surrounding the battered woman and her abuser is usually vastly different. The male abuser, whom the battered woman protects herself against, is most often physically larger and stronger than she, and the relationship between the two involves an ongoing or past relationship, far from a single occurrence.[22] Unlike the male for whom the defense of self-defense originated, the abused woman's fear and actions will be influenced by her knowledge of her abuser's character and propensity for violence.[23] As a result, these self-defense "[r]ules requiring like force, imminency, consideration of only the circumstances immediately surrounding the killing, and use of an objective reasonable man standard necessarily defeat the woman's claim."[24] Those battered women who must use this male-oriented theory do so at a great risk of conviction.

In using the defense of self-defense, a battered woman will attempt to put forth evidence as to why her action of killing her abusive partner was reasonable.[25] This evidence is most often in the form of expert testimony concerning the psychological state of the abused woman.[26] The desired uses of such expert testimony in self-defense cases involving battered women defendants are as follows:

> Theoretically, the woman's defensive action will be proved necessary and proportionate by showing how the defendant could perceive a threat of imminent danger in verbal threats alone, in a nondeadly [sic] attack from an unarmed spouse, or from a sleeping man. The testimony explains why the woman stayed with her spouse despite the abusive relationship and why, on the occasion in question, she may not have run away or sought assistance from friends, relatives, or the police despite an apparent opportunity to do so. Finally, the testimony explains why the woman cannot be faulted for becoming involved in an abusive relationship. Rather, she is a victim of her social reality, responding to circumstances in accordance with the values of femininity and lifelong marriage to which she was acculturated.[27]

This psychological condition in battered women has generally become known as the "Battered Women Syndrome."[28]

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22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 41.

26 *Id.* at 40 n.167.

27 *Id.* at 41.

28 DRESSLER, *supra* note 13, at 258; *see* Rosman, *supra* note 1, at 809-10.

III. THE BATTERED WOMEN SYNDROME

A. *Discussion of the Battered Women Syndrome*

The Battered Women Syndrome ("BWS"), also called the Battered Woman Syndrome, the Battered Wife Syndrome, or the Battered Spouse Syndrome, results from a cycle of physical abuse against a woman by her partner in a domestic relationship.[29] This cycle of abuse was developed and articulated by Dr. Lenore Walker.[30] Each cycle of abuse has three phases.[31] Phase one is called the "tension building" phase[32] and consists of small episodes of abuse, such as minor incidents of battery and verbal abuse.[33] In addition, during this first phase, the victim of the domestic abuse "may plan to escape or [has] tried to escape in the past and failed."[34] Phase two involves an "acute battering incident," also called the "major violence phase,"[35] where the woman is severely beaten.[36] The woman's behavior during this second phase is described as follows:

> During [the major violence phase] the woman is more likely to concentrate on survival than on escape. Her behavior at this time is characterized by "learned helplessness." The woman will feel that her batterer is omnipotent and that no one can help

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[29] Douglas A. Orr, Weiand v. State, *and the Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 2 FLA. COASTAL L.J. 125, 128 (2000); *see* Schopp et al., *supra* note 13, at 50-52. One definition of the Battered Women Syndrome is stated as follows: "a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights." Rosman, *supra* note 1, at 809. Battered Women Syndrome also has the following four general characteristics:

> (1) The woman believes that the violence was her fault, (2) [t]he woman has an inability to place the responsibility for the violence elsewhere, (3) [t]he woman fears for her life and/or her children's lives, and (4) [t]he woman has an irrational belief that the abuser is omnipresent and omniscient.

Id. at 810.

[30] *See* Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 50, 53-59; Kerry A. Shad, State v. Norman*: Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159, 1166 (1990).

[31] Rosen, *supra* note 15, at 40 n.165 (citing Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 6 (1982)); *see* Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 50-52.

[32] Rosen, *supra* note 15, at 40 n.165 (citing Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 6 (1982)); Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 50-51.

[33] Orr, *supra* note 29, at 128.

[34] Rosen, *supra* note 15, at 40 n.165.

[35] *Id.*; Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 50-51.

[36] Orr, *supra* note 29, at 128.

> her. She will focus her emotional energy on developing coping responses rather than escape responses.[37]

The final phase, occurring after the "acute battering incident," is called the "honeymoon" phase and is characterized by calmness, where the abuser's behavior is "kind, loving, and contrite."[38] Unfortunately, this change in behavior reinforces the woman's desire that her partner will change his abusive ways.[39] In addition, "[d]ue to learned helplessness and her desire to make the relationship work, the victim is likely to succumb to her tormentor's promises of reform . . . ."[40] Thereafter, however, the cycle will start over and phase one will begin again.[41] This cycle also changes for the worse over time because "the tension building periods become longer and more intense while the periods of contrition become shorter and less compelling."[42]

This cycle of abuse over time has dramatic psychological effects on the abused woman because she develops a constant fear of her tormentor and believes that she is powerless to make her situation better.[43] The majority of women in this situation are unable to leave their batterer for a number of reasons, such as lack of financial resources, lack of any alternative place to go "due to the reluctance of friends, family, and police to get involved," or out of fear that the abuser could or has already threatened to kill her if she attempts to leave.[44] Thus, "[k]illing her abuser becomes her only means of escape" from her fearful, perpetually abusive environment.[45]

Many battered women feel that the particular episode culminating in the killing of the batterer was more severe or life-threatening than previous battering episodes.[46] Over the course of the battering cycle, the abused woman develops a sense as to oncoming violence or certain environmental factors that trigger violent episodes.[47] One article summarized this notion as follows:

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37 Rosen, *supra* note 15, at 40 n.165 (citing Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 6, 9 (1982)) (citations omitted).

38 *Id.*; Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 50-51.

39 Orr, *supra* note 29, at 128; Rosman, *supra* note 1, at 809.

40 Rosen, *supra* note 15, at 40 n. 165; Rosman, *supra* note 1, at 809; Schopp et al., *supra* note 13, at 51, 87-89.

41 Orr, *supra* note 29, at 128; Schopp et al., *supra* note 13, at 51.

42 Rosen, *supra* note 15, at 40 n.165 (citing Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 9 (1982)).

43 Orr, *supra* note 29, at 128; Schopp et al., *supra* note 13, at 51, 88-89.

44 Rosen, *supra* note 15, at 41 n.169; *see* Rosman, *supra* note 1, at 809-10; Schopp et al., *supra* note 13, at 51-52, 88.

45 Orr, *supra* note 29, at 128; *see also* Schopp et al., *supra* note 13, at 87-88.

46 Rosen, *supra* note 15, at 38 n.161 (citing 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, 634-35 (1980)).

47 *Id.*

> Studies suggest that battered women have learned to be attentive to signs of escalating violence and to modify their behavior in response to these danger signals in order to pacify violent husbands. Subtle motions or threats that might not signify danger to an outsider or to the trier of fact [jury] acquire added meaning for a battered woman whose survival depends on an intimate knowledge of her assailant.[48]

Lastly, the woman's ultimate decision to kill her abuser develops in one of three situations: confrontational, non-confrontational, and third party intervention.[49] The first situation, confrontation, arises when the battered woman kills her abusive partner during an incident of abuse.[50] This situation encompasses the majority of domestic violence prosecutions against the abused spouse.[51] The second situation, non-confrontation, arises when the battered woman kills her abusive partner when an incident of abuse is not immediately occurring, sometimes when the abuser is asleep.[52] The third situation, third party intervention, arises when the battered woman hires or "importunes" a third party to kill the abusive partner for her.[53] The following section will focus on cases involving the first two situations, confrontational and non-confrontational, and how the West Virginia Supreme Court of Appeals has addressed the use of the Battered Women Syndrome in those cases.

B. Treatment of the Battered Women Syndrome in West Virginia Cases Alleging Self-Defense – A Critique

West Virginia recognizes the BWS, but the case law is sparse. There may be various reasons for this, such as lack of understanding by defense counsel as to its proper use, lack of success in defense cases using the BWS, belief among trial judges that the BWS does not really exist, or perhaps because few cases are appealed that attempt to make use of the BWS. For example, the record of a 1996 West Virginia Supreme Court of Appeals case stated that the Raleigh County Circuit Court judge commented during the pre-trial proceedings that "he did not 'really think there is such a thing' as battered women's syndrome."[54] In the West Virginia Supreme Court of Appeals cases where the BWS was discussed, the court has offered no clear guidelines for how an abused

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48 *Id.*

49 DRESSLER, *supra* note 13, at 258-59.

50 *Id.*; *see* Schopp et al., *supra* note 13, at 74.

51 DRESSLER, *supra* note 13, at 259.

52 *Id.*; *see* Schopp et al., *supra* note 13, at 73-74.

53 DRESSLER, *supra* note 13, at 259.

54 State v. Wyatt, 482 S.E.2d 147, 157 (W. Va. 1996).

woman can properly use the BWS as part of her claim for self-defense and has not adopted the BWS as a separate defense.

The West Virginia Supreme Court of Appeals first mentioned the possibility of the use of the BWS in *State v. Dozier*[55] and *State v. Duell*.[56] The court in *Dozier* addressed a self-defense claim by a woman who had a history of abuse.[57] In reversing the judgment of the Circuit Court of Jefferson County and awarding the defendant a new trial, the court made reference to the possible use of the BWS when it reasoned as follows:

> [W]e know the defense would be entitled, in the event of a retrial, to elicit testimony about the prior physical beatings she received in order that the jury may fully evaluate and consider the defendant's mental state at the time of the commission of the offense.[58]

In *Duell*, the court addressed an insanity defense claim where a psychologist testified that the defendant, a battered woman, was "out of touch with reality."[59] In its later decisions involving self-defense claims by battered women, the court, in relying on the foundations set by *Dozier* and *Duell*, expanded its analysis of the BWS. Each of these decisions is set forth below and is analyzed in chronological order to demonstrate how the court has addressed, over time, the possible uses and limitations of the BWS by battered women defendants.

1. *State v. Steele*

In 1987, the West Virginia Supreme Court of Appeals specifically confronted the issue of the BWS in *State v. Steele*.[60] The court stated that its past decisions in both *Dozier* and *Duell* "suggest that, in an appropriate case, evidence regarding [Battered Women S]yndrome may be introduced."[61] In this and later cases, however, the court has been far from clear as to what constitutes an "appropriate case" and how the use of the BWS actually advances the case for the abused woman. In *Steele*, the defendant, an abused ex-wife, sought to defend her killing of her ex-husband on the underlying defense of self-defense based on the BWS.[62] On appeal, the defendant claimed that the trial court "improperly limited expert testimony regarding the 'battered woman's syndrome'

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55 State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979).

56 State v. Duell, 332 S.E.2d 246 (W. Va. 1985).

57 *Dozier*, 255 S.E.2d at 555.

58 *Id.*

59 State v. Steele, 359 S.E.2d 558, 563 (W. Va. 1987) (citing *Duell*, 332 S.E.2d at 246).

60 *Steele*, 359 S.E.2d at 558.

61 *Id.* at 563.

62 *Id.* at 560.

and the history of threats and violent behavior directed toward the defendant by the victim."[63]

The record indicated that the woman was subjected to intimidation and threats of violence by her then husband[64] for a five-year period.[65] Specifically, when the defendant confronted her husband about an extramarital affair he was having, the husband allegedly vandalized her trailer while she was away.[66] In addition, after the defendant brought an action for divorce, the husband threatened to burn her trailer if she attempted to carry through with the divorce.[67] The defendant was granted a divorce and, one month later, a fire destroyed her trailer.[68] She then moved into a farmhouse, which was destroyed by fire soon afterwards.[69] The defendant later remarried, but her new husband was shot by someone through the window of the couple's home.[70]

The defendant testified at trial that her abusive ex-husband admitted to shooting her new husband and promised he would "finish the job."[71] Two years later, the couple's house was again destroyed by fire.[72] The defendant testified that thereafter, her ex-husband's threats increased.[73] The testimony of the defendant indicates that she agreed to travel with her ex-husband out of fear for herself and her family if she turned down his request.[74] When the defendant changed her mind and told her ex-husband that she did not want to go, he grabbed her arm, forced her into his car, and drove her in a direction different from the route known for the planned trip.[75] During this time, he spoke to her with sexual innuendos, "told her he had a 'surprise' for her," stopped the car on a remote road, and instructed her to get into the back seat, which she did.[76] As the ex-husband turned around in the car, she shot him with a handgun she was carrying.[77] She stated that she shot him because "[she] was scared of what he

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63 *Id.*

64 The defendant and the deceased were divorced before the homicide occurred. *Id.* at 561.

65 *Id.* at 560.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.* at 561.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

was going to do to [her]."[78] The defendant then ignited the car and fled on foot.[79]

The defendant, though testifying to the above allegations at trial, sought to introduce the testimony of an expert, a psychologist, who examined the defendant three months after she shot her ex-husband.[80] The psychologist testified at trial that the defendant had a "tremendous amount of residual fear" toward her ex-husband.[81] The trial court examination of the expert's testimony went as follows:

> When asked whether such fears were justified, [the expert] replied they were. He described [the defendant and the decedent's] relationship as having been characterized by a long-term pattern of intimidation, and noted that the defendant had "very, very little ability" to resolve her situation. He concluded by observing that the defendant's situation was an exaggeration of the common scenario in which one is "pushed to the wall" and acts violently out of character. The trial court sustained an objection to this last remark as touching upon matters for the jury's determination.[82]

When attempting to testify as to the individual incidents of violence against the defendant, however, the expert was not permitted to do so.[83] Ultimately, the West Virginia Supreme Court of Appeals determined that the trial court did not err because, not only was the defendant allowed to testify as to her own allegations of abusive events, but the expert, along with an additional expert, was allowed to testify as to their opinions of the "defendant's mental condition resulting from the relationship, her belief that the [decedent] was dangerous, and her inability to extricate herself from the situation."[84] Specifically concerning the use of expert testimony on the issue of the BWS, the court stated, "Expert testimony can be utilized to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome."[85] The defendant was also given her prof-

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78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 565.

84 *Id.*

85 *Id.* at 564. This ruling on the use of expert testimony on the Battered Women Syndrome was elevated to a syllabus point for the West Virginia Supreme Court of Appeals. *See* Syl. Pt. 5, State v. Steele, 359 S.E.2d 558 (W. Va. 1987).

fered instructions on self-defense.[86] The court affirmed the trial court's judgment of first degree murder and third degree arson against the defendant.[87]

The *Steele* case represents the inadequacy of the defense of self-defense in domestic violence cases and the inability of the BWS testimony to bolster that defense. The court first based its analysis on the traditional notion of self-defense.[88] Then, the court examined the relevance of the defendant's use of evidence of prior violent acts by the deceased.[89] The court maintained that this evidence could be used by a defendant to show "the reasonableness of the defendant's belief that the deceased intended to inflict serious bodily injury or death and, as a consequence, the defendant was justified in the killing."[90] When the court approached the issue of the BWS in homicide cases, however, the court's analysis was highly inconsistent. Specifically, the court conceded that the killing in such cases is often "not triggered by an act of violence toward the defendant that would meet the traditional standard of threatening serious bodily injury or death."[91] The court also noted that battered women "can lose the capability to objectively determine the degree of danger."[92] Despite its recognition that battered women can lose their objective capacity, the court nonetheless held that those battered women will still be held to an objective reasonableness standard.[93] As support for this inconsistent result, the court cited a 1984 New

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86 *Id.* at 565.

87 *Id.* at 566.

88 *Id.* at 564. The language of the traditional defense of self-defense on which the court relied is as follows:

> Where, in a trial for murder, there is competent evidence tending to show that the accused believed, and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm at the hands of several assailants acting together, he may defend against any or all of said assailants, and it is reversible error for the trial court to refuse to instruct the jury to that effect.

Id.

89 *Id.*

90 *Id.* The full text of the court's reasoning on the relevance of evidence of prior violent acts is as follows:

> The reason evidence of prior acts of violence toward a defendant by the deceased is relevant is because it relates to the reasonableness of the defendant's belief that the deceased intended to inflict serious bodily injury or death and, as a consequence, the defendant was justified in the killing.

Id.

91 *Id.*

92 *Id.* The court reasoned as follows: "[I]t is shown by competent psychological studies that women who have suffered severe and prolonged physical abuse can lose the capability to objectively determine the degree of danger." *Id.*

93 *Id.*

Jersey decision, which summarized the relevance of psychological testimony in cases involving the BWS.[94] This decision is cited as follows:

> We do not mean that the expert's testimony could be used to show that it was understandable that a battered woman might believe that her life was in danger when indeed it was not and when a reasonable person would not have so believed . . . . Expert testimony in that direction would be relevant solely to the honesty of the defendant's belief, not its objective reasonableness. Rather, our conclusion is that the expert's testimony, if accepted by the jury, would have aided it in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life.[95]

The above reasoning by both the West Virginia Supreme Court of Appeals and the New Jersey Supreme Court shows bias against victims of domestic violence who act against their abusers. Specifically, the West Virginia Supreme Court of Appeals recognized a decline of the objective reasoning in women who have endured long-term abusive relationships by "los[ing] the capability to objectively determine the degree of danger."[96] Yet, the court cites the New Jersey Supreme Court as stating the objective, reasonable person standard will be used anyway to determine the abused woman's belief of imminent danger.[97] Given that an objective reasonableness standard was used in this case, the case's outcome makes clear that a strict, objective reasonableness standard is inadequate and biased when used in battered women cases. The outcome also indicates a possible bias or lack of understanding by the jury of the circumstances surrounding battered women when instructed by the trial judge to apply an objective reasonableness standard to the abused woman's actions.

Even putting aside the allegations of threats and violence covering a five-year period by the decedent, the incidents leading up to the shooting indicate that the actions of the defendant could be justified on traditional confrontational self-defense grounds alone. As stated above, the ex-husband forced the defendant into his car, spoke to her using sexual innuendos, told her he had a "surprise" for her, stopped the car on a remote road, and told her to get into the back seat.[98] Just on these facts alone, a reasonable person could easily believe that she was acting in self-defense from a "reasonable belief" that she was in imminent danger of an attack, such as the presumed rape in this instance.[99] In

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94 *Id.* (citing State v. Kelly, 478 A.2d 364, 377 (N.J. 1984)).

95 *Id.* (citing *Kelly*, 478 A.2d at 377).

96 *Steele*, 359 S.E.2d at 564.

97 *Id.* (citing *Kelly*, 478 A.2d at 377).

98 *Steele*, 359 S.E.2d at 561.

99 *See generally* DRESSLER, *supra* note 13, at 262.

addition, a reasonable person should also see the necessity of the action given the vulnerability of the abused woman in the back seat of her ex-husband's car.[100] Lastly, a reasonable person should also see that the proportion of force was justified to repel the harm threatened.[101] Without the use of a handgun to repel an impending rape in the backseat of a car on a remote road, a woman would have little resources for defense against her male attacker.

A different outcome should have resulted in this case even without factoring in the defendant's knowledge of the fear she had and the abuse she had received as a result of her abuser's past actions. It is difficult to believe that any other instrument besides a firearm would repel advances from her attacker. If such an alternative non-lethal method was tried first without success, such an attempt to repel the attack could lead to further violence toward the victim beyond the inevitable rape. It is not reasonable to require a woman in such a situation to either succumb to the attack or to defend herself with useless non-lethal methods in the backseat of a car. The law in this case forces the abused victim to make a choice: succumb to the attack and possibly fight back using non-lethal means, inevitably causing further abuse, or use lethal force to repel the attack and be sentenced to prison for murder. The law here protects the attacker more so than the victim. Such a result is highly unjust.

2. *State v. McClanahan*

In 1994, the West Virginia Supreme Court of Appeals again addressed the issue of the BWS.[102] *State v. McClanahan* involved a semi-confrontational self-defense case involving a woman who suffered from past abuse.[103] The defendant was subjected to abuse from her husband while he drank.[104] The facts indicate that the defendant and her husband had marital problems, and that the defendant's husband subjected her to verbal abuse, threatened to kill her, and beat and struck her on occasion.[105] On the occasion in question, the defendant had an argument with her husband and the husband grabbed her by her shirt.[106]

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100 *See generally id.*

101 *See generally id.* While it is argued that the defendant's use of a firearm in the given situation was reasonable, this author does not contend that the defendant's subsequent act of igniting the vehicle was reasonable. However, because the subsequent act was not used to repel the ex-husband's impending attack and because the act resulted in a separate charge, specifically arson, this author's discussion of reasonable force is limited to the defendant's use of the firearm in self-defense that actually resulted in the homicide. In this context, the Battered Women Defense would only be used as a defense to the homicide charge, i.e., use of the firearm to repel the existing threat. It would not, however, be used as a defense to the subsequent arson charge because the act of igniting the car with her deceased ex-husband inside occurred after the threat was repelled.

102 State v. McClanahan, 454 S.E.2d 115 (W. Va. 1994).

103 *Id.*

104 *Id.* at 117.

105 *Id.*

106 *Id.*

The defendant then retrieved a handgun from her upstairs bedroom, went to the doorway of the house, and when her husband attempted to reenter the house, she said, "Get away from me" and shot him once, wounding him.[107]

The defendant, at her trial for unlawful wounding, presented a licensed psychologist who testified that the defendant "demonstrated the characteristics of a person suffering from the battered wife syndrome."[108] Even though the "battered spouse" defense was raised at her trial and was submitted to the jury, the defendant did not raise error on that issue, but instead raised issue with regard to the defense of self-defense.[109] This is unfortunate, though not surprising, because evidence of the BWS, as indicated above, had not been particularly useful in West Virginia criminal cases involving battered women. As this case indicates, the traditional claim of self-defense does not seem to provide the abused woman a fair trial when she acts against her abusive spouse. Specifically, the court analyzed the use of the defense of self-defense in criminal cases as follows: "[A]n apprehension of harm, to support a claim of self-defense, must be an apprehension existing at the time of the defendant's attack on the victim."[110] Further, "[n]o apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot."[111]

Thus, under the facts of this case, a "reasonable person" may not have reacted with such force as did the defendant. However, during the defendant's trial, the defendant's husband even testified that he had been abusive to the defendant and that, after thinking about the events before the shooting, he believed that the defendant's act of shooting him was justified.[112] The defendant's husband testified, "I don't think she [the defendant] wants any more beatings and stuff like that. I think she had a right to do it."[113] Yet, the West Virginia Supreme Court of Appeals affirmed the jury's verdict of guilty.[114] This result poses the following question: Is it possible for a person who has suffered a history of abuse and who is occasionally beaten by her husband to react as an objectively "reasonable person" in any threatening situation involving her abusive husband?

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107 *Id.*

108 *Id.*

109 *Id.* at 117 n.1.

110 *Id.* at 118.

111 *Id.* (quoting Syl. Pt. 6, State v. McMillion, 138 S.E. 732 (W. Va. 1927)).

112 *McClanahan*, 454 S.E.2d at 117.

113 *Id.*

114 *Id.* at 121.

3. *State v. Smith*

Because it appears that confrontational cases by abused women are very hard to win, even with evidence of past abuse and testimony of such facts by the abuser, as seen in *McClanahan*,[115] it would therefore seem impossible to set forth a successful claim of self-defense in a non-confrontational situation. *State v. Smith*, a 1996 *per curiam*[116] West Virginia Supreme Court of Appeals decision, suggests this result.[117]

Smith involved a typical non-confrontational situation: The abuser was asleep when the abused partner acted.[118] The unusual aspect of this case, however, is that the defendant merely held the barrel of the rifle while her 16-year-old son[119] pulled the trigger.[120] The abuser was the defendant's boyfriend and had lived with the defendant in her mobile home for several years.[121] The record indicates much testimony of arguments, shouting, threats, and use of profanity, which was mutual between the defendant and her boyfriend.[122] The defendant testified that her boyfriend had struck her on previous occasions.[123] The court noted that the defendant did not establish that she was physically injured or sought medical assistance from her boyfriend's strikes.[124] The children testified that the morning before the shooting, the boyfriend was angry and struck the defendant's head against the side of her mobile home.[125] The defendant then left for her mother's house, but returned that evening.[126] Another argument ensued, during which the boyfriend allegedly threatened to kill the defendant.[127]

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115 *Id.* at 117.

116 A per curiam opinion is not considered legal precedent and anything included in the opinion not included in the syllabus points should be considered as *obiter dicta*. State v. Riley, 500 S.E.2d 524, 527 n.1 (W. Va. 1997) (citing Lieving v. Hadley, 423 S.E.2d 600, 604 n.4 (W. Va. 1992)). However, for purposes of this Note, this case is analyzed to show how the West Virginia Supreme Court of Appeals ruled on a specific, non-confrontational case involving a woman in an abusive relationship that acted against her abuser.

117 *See* State v. Smith, 481 S.E.2d 747 (W. Va. 1996).

118 *Id.* at 749.

119 *Id.* The defendant's 16-year-old son was from a previous marriage and he resided in the mobile home. *Id.* at 748. The defendant also had two other children from a previous marriage, but neither of the two resided in the mobile home. *Id.* In addition, the defendant and her boyfriend, the deceased in this case, had three young children together who did reside in the mobile home. *Id.*

120 *Id.* at 749.

121 *Id.* at 748.

122 *Id.* at 749.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

Afterwards, when the boyfriend fell asleep on the couch, the defendant put her three young children in the car, went back inside the mobile home, and held the barrel of a rifle while her son pulled the trigger, killing the boyfriend.[128] During the shooting, the defendant said to her son, "Let's just, you know, it's the only way we'll be safe."[129] Lastly, during her incarceration for homicide and conspiracy,[130] the defendant wrote various letters to her son, also incarcerated, asking him to take responsibility for the shooting so she could be released and gain custody of her three young children.[131]

At trial, the court refused to admit evidence of the deceased's prior acts of violence toward her and her children.[132] The court also refused to admit the testimony of the defendant's expert witness, a psychologist, on the issue of the defendant's fear of the deceased.[133] The expert did testify *in camera*, however, that the defendant did not meet the *full* criteria of the BWS.[134] The trial court granted the State's motions in limine to exclude "*any evidence* of [the deceased's] alleged acts of misconduct or violence toward the appellant or her children and to exclude *any reference* by the appellant to the theory of 'battered woman syndrome.'"[135] The trial court concluded that the evidence before the court was insufficient to give a jury instruction on self-defense.[136] On appeal, the defendant alleged, among other things, that the trial court erred in refusing to give a jury instruction on self-defense and for refusing to admit evidence of the deceased's prior acts of violence toward her and her children.[137] The West Virginia Supreme Court of Appeals affirmed the trial court's decision to refuse to instruct the jury on self-defense because, though the defendant feared the deceased, the defendant was not in imminent danger[138] and did not suffer from BWS.[139]

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128 *Id.* It is important to note that the rifle misfired when the son first pulled the trigger. *Id.* Because the misfire did not awaken the boyfriend, the son reloaded the rifle and, while the defendant again held the barrel, fired the fatal shot. *Id.*

129 *Id.*

130 *Id.* at 748. The defendant was convicted by jury of second-degree murder and the offense of conspiracy. *Id.*

131 *Id.* at 749-50.

132 *Id.* at 750-51.

133 *Id.* at 751.

134 *Id.* at 752 n.5.

135 *Id.* at 750 (emphasis added).

136 *Id.* at 750.

137 *Id.* at 750-51.

138 In reaching its conclusion to exclude evidence of the deceased's alleged prior bad acts, the court pointed to syllabus point one of the opinion concerning self-defense, which reads:

> When in a prosecution for murder the defendant relies upon self-defense to excuse the homicide and the evidence does not show or tend to show that the defendant was acting in self-defense when he shot and killed the deceased, the

In support of its decision, the court cited a 1987 Pennsylvania Superior Court case, *Commonwealth v. Grove*.[140] The facts of that case were similar to *Smith*, in that it involved a woman who, with the help of her daughter, shot and killed her husband while he slept.[141] The court affirmed the defendant's conviction of murder and conspiracy and rejected the defendant's assertion that the trial court erred in excluding evidence of her husband's past acts of violence.[142] The court held that the defendant "offered no evidence whatsoever to establish that she or any other person was in imminent danger of death or serious bodily injury on the present occasion when the deadly force was used."[143] Interestingly, however, the court also noted that the Pennsylvania Supreme Court had explained the following concerning the plight of battered women: "A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse."[144] This statement, however thoughtful, did not appear to influence the court's opinion that self-defense was not present and prior bad acts of her abuser should be withheld.

> defendant will not be permitted to prove that the deceased was of dangerous, violent and quarrelsome character or reputation.

Id. at 751 (quoting Syl. Pt. 1, State v. Collins, 180 S.E.2d 54 (W. Va. 1971)). Since the court determined that the evidence did not indicate the presence of self-defense, the court pointed to syllabus point two of the opinion concerning the giving of jury instructions, which reads: "Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." *Id.* at 753 (quoting Syl. Pt. 4, *Collins*, 180 S.E.2d at 54).

139 *Id.* at 752.

140 *Id.* at 751 (citing Commonwealth v. Grove, 526 A.2d 369, 372-73 (Pa. Super. Ct. 1987)).

141 *Id.* at 751 (citing *Grove*, 526 A.2d at 372-73).

142 *Id.*

143 *Id.* at 752 (quoting *Grove*, 526 A.2d at 372-73).

144 *Id.* at 751 (quoting *Grove*, 526 A.2d at 372-73). The full text of the Pennsylvania Superior Court's analysis of its ultimate conclusion that self-defense was not present reads as follows:

> We find that self-defense was not properly at issue because there was no evidence presented to establish that appellant reasonably believed that she or any other person was in imminent danger of death or serious bodily injury on the present occasion when the deadly force was used. In reaching this conclusion we are mindful of the unique questions and considerations which arise in cases involving intra-familial, and especially intra-spousal, violence or abuse. In the context of a claim of self-defense by a battered spouse, our Supreme Court has explained: "A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse."

Id. at 751 (quoting *Grove*, 526 A.2d at 372-73).

4. *State v. Riley*

Less than a year after deciding *Smith*, the West Virginia Supreme Court of Appeals addressed another non-confrontational self-defense claim by a battered woman who killed her abuser in *State v. Riley*.[145] This *per curiam*[146] opinion concerned the alleged error of the trial court, among other alleged errors, that, because the defendant had a history of abuse by the deceased, she should have been allowed to further develop her theory of the BWS as a defense.[147] The record of the case indicates a history of abuse.[148] Though the defendant stated that the abuse was "infrequent," she testified that the deceased was "nasty" and verbally abused her "so bad you would be afraid that he might use his fist on you."[149] She also testified to an episode where the deceased threw a knife into the wall near the defendant's head.[150] The defendant testified that, shortly before she shot the decedent, the decedent slapped her in the face.[151] Then, when the defendant left the room to lie down, the decedent "entered the room and repeatedly threw [her] cat across the room."[152] Thereafter, the abuser called the emergency services and informed them that the defendant had shot him.[153] The abuser subsequently died from the gunshot wound.[154]

The trial court refused to give a self-defense instruction to the jury because it determined that no evidence of self-defense existed.[155] Interestingly, on appeal, the defendant did not assign error to this ruling.[156] Given the above-mentioned analysis in *Smith*, however, it is both unfortunate and not surprising that the defendant did not do so. The court's strict interpretation of the male-oriented concept of self-defense shows the discrimination and unfairness that results in such cases involving battered women who strike back against their abuser. The defendant utilized the services of an expert psychologist, who testified that the defendant was "a classic battered spouse" that had suffered physical and emotional abuse by the deceased and her former husband.[157] The lower

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145 State v. Riley, 500 S.E.2d 524 (W. Va. 1997).

146 *See supra* note 116.

147 *Riley*, 500 S.E.2d at 527.

148 *Id.* at 528.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 527.

154 *Id.*

155 *Id.* at 528 n.2.

156 *Id.*

157 *Id.* at 528. The record indicates that she was married to her former abusive husband for twenty-nine years. *Id.* The expert psychologist testified that battered spouses, even after an abu-

court allowed the expert to testify as to those limited facts on which his medical conclusions were based, but noted that any other hearsay evidence could not be used as direct evidence of the decedent's past abusive acts.[158]

The West Virginia Supreme Court of Appeals, in reflecting on its previous decisions, noted that the BWS evidence has been found admissible in West Virginia for three purposes on behalf of a criminal defendant.[159] The court stated those three purposes as follows:

> First, [evidence of the BWS] can be used to determine the defendant's mental state where self-defense is asserted.[160] Second, it can be used to negate criminal intent.[161] Finally, in *State v. Wyatt*, we discussed the potential use of the battered spouse syndrome "to establish either the lack of malice, intention, or awareness, and thus negate or tend to negate a necessary element of one or the other offenses charged."[162] The discussion in *Wyatt*, however, was rather cryptic, and was neither expounded upon nor elevated to the syllabus.[163]

The court, in affirming the trial court's decision, noted that the trial court allowed the defendant to present "substantial evidence" on the issue of the BWS.[164] Concerning the defendant's alleged error of the trial court in refusing to allow the admission of certain testimony of others as to prior bad acts by the deceased, the court stated the following: "Conferring the right of introduction of evidence upon a defendant . . . does not translate into authority to engage in an unlimited foray into the issue [of the BWS]. The court still possesses the right to limit the testimony; when it becomes duplicative, the court may refuse to accept additional witnesses."[165]

5. *State v. Whittaker*

In its most recent decision, the majority opinion of the West Virginia Supreme Court of Appeals in *State v. Whittaker* made all too clear the power of trial courts to limit or prohibit the admission of certain evidence put forth on

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sive relationship ends, continue to find themselves in further abusive relationships and "feel unable to break free from that abuse." *Id.* at 528 n.3.

158 *Id.* at 530.

159 *Id.* at 530 n.6.

160 *See* State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979).

161 *See* State v. Lambert, 312 S.E.2d 31, 35 (W. Va. 1984).

162 State v. Wyatt, 482 S.E.2d 147, 159 (W. Va. 1996).

163 State v. Riley, 500 S.E.2d 524, 530 n.6 (W. Va. 1997).

164 *Id.* at 530.

165 *Id.*

behalf of a battered woman who claims self-defense after killing her abuser.[166] Once again, the drafter of the majority opinion hid behind the *per curiam* veil in announcing its decision against the battered woman.[167]

The defendant in *Whittaker*, a woman who suffered about ten years of abuse at the hands of her boyfriend, was charged with first degree murder after she shot her boyfriend inside her home.[168] Over the course of the couple's relationship, the defendant, on many occasions, tried to obtain refuge from the abuse for herself and her daughter[169] at various places, such as her pastor's house, her aunt's house, and at a local battered women's shelter.[170] The defendant also secured four separate domestic violence petitions against her boyfriend.[171] The abuse by the boyfriend to both the defendant and her daughter consisted of "hitting, yelling, threats of death and bodily harm, throwing them across the floor, torturing and eventually killing [the daughter's] pet cat and pet rooster in front of her, and stalking."[172] In addition to seeking the four protective orders, the defendant tried to end the relationship with her boyfriend and the continuing violence in other, non-lethal ways, such as moving to various places.[173] The defendant and her daughter sought refuge from the boyfriend at a local women's shelter on numerous occasions, staying there anywhere from two days to three months at a time.[174]

On the day of the shooting, the defendant and her daughter went to a scheduled doctor's appointment, where afterwards they were threatened in the parking lot by the boyfriend who was there waiting for them to exit the doctor's

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166 State v. Whittaker, 650 S.E.2d 216 (W. Va. 2007).

167 *Id.*

168 *Id.* at 222.

169 The daughter, who was nine years old at the time of the incident, was the child of both the defendant and the deceased boyfriend. *Id.* at 221 & n.2.

170 *Id.* at 221.

171 *Id.* According to the record, three of the four protective orders were never served on the boyfriend. *Id.* at 221-22. At the time of the boyfriend's death, one of the protective orders was still pending. *Id* at 222. Defendant requested that the first protective order be dismissed and she failed to appear at the final hearing of another. *Id.* at 222 n.4. Importantly, though the majority recognized that the defendant caused two of the protective order petitions to be dismissed, it also recognized that "fear of retaliation by [the boyfriend] may have motivated [the defendant] to permit the dismissal of these filings." *Id.* at 232 n.20.

172 *Id.* at 221 n.3.

173 *Id.* at 222. On one such move, the defendant purchased a mobile home and moved it beside her parents' house, but the boyfriend left his home and moved in with her anyway. *Id.* Later, the defendant and her daughter left the home and stayed at a hospital so they could be protected by security. *Id.* Over time, the hospital personnel told them to go to a woman's shelter. *Id.* The record states that during the defendant's stay at the woman's shelter, the county sheriff's department tried to serve the boyfriend with a domestic violence petition, but was unsuccessful. *Id.* The record also states that the boyfriend had knowledge of the petition. *Id.* After leaving the shelter, the defendant and her daughter stayed at her aunt's house. *Id.*

174 *Id.* at 222 n.5.

office building.[175] After driving to various places, the three of them returned to the defendant's home.[176] When they entered the home, the boyfriend picked up the nine-year-old daughter by her hair and her shirt and, as the defendant testified, "rolled her . . . across the floor like [a] bowlin[g] ball."[177] Fearing what the boyfriend would do next, the defendant picked up the boyfriend's .38 caliber revolver from a kitchen cabinet and fired one shot.[178] The shot, made from seventeen feet away from the boyfriend, hit him between the eyes, killing him instantly.[179] According to the record, the defendant then panicked and placed a shotgun in the deceased boyfriend's hand to aid her self-defense claim.[180] She then called the police.[181]

The defendant was then charged with first-degree murder.[182] At the close of her trial the jury found her guilty of voluntary manslaughter and sentenced her to ten years in prison.[183] The defendant then appealed, arguing, among other things, that the jury erred in not acquitting her based on self-defense and that the court erred in limiting the testimony of her defense witnesses.[184] In affirming the trial court's ruling, the West Virginia Supreme Court of Appeals held that sufficient evidence existed to deny the defendant's motion for acquittal.[185]

Whitaker is all-too-recent proof of the inadequacies of the traditional self-defense laws in West Virginia and how those inadequacies unfairly prosecute those battered women who fall through the cracks of an ineffective government system and who resort to self-help when the current government system

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175 *Id.* at 222.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.* at 222, 224.

180 *Id.* at 222.

181 *Id.*

182 *Id.* at 223.

183 *Id.*

184 *Id.* at 221, 223. Unfortunately, defense counsel did not raise the issue of defense of others in the defendant's motion for a directed verdict. *Id.* at 226. This is surprising given the defendant's testimony that she shot the boyfriend right after he abused their nine-year-old daughter because the defendant was afraid of what he would do next. *Id.* at 222. Due to defense counsel's failure to raise this claim in the defendant's motion for a directed verdict, the West Virginia Supreme Court of Appeals did not address whether the evidence supported such a claim for the defendant. *Id.* at 226 n.16.

185 *Id.* at 233. Among the evidence presented by the State was that the defendant knew the location of the gun in the home; the defendant shot the boyfriend between the eyes from seventeen feet away, even though she testified that she never used the gun before; the defendant had to walk through the boyfriend's blood in order to retrieve the shotgun that she placed in the deceased boyfriend's hand; and the defendant gave varying statements to police about the shooting. *Id.* at 224-25.

fails them.[186] The West Virginia court system failed the defendant in this case because the battered woman was forced to use the traditional defense of self-defense and the evidentiary limitations that went with it. These evidentiary limitations, as the court termed "inadmissible hearsay," precluded the defendant from fully developing her claim of self-defense because she was not able to relay to the jury through certain witnesses "the full extent of abuse she had suffered" at the hands of her abuser.[187] Her witnesses included a pastor of a church where the defendant and her daughter tried to find relief from the abuse and the defendant's two aunts, one of which had provided shelter to the defendant and her daughter during the days just prior to the shooting.[188] These witnesses were prohibited from testifying as to what the defendant told them concerning the abuse the defendant had received from her boyfriend, even though some of the defendant's statements were made just days before and on the day of the shooting.[189] The State, on the other hand, was allowed to admit into evidence statements that the defendant made to police officers, though the statements were not "recorded to preserve her exculpatory comments."[190] The prohibitions placed on the admissibility of the defendant's out-of-court statements proving abuse, coupled with the free admissibility of the defendant's out-of-court statements to police officers, makes clear the sheer unfairness of the traditional defense of self-defense's burdens of proof and how the current evidentiary rules exacerbate those burdens.[191]

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[186] As stated previously, the battered defendant in *Whitaker* sought four separate protective orders against her boyfriend, two of which were withdrawn by her action or inaction—most likely due to threats from the boyfriend if the petitions continued. *Id.* at 221-22, 232 n.20. The county police department was unsuccessful in serving one of the four protective order petitions on the boyfriend, although the boyfriend had knowledge of the petition. *Id.* at 222. The defendant moved residences multiple times to avoid the boyfriend and the inevitable abuse, but to no avail. *Id.* Hospital personnel directed her out of the hospital and to a local woman's shelter after the battered woman and her young daughter sought shelter and protection there. *Id.* The woman stayed at the shelter on multiple occasions, staying from two days to three months at a time. *Id.* at 222 n.5. Still, the abuse continued. The evidence clearly shows that the system failed the battered woman and her nine-year-old daughter. The woman sought non-lethal relief through the system numerous times, only to be spit back into society where her abuser was waiting. The abuser was free, his victim was not. After ten years of abuse and numerous failed attempts at legal relief, what did society expect her to do when the abuser picked up her young daughter by the hair and shirt and threw her down the hall? How did society expect her to react to continued beatings and threats of death and great bodily harm to herself and her daughter? Now, because the failed system left a battered woman to fend for herself, the abuser is dead and the failed system sent the abused victim to prison.

[187] *Id.* at 227.

[188] *Id.* at 227-29.

[189] *Id.*

[190] *Id.* at 231.

[191] The evidentiary analysis in *Whitaker* illuminates both the unfairness of the current system and the majority's and concurrence's ignorance of the circumstances surrounding battered women. The majority stated the defendant's burden under the current defense of self-defense as follows: "In order to prove that she shot [the boyfriend] in self-defense, [the defendant] would also need to

The majority opinion openly, but emptily, recognizes the plight of a battered woman in the legal system.[192] Though the majority rules against the battered woman and upholds her prison sentence, it "remain[s] deeply troubled by the facts underlying this case."[193] The majority plainly admits that, "[s]imply put, our law enforcement/criminal justice system utterly failed" the defendant and her daughter.[194] However, recognition of a perpetual problem in the legal system, without more, will not set free the battered women defendants, the true victims in these cases. Lastly, the court concluded, without proposing a solution, such as the restructuring of the state's defense of self-defense or evidentiary rules to properly and fairly handle battered women cases, that pawning off the domestic violence problem onto the other branches of government was a better solution: "Although our decision of this case stands firm, we nonetheless wish to renew our continuing commitment to ensuring the safety, security, and

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establish that she had had an abusive relationship with [the boyfriend] in which he was the aggressor." *Id.* at 228. Once the majority laid down this rule, it then proceeded to deny the defendant the opportunity to put forth evidence proving the existence of an abusive relationship and the defendant's state of mind in that relationship. *Id.* at 228-29. In an abusive relationship, it is common knowledge that the relationship centers on control. This control can take many forms, but can consist of physical, mental, emotional, financial, and social control. With the realities of the BWS facing the court for over twenty years, *see* State v. Steele, 359 S.E.2d 558, 563 (W. Va. 1987), the court should be intimately aware that batterers greatly limit the contact their victims have with the outside world, including family members. A battered woman may have only a handful of people with whom she can communicate the abuse, such as family members and clergy persons, as was seen in this case. Given this reality, to exclude the testimony of the few persons with whom the battered woman has been able to discuss the abuse, is to effectively deny the abused victim a claim of self-defense. If the burden falls on the abused to put forth evidence of the abuse in a traditional self-defense claim, but the abuser severely limits his victim's access to admissible mediums for proving that abuse and the court prohibits the only real evidence of abuse (the defendant's out-of-court statements to family and clergy persons in pursuit of shelter from the abuse) but allows the admissibility of the defendant's out-of-court statements to police, then a battered woman has no hope of successfully proving self-defense under the current evidentiary rules and traditional self-defense laws.

192 *Whitaker*, 650 S.E.2d at 232-33.

193 *Id.* at 232. The majority continued its solution-less recognition of the problem surrounding self-defense cases involving battered women by stating as follows:

> Under no circumstances do we condone vigilante justice. However, we sympathize with the plight in which [the defendant] found herself after her numerous attempts to seek help from law enforcement authorities were unsuccessful. [The defendant's] domestic violence petitions were not served on [the boyfriend], and, thus, they were not enforced. Simply put, our law enforcement/criminal justice system utterly failed [the defendant] and [her daughter]. Perhaps even more troubling, though, is the fact that [the defendant's] case is not an isolated incident; we previously have been asked to review the convictions of domestic violence victims who have felt the need to end the cycle of abuse by resort to whatever means were at their disposal.

Id. at 232-33 (quotation marks and citations omitted).

194 *Id* at 233.

dignity of victims of domestic abuse, and we encourage our coordinate branches of government to do likewise."[195]

Whitaker begs for reform of the current system where battered women are involved. In addition to the majority's empty recognition of the continuing problem, two dissenting justices put forth stinging opinions against the majority's analysis and ultimate holding.[196] Justice Albright's dissenting opinion states that, "[t]he majority demonstrates an inability to fully comprehend the underpinnings of the battered spouse syndrome by upholding, with minimal analysis, the trial court's evidentiary rulings."[197] The dissent convincingly argues that the defendant should have been allowed to put forth evidence of her out-of-court statements of abuse, and that denying her the right to do so "wrongly prevented [the jury] from hearing evidence that might have tipped the scales in favor of Appellant's affirmative defense that she was acting in self

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195 *Id.* at 233.

196 *Id.* at 233-36 (Albright, J., dissenting); *Id.* at 236 (Starcher, J., dissenting). Justice Maynard's concurring opinion, unconvincingly titled, "the rest of the story," makes clear that he truly does not understand the plight of battered women. *Id.* at 237 (Maynard, J., concurring). Unfortunately, his concurring opinion was the third vote necessary to uphold the battered defendant's conviction (3-2 decision). This clear lack of understanding or compassion is evident in his statement, as follows:

> My dissenting colleagues . . . would have you believe that the appellant was a battered woman who, after suffering mental and physical abuse by [the boyfriend] for ten years, shot him in self-defense and that because of certain rulings by the trial court, which were affirmed by the majority, she was prevented from offering evidence of that abuse. That is a preposterous and outrageous claim and is simply not what happened. The record in this case shows that [the defendant] shot and killed an unarmed man.

Id. Justice Maynard conveniently forgets that the boyfriend, who had been drinking at the time of the shooting, was armed with one of the most prevalent and effective weapons in battered women cases—his fists. It is unreasonable for anyone to require an abuser to have a firearm or other similar weapon in hand before a battered woman can defend herself. Such a statement by the concurring opinion shows ignorance of the battered woman's daily environment, as the abuser can just as easily kill his victim with his fists or a glass bottle than he could with a firearm or a knife. In addition, Justice Maynard's concurring opinion recognizes that the defendant had many opportunities to get away from her abuser on the day she shot him. *Id.* Again, this demonstrates the Justice's lack of understanding or recognition of the absolute control the abuser has over his victim. *See id.* at 233-34 (Albright, J., dissenting) ("Sadly, the paradigm presented by a battered spouse is an individual who is prevented by emotional or financial obstacles, or both, from permanently escaping the environs of the abusing spouse."). Justice Albright, in his dissenting opinion, answers this incorrect assumption of the battered woman's ability to freely leave the abusive relationship as follows: "Many lay people have difficulty comprehending why an act of violence was committed by a battered woman at a time when she may have seemingly had the opportunity to extricate herself from the situation. This societal misapprehension stems from an inability to fully grasp that, from the perspective of the battered wife, the danger is constantly immediate." *Id.* at 235 (Albright, J., dissenting) (citations omitted). Such incorrect beliefs of the circumstances surrounding battered women and their abusers, such as Justice Maynard's concurring opinion, place the rights of the abusers above those of their victims and hamper the progress of the West Virginia Supreme Court of Appeals in protecting the rights of battered women.

197 *Id.* at 233 (Albright, J., dissenting).

defense when she shot [her boyfriend]—the man who had inflicted both mental and physical abuse upon her for ten long years."[198] Such evidence of abuse is necessary to a battered woman's claim of self-defense because, "[o]nly when the jury has been permitted to hear and consider all of the factual information surrounding the incident, which includes a full history of prior threats and past beatings, can it properly evaluate whether the defendant had reasonable grounds to believe that she was in immediate danger."[199]

As the above analysis of the West Virginia cases makes clear, the West Virginia Supreme Court of Appeals has allowed evidence of the BWS for three distinct purposes,[200] but does not allow evidence of the battered woman's own out-of-court statements of past abuse, even if those statements were made on the same day as the killing.[201] The limitations placed on the admissibility of the battered woman's evidence, whether evidence of the BWS or previous acts of abuse, make the totality of admissible evidence highly insufficient in battered women cases when used in conjunction with the traditional defense of self-defense. As the following section discusses, evidence of both the BWS and prior acts of violence can only truly benefit a battered women's claim of self-defense when a Battered Women Defense is made available to her.

IV. ARGUMENT FOR ADOPTION OF THE BATTERED WOMEN DEFENSE IN WEST VIRGINIA

West Virginia needs to adopt a Battered Women Defense to adequately address self-defense claims by battered women who kill their abusers. As the previous section makes clear, West Virginia's adherence to its static self-

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198 *Id.* (Albright, J., dissenting). The dissent argues that the evidence of the defendant's out-of-court statements to her aunt made on the same day that the boyfriend was shot "clearly were not too remote to be relevant to Appellant's state of mind." *Id.*

199 *Id.* at 234 (Albright, J., dissenting). The dissent further argues that the majority "downplays the significance" of the defendant's out-of-court statements made to others at the time of the abusive incidences. *Id.* As the dissent explains, "[w]hat the majority overlooks . . . is that by preventing the jury from hearing these statements, the jury was denied information that was relevant to [the defendant's] mental state—evidence which was offered to explain her actions and tended to support her theory that she acted in self-defense." *Id.*

200 The three purposes for which the West Virginia Supreme Court of Appeals has allowed evidence of the BWS are as follows:

> First, [evidence of the BWS] can be used to determine the defendant's mental state where self-defense is asserted. Second, it can be used to negate criminal intent. Finally, in *State v. Wyatt*, we discussed the potential use of the battered spouse syndrome "to establish either the lack of malice, intention, or awareness, and thus negate or tend to negate a necessary element of one or the other offenses charged.

State v. Riley, 500 S.E.2d 524, 530 n.6 (W. Va. 1997) (citing State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979); State v. Lambert, 312 S.E.2d 31, 35 (W. Va. 1984); State v. Wyatt, 482 S.E.2d 147, 159 (W. Va. 1996)). *See supra* notes 159-163 and accompanying text.

201 *Whittaker*, 650 S.E.2d at 227-29. *See supra* notes 187-191 and accompanying text.

defense doctrine in such cases produces harsh and unfair results for the abused defendant. As this Part will discuss, the defense of self-defense is inadequate in these cases because of its foundation in a traditional, male-oriented setting. Adoption of a Battered Women Defense would alleviate this unfairness and would provide the court with a useful, nondiscriminatory standard with which to evaluate the battered woman's self-defense claim.

A. *Inadequacies of the Traditional Defense of Self-Defense in Battered Women Cases*

The statutory and common law in West Virginia does not adequately address the dilemma of women who fight back against their abusive partner. As a result, the traditional defense of self-defense is discriminatory toward women in domestic abuse situations and deprives them of the right to a fair trial. West Virginia, therefore, needs to adopt a new, separate defense—a narrowly tailored version of self-defense—for women in domestic violence situations.

As previously stated, the law of self-defense in West Virginia is as follows:

> [A] defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.[202]

Thus, a battered woman who strikes back against her abuser must meet the following requirements: (1) objective reasonableness, (2) subjective reasonableness, (3) imminent threat of death or serious bodily harm, and (4) proportionality of force against the imminent threat.[203] To support the battered woman's self-defense theory, the West Virginia Supreme Court of Appeals has held that she may offer evidence of the BWS.[204] Such evidence most frequently takes the form of expert testimony, and can be used "to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome."[205] The court has stated that the BWS evidence in self-defense cases will be used to determine the defendant's mental state.[206] This mental state goes to the subjective reasonableness re-

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202 State v. Headley, 558 S.E.2d 324, 328 (W. Va. 2001) (quoting State v. W.J.B., 276 S.E.2d 550, 553 (W. Va. 1981)).

203 *See id.*

204 *See* State v. Steele, 359 S.E.2d 558 (W. Va. 1987); State v. Riley, 500 S.E.2d 524 (W. Va. 1997).

205 Syl. Pt. 5, *Steele*, 359 S.E.2d at 558; Syl. Pt. 4, *Riley*, 500 S.E.2d at 524.

206 *See* State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979).

quirement of self-defense.[207] However helpful, this evidence does not go nearly far enough to bolster the battered woman's defense because it does nothing for the objective reasonableness, imminence, and proportionality requirements.

Theoretically, the BWS evidence should not only show, under the specific facts of a given case, why the battered woman's conduct was reasonable, but it should also prove that her actions were "necessary and proportionate by showing how the [woman] could perceive a threat of imminent danger in verbal threats alone, in a nondeadly [sic] attack from an unarmed spouse, or from a sleeping man."[208] When the battered woman can only use such evidence to determine her mental state, she is placed at a great disadvantage. This disadvantage is seen in each of the West Virginia cases analyzed above because *none* of the battered women attempting a defense of self-defense based on the BWS were successful at trial or on appeal. This unfortunate result is the product of strict interpretation of a discriminatory, out-dated, male-oriented version of self-defense that has little relation to the circumstances surrounding many abused women.[209] As one commentator stated, "One reason the resulting cases [of self-defense involving battered women] are difficult is that they do not fit neatly into the categories of good and evil drawn by the criminal law."[210] The continuing plight of battered women who must resort to the traditional notion of self-defense can be summarized as follows:

> American courts and criminal justice officials have a difficult time dealing with these cases because they often involve sympathetic defendants who cannot fairly be blamed for their conduct but who would have no defense if the law was strictly applied.[211]

Thus, a new, alternate, Battered Women Defense, similar to the traditional defense of self-defense, is necessary to properly account for those cases involving battered women.

B. Proposed Structure of the Battered Women Defense

The Battered Women Defense, narrowly tailoring the defense of self-defense and changing the gender of the actor, would read as follows:

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207 Rosen, *supra* note 15, at 41.

208 *Id.*

209 *See* Rosen, *supra* note 15, at 34 (stating that the traditional notion of self-defense and the requirements of the defense derived therefrom were originally developed for situations involving a man who kills another man of comparative size and strength during a single, threatened attack in order to protect himself or his family).

210 Rosen, *supra* note 15.

211 *Id.*

> A defendant who is not the aggressor and has, as a reasonable battered woman, reasonable grounds to believe, and actually does believe, that she is in imminent danger of death or serious bodily harm from which she could save herself only by using deadly force against her assailant has the right to employ deadly force in order to defend herself.[212] Under this standard, the reasonableness of the defendant's beliefs in the imminence of the danger of death or serious bodily harm and the need to use deadly force must be judged against both the defendant's own subjective beliefs and those of a reasonable battered woman in the same or similar circumstances.

In cases where evidence is submitted indicating that the defendant is a woman who has suffered a history of domestic violence and who suffers from the BWS, the defendant may properly use the defense of Battered Women Defense and is entitled to a jury instruction thereon. One main difference between the Battered Women Defense and the traditional defense of self-defense is the application of the objective reasonableness standard. The traditional defense of self-defense includes both a subjective and an objective standard of reasonableness.[213] However, a woman suffering from the BWS cannot be judged by a traditional objective standard of reasonableness because her abusive environment has altered her mental state.[214] The proper utilization of expert testimony on the BWS requires analysis under a subjective standard of reasonableness.[215]

Even though a strictly subjective standard would greatly improve a battered woman's defense, however, it may lead to results contrary to public policy. Specifically, if the objective standard of reasonableness is completely removed and replaced with a standard that relies solely on what the specific battered woman subjectively believed during the event in question, the court risks encouraging conduct that may have otherwise been erroneous and entirely unnecessary.[216] Therefore, both a subjective reasonableness standard and a narrowly tailored "objective" reasonableness standard are needed in battered women cases to remove this harmful possibility. This narrowly tailored "objective" reasonable person standard would become an otherwise reasonable person who suffers from the BWS standard, or a "reasonable battered woman" stan-

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212 The structure of this proposed defense is based on the language of the traditional defense of self-defense as used by the court in *State v. Headley*. State v. Headley, 558 S.E.2d 324, 328 (W. Va. 2001) (citing State v. W.J.B., 276 S.E.2d 550, 553 (W. Va. 1981)).

213 DRESSLER, *supra* note 13, at 222.

214 *See* State v. Wyatt, 482 S.E.2d 147, 159 (W. Va. 1996) (stating that the West Virginia Supreme Court of Appeals recognizes Battered Women's Syndrome as "a particularized version of post-traumatic stress disorder, of which . . . rape trauma syndrome is another example").

215 Rosen, *supra* note 15, at n.170.

216 *See id.* at 21.

dard.[217] As one commentator notes, there is strength in favor of such a standard of evaluation because "[o]nly then can a jury fully evaluate the reasonableness of the defendant's actions."[218] Thus, the proper application of the Battered Women Defense would require analysis under both a subjective reasonableness standard and a narrowly tailored "reasonable battered woman" standard.

1. The Battered Women Defense Would Allow an Expanded View of the Traditional Imminence Requirement

Requiring evaluation under a "reasonable battered woman" standard, as opposed to the traditional, male-oriented "objective" standard, would greatly improve a battered woman's opportunity to convince the jury that her actions in killing her abuser were necessary in light of the perceived imminent threat imposed on her by her abuser.[219] This expanded view of imminence would allow a battered woman to present a viable claim of self-defense, using the Battered Women Defense, in both confrontational and non-confrontational cases.[220]

The Supreme Court of Washington, in *Washington v. Wanrow*, used a subjective reasonableness standard and took an expanded view of the imminence requirement.[221] The court addressed a claim of self-defense by a woman who, though not abused or battered by her child-molesting "victim," nonetheless had knowledge of her "victim's" reputation for aggressive acts based on events that occurred long before the shooting occurred.[222] One of the errors committed by the trial court at issue was the giving of a jury instruction on self-defense which directed the jury to consider the events occurring "at or immediately before the killing."[223] The court, in reversing the woman's conviction and remanding for a new trial, held that the jury instruction was contrary to Washington's law of self-defense and that "the justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing."[224] Interestingly, the language of the jury instruction that was held invalid in that case is very similar to the language of self-defense used by the West Virginia Supreme Court of Appeals. Specifically, the language of the jury instruction that was held invalid is stated as follows:

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217 Shad, *supra* note 30, at 1173; *see also* Schopp et al., *supra* note 13, at 100-01.

218 Shad, *supra* note 30, at 1173.

219 *See id.* at 1175.

220 *See id.* at 1173.

221 State v. Wanrow, 559 P.2d 548, 556-57 (Wash. 1977), *superseded by statute on other grounds*, as stated in Lewis v. State, 139 P.3d 1078 (Wash. 2006).

222 *Wanrow*, 559 P.2d at 550, 557.

223 *Id.* at 555.

224 *Id.* (emphasis in original).

> To justify killing in self-defense, . . . *there must be, or reasonably appear to be, at or immediately before the killing, some overt act, or some circumstances* which would reasonably indicate to the party killing that the person slain, is, *at the time, endeavoring to kill him or inflict upon him great bodily harm.*[225]

West Virginia's similar law on self-defense is stated, in part, as follows:

> In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that *the deceased was at the time of the killing, making a murderous attack upon the defendant*, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him . . . .[226]

Thus, though West Virginia does allow the defendant to prove the character or reputation of the deceased and to prove prior bad acts by the deceased, the defense can *only* do so if there is evidence of a murderous attack by the deceased "*at the time of the killing*."[227] This requirement, in effect, precludes any successful claim of self-defense by a battered woman in all non-confrontational cases and any confrontational case where the evidence does not adequately convince the court that a murderous attack by the deceased occurred at the time the defendant killed her abuser. This exclusion of crucial evidence seriously undermines and virtually destroys a battered woman's claim of self-defense where she reasonably believed, and a reasonable battered woman would believe, that she was in imminent danger of a murderous attack or serious bodily harm but failed to convince the court that her belief was "objectively reasonable."

The Washington court stated that the following rule was firmly established in self-defense cases: "[T]he jury is entitled to consider *all* of the circumstances surrounding the incident in determining whether [the] defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted."[228] The court then emphasized that this evidence would then be used by the jury in its evaluation of the "degree of force which . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows,

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225 *Id.* (emphasis added).

226 Syl. Pt. 2, State v. Louk, 301 S.E.2d 596 (W. Va. 1983) (emphasis added); Syl. Pt. 3, State v. Gwinn, 228 S.E.2d 533 (W. Va. 1982); Syl. Pt. 1, State v. Hardin, 112 S.E. 401 (W. Va. 1922).

227 Syl. Pt. 2, *Louk*, 301 S.E.2d at 596 (emphasis added); Syl. Pt. 3, *Gwinn*, 228 S.E.2d at 533; Syl. Pt. 1, *Hardin*, 112 S.E. at 401; *see also* State v. McClanahan, 454 S.E.2d 115, 118 (W. Va. 1994) ("[A]n apprehension of harm, to support a claim of self-defense, must be an apprehension existing at the time of the defendant's attack on the victim.").

228 *Wanrow*, 559 P.2d at 556 (citing State v. Lewis, 491 P.2d 1062 (Wash. Ct. App. 1971)) (emphasis in original).

then would believe to be necessary."[229] The Washington court then concluded that the jury instruction must make clear that "the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable."[230]

It is imperative that the West Virginia Supreme Court takes heed of the reasonableness standard utilized by the Supreme Court of Washington and adopt a similar standard. Such adoption should not take the form of a strictly subjective reasonableness standard, however, but must also include the standard of a reasonable battered woman. This standard would be similar to the reasonable woman standard advocated by the Washington court, except it would be tailored to cases involving women who are battered. Thus, a West Virginia jury would, in adding to the language quoted by the Washington court, consider all the facts and circumstances known to the defendant, including those circumstances occurring before the killing, when making its evaluation of whether a reasonable battered woman "in the same situation . . . seeing what [s]he sees and knowing what [s]he knows . . . would believe to be" a necessary degree of force.[231] The failure of the West Virginia Supreme Court to utilize such a standard in self-defense cases involving battered women not only constitutes discrimination under the law but also violates the battered woman's right to equal protection under the law.[232]

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229 *Id.* at 557 (citing State v. Dunning, 506 P.2d 321 (Wash. Ct. App. 1973)).

230 *Id.* at 558, *superseded by statute on other grounds*, as stated in Lewis v. State, 139 P.3d 1078 (Wash. 2006). *See also* State v. Painter, 620 P.2d 1001, 1003 (Wash. Ct. App. 1980) (confirming the proper use of the "subjective" test in self-defense cases is that "a defendant's actions are to be judged against his or her own subjective impressions and not those which a detached jury might determine to be objectively reasonable" and that a corresponding jury instruction must include "the essential element that the person using the force need only reasonably believe, in light of all the facts and circumstances known to him or her, that he or another person is in danger").

231 *Wanrow*, 559 P.2d at 557 (citing *Dunning*, 506 P.2d at 321).

232 *See id.* at 558, *superseded by statute on other grounds*, as stated in Lewis v. State, 139 P.3d 1078 (Wash. 2006). It is unfortunate that the male-oriented, objective reasonableness standard used by the lower Washington court and chastised by the Supreme Court of Washington is similar to the one used currently by the West Virginia Supreme Court of Appeals. The Supreme Court of Washington clearly and effectively articulated the error of the lower court in applying that male-oriented, objective reasonableness standard in self-defense cases involving women as follows:

> The [jury instruction in question] not only establishes an objective standard, but through the persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men. The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, *violates the respondent's right to equal protection of the law.* The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's "long and unfortunate history

2. The Battered Women Defense Must Be Categorized Under A Theory of Excuse, Not Justification

The other necessary distinguishing feature that must be present in the Battered Women Defense that is not present in the current analysis of self-defense is the reliance on the theory of excuse, rather than justification.[233] Under the current theory, "[j]ustified conduct is conduct that will be encouraged or, at least, tolerated under objectively identifiable circumstances that are not exclusive to the defendant."[234] This theory, however, is contrary to the use of the BWS testimony in self-defense cases. The entire purpose of expert testimony on the BWS in these cases is "to show why, under the particular circumstances of the case, the defendant's conduct was reasonable . . . ."[235] Again, as the West Virginia Supreme Court has held, evidence of the BWS is admissible "to determine the defendant's mental state where self-defense is asserted."[236] This individualized use of expert testimony on the BWS is thus contradictory to the objectivity standard underlying the theory of justification. The problems with categorizing self-defense under a theory of justification in cases involving battered women is summarized by one commentator as follows:

> Today, most American jurisdictions classify self-defense as a justification even though it traditionally developed as an excuse. As a result, principles of excuse have become merged with principles of justification in the law of self-defense. Consequently, results in some cases are illogical and inconsistent with basic principles of criminal law. The problem is particularly apt to arise when demands are made to justify self-help behavior that is harmful to society in instances where the actor cannot fairly be held blameworthy because of circumstances particular to that individual. Battered women who kill their abusers present the paradigm example of such cases. Although the defen-

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> of sex discrimination." Until such time as the effects of that history are eradicated, *care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination.* To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

Id. at 558-59 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)) (emphasis added).

233 *See* State v. Kirtley, 252 S.E.2d 374, 381 (W. Va. 1978) (stating that West Virginia has recognized that "the defense of self-defense constitutes a complete justification for a homicide"); Syl. Pt. 3, State v. Preece, 179 S.E. 524 (W. Va. 1935) (stating that self-defense is a justification for homicide).

234 Rosen, *supra* note 15, at 21-22.

235 *Id.* at 41.

236 State v. Riley, 500 S.E.2d 524, 530 n.6 (W. Va. 1997) (*per curiam*) (citing State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979)).

> dant's conduct is understandable, and absolving her from moral blame is not difficult, we are hesitant to proclaim that the act was justified and therefore to be encouraged.[237]

Self-defense as an excuse, on the other hand, "focuses on the actor's subjective perceptions."[238] Further, viewing self-defense as an excuse "allows the fact-finder to consider the whole individual and to evaluate whether, under the circumstances, her life experience enabled her to choose between criminal and noncriminal [sic] conduct. If her inability to choose was reasonable or understandable, she is not culpable."[239] Viewing the Battered Women Defense as an excuse would also accommodate the alteration of the current objective reasonableness standard to the narrowly tailored reasonable battered woman standard. Thus, categorizing the Battered Women Defense under a theory of excuse would more adequately accommodate the purpose of the BWS testimony and would more appropriately explain the rationale behind the battered woman's actions than does the current theory of justification.[240]

C. *Criticisms of the Battered Women Defense are Overestimated and Inaccurate*

It is conceded that adopting an excuse-based Battered Women Defense that makes use of a "reasonable battered woman" standard would bring criticism by some. One concern of commentators is that by focusing on the history of abuse and the psychological harm imposed on the battered woman, the jury will forget or overlook the rights of the abuser.[241] The argument is that such evidence may suggest that the abuser's right to life is somehow less important than the life of the battered woman.[242] Another concern of commentators is that relaxing the standards of self-defense to properly account for battered women in self-defense cases will encourage women in domestic violence situations to retaliate against their abusers without first seeking alternate, non-lethal methods.[243] This view was supported by the majority of the Supreme Court of North Carolina in *State v. Norman*.[244] The *Norman* majority believed that relaxing the

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237 Rosen, *supra* note 15, at 45-46.

238 *Id.* at 22.

239 *Id.* at 23. Specifically, the article noted that by including a particular psychological trait of a battered woman, such as expert testimony on the BWS, the court has taken the analysis closer to one of excuse than of justification. *Id.* at 42.

240 *See id.*; *see also* Shad, *supra* note 30, at 1174.

241 *See* Rosen, *supra* note 15, at 50.

242 *See id.*

243 *See id.* at 53.

244 378 S.E.2d 8 (N.C. 1989) (emphasis in original). For a detailed discussion of this case, see *infra* Part IV.E.

traditional requirements of self-defense in cases involving battered women would have the following result:

> The relaxed requirements for perfect self-defense . . . would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.[245]

A final criticism is that, under a slippery slope theory, the relaxation of the objective self-defense standard in cases involving battered women could lead to relaxation of the standard in "*any type of case* in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat."[246]

These criticisms, however, are overestimated and are inaccurately based on a theory of justification where only a subjective standard of reasonableness is used. Though a battered woman who successfully argues her case under the excuse-based Battered Women Defense would be granted an acquittal, the court would not be holding that her actions were justified or encouraged under the law.[247] It follows, then, that just because a court in one instance excuses the actions of a battered woman based on an examination of the totality of the circumstances in that particular case does not mean that a future person, woman or man, would be given an automatic legal right to kill another who finds herself or himself in the same or similar situation.[248] In addition, limiting the use of the Battered Women Defense to only those women who have a history of abuse and who exhibit symptoms of the BWS would greatly reduce the number of women who could utilize the defense and actually be granted an acquittal.[249] One commentator, who advocated the adoption of an excuse-based self-defense theory, explained the following rationale for why battered women should be excused while others should not:

> Because [a] defendant responded to internal and external coercive pressures, for which she was not responsible but which were created by her social reality as a battered woman, she is not to blame for her conduct. A person who did not suffer from

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245 *Id.* at 15.

246 *Id.* at 16.

247 *See* Rosen, *supra* note 15, at 55.

248 *See id.* at 32.

249 *See id.* at 43.

battered woman syndrome, however, would be culpable under identical external circumstances.[250]

In addition, just because a woman claims to be battered, kills her husband, and claims the Battered Women Defense, does not mean that she will be acquitted. She will still have to put forth sufficient evidence to satisfy both the subjective reasonableness and the more objective "reasonable battered woman" requirements. If the defendant fails to show either that a reasonable belief of an imminent threat of death or serious bodily injury existed or that a reasonable belief in the proportionality of force used against the imminent threat existed, then a conviction would surely follow.[251] Thus, adoption of an excuse-based Battered Women Defense would not justify the woman's conduct as right and proper and would not create the risk of judicially authorized homicide as critics suggest.[252] It would, however, provide battered women who kill their abusive partners with a fair trial "without threatening important values promoted by the criminal law, such as the suppression of private retaliation and the sanctity of human life."[253]

D. *Hypothetical Situation Applying Current West Virginia Self-Defense Law*

The following hypothetical situation involving a battered woman is used to counter the above criticisms and to illustrate the pressing need for a change in the current self-defense law in battered women cases in West Virginia. The hypothetical situation is as follows: A 23-year-old woman has been married to a 34-year-old male for the past five years, and the couple has two young girls, ages four and two. During the first year of marriage, the woman's husband was generally kind to her but was often argumentative and bossy. During the second

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250 *Id.* at 43. The commentator further described the excuse-based self-defense theory and addressed critics' concern of a further reduction of the reasonableness requirement in other cases as follows:

> Excuse recognizes that, even though self-help may not be desirable and may harm society, such conduct often results from a person's understandable inability to choose an alternative course of action due to overwhelming external or internal pressures. Treatment of self-defense as an excuse accommodates the defensive needs of battered women . . . who act in subjectively reasonable fear given their social reality. It allows the fact-finder to consider the defender's subjective beliefs without risking the possibility that all bona fide defensive acts, no matter how objectively unreasonable, will be condoned by the criminal law. Concomitantly, it furthers the criminal law's goals of preserving life and discouraging self-help.

Id. at 56.

251 *See* Shad, *supra* note 30, at 1174.

252 *See* Rosen, *supra* note 15, at 54-56.

253 Rosen, *supra* note 15, at 17.

year, however, he became more and more domineering, constantly asking her where she had been and to whom she had spoken. During these confrontations, he would accuse her of cheating on him and would throw and break dishes, his beer bottles, and whatever small objects were within his reach. None of these objects were thrown directly at the wife, but it frightened her and the two young children. Each time she would truthfully deny his accusations, but with each denial he became more and more angry. At the end of the second year and into the third, the marriage became more hostile. The husband's jealous thoughts intensified and he refused to allow her to see any of her friends or to call her mother, with whom she was very close.

On one occasion, when he caught his wife talking to her mother on the telephone, he became furious, ripped the phone off the wall, and threw it across the room, nearly hitting their youngest daughter. He then slapped his wife in the face and said if he caught her on the phone again, he would cut her throat. After this event, the husband became more and more physical with his wife. If dinner was not cooked to his satisfaction or if he believed the house was not straightened as it should be, he would slap or strike her. During the latter part of the third and into the fourth year of marriage, the oldest child, then three, began to shy away from her father and to become scared when he entered the room. The wife noticed that the child's underwear was sometimes soiled and there was often redness around the child's private parts. When the wife inquired to the husband what would cause this, he became infuriated, denied any knowledge as to the cause, and began repeatedly beating his wife. He said that if she ever mentioned the subject again, he would tie her up, kill their daughters in front of her, and cut her throat.

Thereafter, cursing, yelling, and beatings were a daily occurrence. The wife attempted to contact friends or family, but each time she was caught and beaten more severely. On one occasion, she found the car keys her husband had hidden from her and drove herself and her two daughters to her mother's house to escape her abusive husband. She knew she could not contact the police because if her husband found out she had reported his behavior he would surely kill her, their daughters, and possibly her mother. The next morning, while her mother was away at the store and she was playing with her daughters in her mother's yard, her husband pulled up in his truck, got out, struck his wife in the face, and yelled hysterically at her for leaving him. He put their daughters into the truck, grabbed his wife by the hair, and threw her into the passenger seat of the truck. He threatened that if she ever left the house again he would torture and kill her, their daughters, and her mother for helping her escape. When they arrived at their home, he took the children to their room and closed the door. He then dragged his wife into the basement and tied her to a chair, stating that now she would never be able to escape again.

For the next several days, the husband kept his wife tied in the basement. When her mother inquired as to her whereabouts, her husband replied that she was ill and could not receive visitors. He would bring his wife table scraps in the family dog's food bowl and left the dog's water bowl in front of

her to drink. He would then go back upstairs and lock the basement door. When he came down to visit her, he often told her their girls thought she had abandoned them. He informed her that the oldest daughter, now four, gave him more sexual enjoyment than she ever did. After beating and raping his wife, he would sit for hours and mock her. The wife noticed that the husband had a key on a string around his neck. He saw her staring at it and told her that it was the basement door key, his assurance that she would not desert him again. The wife, after enduring this torture for days, was frantically concerned about the well-being of her daughters. She didn't know what her husband was doing to them or even if they were still alive.

On one later occasion the husband again came down to "visit" her. This time she could tell he had been drinking heavily. He said that she would not be in the basement much longer, because he was growing tired of walking down the basement stairs. He said that death would be much better for her. He then proceeded to beat her more violently than he ever had, knocking her unconscious. When she awoke, she realized that her pants and underwear had been removed and she felt sharp pain throughout her body. She looked to her right and saw her husband slumped down in a chair beside her. He was sound asleep, snoring loudly. She noticed the basement key hanging around his neck. She also noticed that the rope that tied her hands together was slightly loosened. She figured that it must have become loosened during the beatings and because her husband was drunk he must not have noticed.

She then realized her chance of escape. She wiggled the ropes until her wrists were free, untied herself, quietly walked up the basement steps, and tried to turn the doorknob. The door was locked. She then remembered the key. She returned to where her husband was sleeping. She tried to find a way to remove the key from around his neck without waking him, but could not do so. She knew she had to act quickly because her husband would soon awake and she knew this was her only chance to escape and rescue herself and her daughters. She frantically searched the basement to find something to cut the chain without waking her husband. She found an old metal pair of scissors and went over to her sleeping husband. She tried to cut the chain, but was unsuccessful. She knew that if he awoke and found her untied he would surely kill her and possibly kill their daughters if he hadn't already. She tried one more time to cut the chain and when she pulled on it, her husband, though still asleep, moved in the chair making a grunting noise. This movement and noise startled her, so she thrust the point of the metal scissors into her sleeping husband's neck, killing him. She then grabbed the key, ran up the stairs, unlocked the door, and called for her young daughters. She found them sound asleep in their beds. Though she did not thoroughly examine them, they did not appear to have been beaten or starved. She quickly gathered them up and drove to her mother's house.[254]

[254] For those readers who may feel that the facts of this hypothetical are too graphic, unreasonable, and outlandish to be humanly possible, please read the facts contained in State v. Norman, 366 S.E.2d 586 (N.C. App. 1988), *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989). *See*

Soon afterwards, the wife was charged with the murder of her husband. At trial, the battered defendant sought a defense under West Virginia's current, traditional, male-oriented self-defense law, as it was the only self-defense law available to her. However, this case involved a non-confrontational homicide. The trial court, therefore, did not allow her theory of self-defense to go to the jury because her husband was asleep at the time of the killing, indicating that she was not "under an apprehension of danger existing at the time she [killed] her husband . . . ."[255] Because the trial court ruled that self-defense was not a

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also infra Part IV.E. (providing a detailed discussion of the *Norman* case). The facts of that unfortunate and frustrating case are more graphic and appalling that this simple hypothetical, and represents the possible, real-world, vicious, inhumane treatment of a battered woman at the hands of her cowardly, vile husband over a twenty year period. *Norman*, 366 S.E.2d at 586.

[255] *See* State v. McClanahan, 454 S.E.2d 115, 118 (W. Va. 1994) ("[A]n apprehension of harm, to support a claim of self-defense, must be an apprehension existing at the time of the defendant's attack on the victim."); Syl. Pt. 6, State v. McMillion, 138 S.E. 732, 733 (W. Va. 1927) ("No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot."); State v. Riley, 500 S.E.2d 524, 528 n.2 (W. Va. 1997) (*per curiam*) (noting that the trial court "found no evidence of self-defense and refused to give an instruction regarding self-defense" even though female defendant testified regarding a history of abuse from the deceased); State v. Smith, 481 S.E.2d 747, 751 (W. Va. 1996) (*per curiam*) (upholding the trial court's denial of a self-defense instruction because, even though female defendant testified to episodes of abuse, including one the morning before the shooting where the deceased struck defendant's head against the side of her mobile home and threatened to kill her, "there was no evidence presented to establish that appellant reasonably believed that she or any other person was in imminent danger of death or serious bodily injury *on the present occasion when the deadly force was used*" against her sleeping live-in boyfriend) (emphasis added).

In an even more shocking example of a West Virginia trial court's refusal to give a self-defense instruction, see State v. Headley, 558 S.E.2d 324, 327 (W. Va. 2001). *Headley* involved a battered woman who killed her husband during a violent confrontation. *Id.* The defendant physically fought with her abuser, who threw the defendant on the ground, punched her face and head, from which she received injuries, including a broken nose and severe bruising to her face, arms, and feet. *Id.* She tried unsuccessfully to escape and managed her way into the kitchen and grabbed a knife. *Id.* She told her abuser to stay away, but he said he wasn't afraid and then came toward her and began pushing her. *Id.* She then stabbed him and tried to call the police. *Id.* Her abuser then pulled the telephone out of the wall, hit her with it, and threw the phone across the room. *Id.* Her abuser then collapsed from the knife wound. *Id.* The trial court ruled that the defendant would not be allowed to introduce evidence in support of her self-defense theory. *Id.* The record outlines the result of the trial court's decision as follows:

> [The defendant] was not allowed to offer: (a) evidence of her prior history of domestic violence with [her abuser], (b) testimony from a domestic violence expert, and (c) jury instructions on the issue of self-defense. The State was permitted to offer testimony that while holding the knife, [the defendant] had threatened to kill [her abuser].

Id. The jury found her guilty of involuntary manslaughter and, in addition to her one-year jail sentence, ordered her to pay $187,209.29 in restitution for her abuser's medical bills. *Id.* The West Virginia Supreme Court of Appeals, in reversing the trial court's decision and remanding the case for an entry of a judgment of acquittal, went so far as to chastise the Wood County Circuit Court for its failure to allow the defendant to properly pursue a defense of self-defense. *Id.* at 328-29. The Court further stated its concern as follows: "This omission is especially troubling in

jury issue, given that threats from a sleeping husband do not create "reasonable grounds" of "imminent danger of death or serious bodily injury,"[256] the defendant was excluded from presenting any evidence of (1) the deceased's character or reputation as a dangerous person, (2) any prior attacks by the deceased on the defendant, and (3) any prior threats or specific violent acts on any other persons,[257] including alleged acts of sexual misconduct against her two young daughters, by the deceased.[258]

The defendant was, however, allowed to introduce limited evidence of the BWS by an expert witness. The trial judge, with an obvious bias, stated that he did not particularly like evidence of the BWS because he did not "really think there [was] such a thing" as the BWS.[259] However, because the West Vir-

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this case because the jury specifically asked during its deliberations whether self-defense was an issue." *Id.* at 328 n.3.

256 *See Smith*, 481 S.E.2d at 751 (upholding the trial court's denial of a self-defense instruction because "there was no evidence presented to establish that appellant reasonably believed that she or any other person was in *imminent danger of death or serious bodily injury* on the present occasion when the deadly force was used" against her sleeping live-in boyfriend) (emphasis added). *See also* Rosen, *supra* note 15, at 50.

257 The corresponding law in West Virginia for the use of such evidence in self-defense cases is stated as follows:

> In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that *the deceased was at the time of the killing, making a murderous attack upon the defendant*, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof.

Syl. Pt. 1, State v. Riley, 500 S.E.2d 524 (W. Va. 1997) (*per curiam*); Syl. Pt. 2, State v. Louk, 301 S.E.2d 596 (W. Va. 1983); Syl. Pt. 3, State v. Gwinn, 288 S.E.2d 533 (W. Va. 1982); Syl. Pt. 1, State v. Hardin, 112 S.E. 401 (W. Va. 1922) (emphasis added). The corresponding law in West Virginia for the exclusion of such evidence where self-defense is not found to be present, as in this hypothetical, is stated as follows:

> When in a prosecution for murder the defendant relies upon self-defense to excuse the homicide and the evidence does not show or tend to show that the defendant was acting in self-defense when he shot and killed the deceased, the defendant will not be permitted to prove that the deceased was of dangerous, violent and quarrelsome character or reputation.

Syl. Pt. 2, State v. Riley, 500 S.E.2d 524 (W. Va. 1997) (*per curiam*); Syl. Pt. 1, State v. Collins, 180 S.E.2d 54 (W. Va. 1971).

258 *See Smith*, 481 S.E.2d at 751 (noting that, in a case involving a woman who shot her sleeping live-in boyfriend while he slept, the trial court granted the state's motions in limine to exclude, among other things, any references to alleged sexual abuse of the defendant's daughter by the deceased).

259 *See* State v. Wyatt, 482 S.E.2d 147, 157 (W. Va. 1996) (noting that, during pretrial proceedings, the Raleigh County Circuit Court judge stated that he "did not 'really think there is such a thing' as battered women's syndrome").

ginia Supreme Court had previously held that such expert testimony on the BWS is admissible "to explain the psychological basis for the battered woman's syndrome and to offer an opinion that the defendant meets the requisite profile of the syndrome,"[260] the trial judge felt he had no other choice than to admit such evidence. The trial judge ruled that because such evidence had to be admitted, it would only be used to determine the defendant's mental state.[261] During the trial, this evidence was presented to show why the defendant thought her actions in killing her husband were reasonable, but it did nothing except hurt her case under the objective standard of reasonableness requirement. How could she be objective while tied, naked, tired, sore, and hungry in her own basement? How could she think like an objectively reasonable person after being repeatedly raped and beaten by her abusive husband? How could she remain objectively reasonable while taking advantage of her one chance to free herself from her captor and tend to her young daughters? Nevertheless, under the current law of self-defense in West Virginia, though her actions may have been subjectively reasonable,[262] they were definitely not objectively reasonable.[263] Thus, the defendant's attempt to defend her actions on grounds of self-defense failed and she was convicted of murder.

On appeal, the court upheld the conviction because the trial court properly applied the current law in West Virginia on self-defense. This author has no dispute that the hypothetical trial court properly applied West Virginia's current law on self-defense in the hypothetical situation. This author insists, however, that such law is highly discriminatory. West Virginia should not allow the possibility for such a completely unfair and preposterous result. The abusers in these cases do deserve protection under the law, but at what cost? West Virginia's current law on self-defense puts the rights of the individual abuser above the personal safety and bodily integrity of those beaten at the abuser's hands. This result cannot and should not stand. Such an unfair result would not occur if West Virginia adopted an excuse-based Battered Women Defense. This defense, narrowly tailored to a reasonable battered woman, would properly confront the specific and delicate circumstances surrounding battered women's self-defense cases, more adequately accommodate the purpose of the BWS testimony, and more adequately explain the rationale behind the battered woman's

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260 Syl. Pt. 5, State v. Steele, 359 S.E.2d 558 (W. Va. 1987).

261 *See* State v. Dozier, 255 S.E.2d 552, 555 (W. Va. 1979) (indicating that evidence of the Battered Women Syndrome could be admissible in self-defense cases to determine the defendant's mental state).

262 The subjective reasonableness test in the defense of self-defense in West Virginia is found in the language "a defendant who . . . *actually does believe*, that he is in imminent danger of death or serious bodily harm . . . ." State v. W.J.B., 276 S.E.2d 550, 553 (W. Va. 1981) (emphasis added).

263 The objective reasonableness test in the defense of self-defense in West Virginia is found in the language "a defendant who . . . *has reasonable grounds to believe* . . . that he is in imminent danger of death or serious bodily harm . . . ." *Id.* (emphasis added).

actions. In addition, because any acquittal under the Battered Women Defense would be categorized under a theory of excuse, the court's holding would ease societal fears that the homicide was deemed proper or justified.

E. State v. Norman *Should Not Stand in West Virginia*

As cited previously in this Note, the most compelling example of the need for an excuse-based Battered Women Defense incorporating the "reasonable battered woman" standard is seen in the North Carolina decision *State v. Norman*.[264] Unfortunately, the strict application of perfect self-defense law in that case, still the current law of North Carolina, [265] parallels the application of self-defense law in West Virginia.[266] In reading the following appalling facts of the *Norman* case, it is important to understand that if this or a similar case was brought before a West Virginia court strictly applying current, traditional self-defense law, the same tragic result would surely occur.[267]

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[264] State v. Norman, 366 S.E.2d 586 (N.C. App. 1988), *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

[265] *See Norman*, 378 S.E.2d at 13 ("[O]ur law of self-defense . . . require[s] that a defendant claiming that a homicide was justified and, as a result, inherently lawful by reason of perfect self-defense must establish that she reasonably believed at the time of the killing she otherwise would have immediately suffered death or great bodily harm.").

[266] *Compare id.* ("[A] defendant claiming that a homicide was justified . . . by reason of perfect self-defense must establish that she reasonably believed at the time of the killing she otherwise would have immediately suffered death or great bodily harm"), *with* State v. McClanahan, 454 S.E.2d 115, 118 (W. Va. 1994) ("[A]n apprehension of harm, to support a claim of self-defense, must be an apprehension existing at the time of the defendant's attack on the victim."), *and* Syl. Pt. 6, State v. McMillion, 138 S.E. 732 (W. Va. 1927) ("No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot.").

[267] *Compare Norman*, 378 S.E.2d at 13 ("The evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was 'imminent' or about to happen to the defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head. The defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, *all* of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband."), *with* State v. Riley, 500 S.E.2d 524, 528 n.2 (W. Va. 1997) (*per curiam*) (noting that the trial court "found no evidence of self-defense and refused to give an instruction regarding self-defense" even though female defendant testified regarding a history of abuse from the deceased), *and* State v. Smith, 481 S.E.2d 747, 751 (W. Va. 1996) (*per curiam*) (upholding the trial court's denial of a self-defense instruction because, even though female defendant testified to episodes of abuse, including one the morning before the shooting where the deceased struck defendant's head against the side of her mobile home and threatened to kill her, "there was no evidence presented to establish that appellant reasonably believed that she or any other person was in imminent danger of death or serious bodily injury *on the present occasion when the deadly force was used*" against her sleeping live-in boyfriend) (emphasis added).

The defendant in *Norman*, a battered woman, was subjected to a barrage of physical, verbal, and psychological abuse from her alcoholic, abusive husband for twenty years.[268] A few years into the marriage, when the defendant was pregnant with the couple's youngest child, her husband beat her and kicked her down a flight of stairs.[269] The following day, as a result of this violence, the baby was born prematurely.[270] The husband did not work; instead, in order to gain an income for himself, he forced his wife to prostitute herself.[271] If she did not make a minimum of one hundred dollars each day from her forced prostitution or if she pleaded to her husband to stop making her perform those acts, then he would beat her.[272] This practice occurred every day for years and lasted until her husband's death.[273] The Court of Appeals of North Carolina described *part* of the abuse as follows:

> [Her husband] commonly called defendant "Dogs," "Bitches," and "Whores," and referred to her as a dog. [Her husband] beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. Defendant exhibited to the jury scars on her face from these incidents. [Her husband] would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.[274]

The defendant's husband threatened to cut her heart out, told her in front of another person that he would "cut her breast off and shove it up her rear end," and often said to both her and others that he would kill her.[275]

A day and a half before the shooting, the defendant's husband again forced her to prostitute herself at a truck stop to make money.[276] Her husband

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268 State v. Norman, 366 S.E.2d 586, 587 (N.C. App. 1988), *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.*

274 *Id.*

275 *Id.* at 587-88.

later, while drunk, went to the truck stop, beat his wife there, slammed the car door into her, and threw hot coffee on her.[277] He was arrested on the return home for DUI and, when released from jail the next day, he again beat, slapped, and threw glasses, ashtrays, and beer bottles at his wife, and later smeared a sandwich in her face that she had made for him.[278] That evening, a police officer came to their house because of a report received about a domestic dispute at the home.[279] The responding officer testified that "defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer."[280] When told by the officer that she should file a warrant against her husband, she said that she could not because her husband would kill her.[281] The officer returned to the home shortly after this conversation because of another report received.[282] The events occurring from this second report were stated as follows:

> [D]efendant had taken an overdose of "nerve pills," and . . . [her husband] was interfering with emergency personnel who were trying to treat defendant. [Her husband] was drunk and was making statements such as, "If you want to die, you deserve to die. I'll give you more pills," and "Let the bitch die . . . . She ain't nothing but a dog. She don't deserve to live." [Her husband] also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased [her husband] into the house. Defendant was taken to [the hospital].[283]

On the day of her husband's death, he was more violent and angry than usual.[284] He beat the defendant all day, slapped her, poured a beer on her head,

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276 *Id.* at 587.

277 *Id.* at 587-88.

278 *Id.* The appalling incident involving the sandwich was stated in the court record as follows:

> [Her husband] asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; [her husband] again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. [Her husband] took the third sandwich and smeared it in defendant's face.

Id. at 588.

279 *Id.*

280 *Id.*, *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.*

kicked her in the side of the head while she was driving, threatened to cut her throat, threatened to kill her, threatened to cut off her breast, smashed food in her face, and put out a cigarette on her chest.[285] Later that day when her husband went to the bedroom to take a nap, the defendant went in also and tried to lie down on one of the beds in the room.[286] Her husband told her, "No bitch . . . Dogs don't sleep on beds, they sleep in [sic] the floor."[287] Then, one of the defendant's daughters asked her if she could watch her baby.[288] She did so but, when the child began to cry, she took it to her mother's house out of fear that the crying would bother her husband.[289] While at her mother's house, she found a pistol.[290] She then proceeded with the pistol to her own home, where she shot her sleeping husband.[291]

At the defendant's trial for the murder of her husband, the court refused to instruct the jury on self-defense.[292] The defendant was convicted of voluntary manslaughter.[293] The Court of Appeals of North Carolina reversed the trial court's decision and remanded the case, stating that, because the evidence was sufficient to send the self-defense question to the jury, the defendant was entitled to a self-defense instruction.[294] The court of appeals attempted to justify its conclusion by merging the facts of the case into the strict mold of traditional self-defense. In so doing, however, the court relied exclusively on the defendant's own perceptions and the theoretical mental state of a spouse suffering from Battered Spouse Syndrome to overcome the subjective and objective reasonableness requirements and the imminence requirement of self-defense.[295] As

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285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.*

292 State v. Norman, 378 S.E.2d 8, 16 (N.C. 1989).

293 *Id.*

294 State v. Norman, 366 S.E.2d 586, 592 (N.C. App. 1988), *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

295 *Id.* at 591. Defendant's testimony pertaining to the reasonableness of her actions was stated as follows:

> Defendant testified that things at home were so bad she could no longer stand it. She explained that she could not leave [her husband] because he would kill her. She stated that she had left him before on several occasions and that each time he found her, took her home, and beat her. She said that she was afraid to take out a warrant on her husband because he had said that if she ever had him locked up, he would kill her when he got out. She stated she did not have him committed because he told her he would see the authorities coming for him and before they got to him he would cut defendant's throat. Defendant also testified that when he threatened to kill her, she believed he would kill her if he had the chance.

one commentator noted, the use of such evidence by the court of appeals to satisfy the objective reasonableness and imminence requirements amounted to the employment of a "reasonable battered woman" standard.[296] That standard, however, did not fit into the traditional objective standard used by North Carolina and was thus improper. The court erred when it attempted to fit the reasonable battered woman standard into a justification-based, traditional, male-oriented version of self-defense. Even though the idea behind such a move is noteworthy, it is not a proper application of the law. To be a proper application of the law, the court must adopt a new form of self-defense, a Battered Women Defense, and then apply the reasonable battered woman standard to that defense. Unfortunately, however, because of the court of appeals incorrectly applied North Carolina's self-defense law, its decision was overturned and the defendant's conviction was reinstated by the Supreme Court of North Carolina.[297]

The Supreme Court of North Carolina's decision, though resulting from a proper application of North Carolina's self-defense law, should be an obvious and glaring example to every state utilizing a similar self-defense law, including West Virginia,[298] that the application of such a traditional, male-oriented self-

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Id.

296 *See* Shad, *supra* note 30, at 1169.

297 State v. Norman, 378 S.E.2d 8, 16 (N.C. 1989). The Supreme Court of North Carolina chastised the court of appeals' incorrect application of North Carolina's self-defense law and voiced continued approval of the outdated law as follows:

> The reasoning of our Court of Appeals in this case proposes to change the established law of self-defense by giving the term "imminent" a meaning substantially more indefinite and all-encompassing than its present meaning. This would result in a substantial relaxation of the requirement of real or apparent necessity to justify homicide. Such reasoning proposes justifying the taking of human life not upon the reasonable belief it is necessary to prevent death or great bodily harm—which the imminence requirement ensures—but upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat.
>
> . . . .
>
> . . . [W]e decline to expand our law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified and, thus, lawful by reason of perfect self-defense . . . .

Id. at 15-16.

Fortunately for the defendant in *Norman*, however, though the harsh, punitive judicial system did not offer her sympathy, the executive department did come to her aid. "On July 7, 1989, three months after the North Carolina Supreme Court's decision reinstated Mrs. Norman's conviction, North Carolina Governor James G. Martin commuted her sentence and ordered her release from prison . . . . Mrs. Norman had served two months in prison." *See* Shad, *supra* note 30, at n.24 (citing Ruffin, *Battered Wife Released From Prison*, THE NEWS & OBSERVER (Raleigh), July 8, 1989, at A1, col. 1).

298 It is important to note here an important distinction between North Carolina's and West Virginia's self-defense laws. North Carolina employs two forms of self-defense—perfect self-

defense law to cases involving battered women is unacceptable, unfair, discriminatory, and should not remain current law in those cases. One commentator discussed the resulting decision in *State v. Norman* and the obvious need for changes in North Carolina's self-defense law as follows:

> There is no question that the North Carolina Supreme Court's decision in *State v. Norman* is a correct application of the existing law. That this is true illustrates how inadequately traditional rules of law are equipped to resolve the problem of domestic violence, and exemplifies the need for changes in the law that will recognize the impact of battered woman syndrome on its victims and ensure more equitable treatment of cases involving battered women.[299]

The decision of the Court of Appeals of North Carolina, though later overruled by the Supreme Court of North Carolina, made the following important observations into the plight of battered women and the need for an accommodation of battered women in self-defense cases:

> Mindful that the law should never casually permit an otherwise unlawful killing of another human being to be justified or excused, this Court is of the opinion that with the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act

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defense and imperfect self-defense. State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989). Imperfect self-defense is defined in North Carolina as follows:

> [I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

State v. Wilson, 285 S.E.2d 804, 808 (N.C. 1982) (quoting State v. Norris, 279 S.E.2d 570, 573 (N.C. 1981)). West Virginia does not recognize imperfect self-defense. Because West Virginia's sole version of self-defense is very similar to North Carolina's version of perfect self-defense, this author will limit the discussion of North Carolina's law to its version of perfect self-defense and not imperfect self-defense.

299 Shad, *supra* note 30, at 1177.

> in self-defense. Such a standard, in our view, would ignore the realities of the condition.[300]

Likewise, West Virginia should no longer "ignore the realities of the condition" of battered women.[301] A judicial outcome such as *State v. Norman* should never have occurred, but was inevitable under North Carolina's strict law of self-defense. Unfortunately, a similar result is certain to occur under West Virginia's current, traditional self-defense law unless immediate change is made. The need for the adoption of an excuse-based Battered Women Defense in West Virginia is thus evident and long overdue.

V. CONCLUSION

Domestic violence is a serious problem in West Virginia and the United States in general, especially against women. Many women suffer abuse as part of their daily lives. On occasion, however, a battered woman strikes back against her abusive partner. A few of these cases result in the death of the abuser at the hands of the abused, usually occurring during a lull in the violence. This lull may be the only available opportunity that the battered woman has in defending herself from further abuse, serious injury, or death when the lull inevitably ends. When the battered woman does act, however, she faces a harsh, punitive judicial system that is unresponsive to the plight of battered women. If she is to gain acquittal for her reasonable actions, she must utilize a discriminatory, unmodified, traditional, male-oriented version of self-defense. She may also use expert testimony on the BWS to show the subjective reasonableness of her actions. However, because self-defense in West Virginia also requires an objective standard of reasonableness and because a woman subjected to years of verbal, physical, and psychological abuse no longer reacts to her environment as an objective reasonable person, her self-defense claim must fail.

West Virginia should no longer accept such a harsh, unfair, static result. West Virginia should not force a battered woman who protects herself against her abuser to seek acquittal through a traditional, male-oriented version of self-defense. As the above examination of West Virginia's self-defense cases involving battered women makes clear,[302] application of West Virginia's current self-defense laws inevitably fail the battered women defendants, no matter how compelling the circumstances.

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300 State v. Norman, 366 S.E.2d 586, 592 (N.C. App. 1988), *overruled by* State v. Norman, 378 S.E.2d 8 (N.C. 1989). The court further justified its position by stating that, based on the evidence of abuse before the court, a jury "could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense." *Id.*

301 *Id.*

302 *See* discussion *supra* Part III.B.

West Virginia should, therefore, adopt an excuse-based version of self-defense, entitled, "Battered Women Defense." Battered Women Defense would be a narrowly tailored version of the traditional law of self-defense, except that it would contain a "reasonable battered woman" standard instead of the traditional objective reasonableness standard. This "reasonable battered woman" standard would lower the objectivity standard to that of a reasonable woman suffering from the BWS, while not relying entirely upon that particular woman's subjective perceptions to gain an acquittal. Evidence of a history of abuse and expert testimony on the BWS would be introduced to prove whether the defendant's conduct satisfied both the subjective reasonableness and reasonable battered woman standards. Altering the traditional justification-based law of self-defense to an excuse-based Battered Women Defense would remove societal fears that such conduct would be accepted or encouraged by the courts. The new, narrowly tailored law would not justify the defendant's conduct as valid. Instead, it would give the court a useful, nondiscriminatory self-defense standard to use in performing a case-by-case evaluation of whether the battered woman defendant's conduct was, under the specific circumstances of the particular case, understandable and, thus, excused from punishment.

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