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Domestic Homicides: The Continuing Search for Justice

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DOMESTIC HOMICIDES: THE CONTINUING SEARCH FOR JUSTICE

CAROLINE FORELL*

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I. INTRODUCTION

Domestic homicides include killing an intimate partner¹ out of jealous rage, and killing a batterer out of fear and despair. How the criminal law treats these different kinds of domestic homicides continues to challenge our sense of justice. In this Article, I first address the injustice that the partial defense of provocation for domestic homicides currently presents. I then discuss why eliminating or modifying the defense will continue to be problematic so long as mandatory sentencing persists. I next turn to the recent developments in Australian states, where experimentation in this area continues. I describe and analyze Australia's continuing debate over how the criminal law should respond to different kinds of domestic homicides. Finally, I examine the most recent sweeping change to American criminal defense law: Stand Your Ground/Castle laws such as

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¹ Domestic homicides also frequently involve the killing of an intimate partner's lover. See *infra* notes 17-19, and accompanying text.

Florida's law.² I suggest that American lawmakers should consider enacting a modified version of a recent Australian provision by amending the modern Castle laws to provide a presumption of self-defense for domestic violence survivors who kill their batterers in their homes or vehicles.

II. WHAT'S WRONG WITH PROVOCATION

Professor Aya Gruber provides the latest major U.S. academic contribution to this area in her 2014 article, "A Provocative Defense."³ There she (in her own words) "provocatively"⁴ argues that in the United States this defense, in its current form, functions fairly for all forms of domestic homicide. Gruber suggests further that I, and others who voice dissatisfaction with American criminal law's status quo on provocation, are misguided. She charges that we are using "criminal punishment to express an anti-masculinity" message⁵ while disregarding the negative impact that changing or abolishing the provocation defense would have on young minority men "accused of non-intimate homicides and facing murder charges in one of the most punitive systems on earth."⁶

I respectfully disagree with Professor Gruber's claim that provocation functions fairly and with her portrayal of many of the critics of the current form of the provocation defense. Gruber describes such criticism in purely gendered terms. She says that critics believe provocation "gives male defendants a benefit they do not deserve (mitigation) and denies female

2. FLA. STAT. § 776.013 (2014).

3. See Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 273 (2015) [hereinafter Gruber, *Provocation*] (citing to four of my publications as examples of anti-male bias because I seek to distinguish between heat of passion killings and killing one's batterer. Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27 (2006) [hereinafter Forell, *Gender Equality*] (cited in Gruber, *Provocation* at 277 n.25, 293 n.142, 300 n.187, 310 n.253, 311 n.258, 313 n.272, 314 n.280, 315 n.284, 322 n.331); CAROLINE FORELL & DONNA MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000) [hereinafter FORELL, *A LAW OF HER OWN*] (cited in Gruber, *Provocation* at 292 n.135, 296 n.166, 323 n.377); Caroline Forell, *The Meaning of Equality: Sexual Harassment, Stalking, and Provocation in Canada, Australia, and the United States*, 28 T. JEFFERSON L. REV. 151 (2005) [hereinafter Forell, *The Meaning of Equality*] (cited in Gruber, *Provocation* at 297 n.169); Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597 (2004) [hereinafter Forell, *Homicide*] (cited in Gruber, *Provocation* at 290 n.128, 291 n.129, 291 n.147, 295 n.155, 324 n.345)).

4. Gruber, *Provocation*, *supra* note 3, at 273.

5. *Id.*

6. *Id.* at 312 (quoting Aya Gruber, *Murder, Minority Victims and Mercy*, 85 U. COLO. L. REV. 129, 185 (2014)).

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defendants a better disposition (acquittal).”⁷ However, my criticism of provocation, while highlighting the need for substantive equality by taking women’s experiences into account,⁸ is based on the degree of culpability of certain homicidal conduct *regardless* of gender. My concern is that the parallel use of provocation for domestic killings out of jealous rage and domestic killings out of fear of continuing physical violence is unfair and immoral. The unfairness is exacerbated in jurisdictions that have enacted the Model Penal Code’s more expansive and subjective Extreme Emotional Disturbance (EED) defense.⁹

There is a gender chasm when it comes to committing domestic homicide. Men commit many more domestic homicides than women¹⁰ and are much more likely than women to kill out of jealousy.¹¹ Furthermore, while most male homicide victims are not killed by intimates, most female victims of homicide are killed by husbands, lovers, ex-husbands, or ex-lovers.¹² Many of these men were batterers before they were killers.¹³ In contrast, most of the women who commit domestic homicides are domestic violence survivors.¹⁴

These gendered facts do not mean that it is anti-male to argue that some homicides deserve to be treated as murders while others do not, even if, in application, this means that more men than women who commit domestic homicide will be found to be murderers.¹⁵ Instead, critics such as myself

7. *Id.* at 314.

8. *See* Forell, *Gender Equality*, *supra* note 3, at 29-30.

9. *See id.* at 30; *see also* Carolyn Ramsey, *Criminal Law: Provoking Change: Comparative Insights on Feminist Homicide Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 83 (2010).

10. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 2283556, FEMALE VICTIMS OF VIOLENCE (2009) (“Females made up 70% of victims killed by an intimate partner in 2007, a proportion that has changed very little since 1993.”).

11. Donna Coker, *Heat of Passion and Wife Killing*, 2 S. CAL. REV. L. & WOMEN’S STUD. 71, 91 (1992); Margo J. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 206 (1992).

12. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT’L INST. JUST. J. 14, 18 (2003).

13. Many men who kill out of jealous rage are batterers whose past conduct makes it likely that they are a continuing danger to society and need to be incarcerated. *See* Coker, *supra* note 11, at 89; R. EMERSON DOBASH & RUSSELL P. DOBASH, *WHEN MEN MURDER WOMEN* 82 (2015).

14. CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 23-31 (1987); Wilson & Daly, *supra* note 11, at 206.

15. Furthermore, since men kill far more often than women, inevitably more men than women will be found guilty of murder. *See id.*

assert that different reasons for killing merit different legal responses. *Anyone* who kills another out of possessiveness and anger, where the other threatened no serious physical violence, should be guilty of the crime of murder.¹⁶

There is another fairness problem with current provocation law as applied in domestic homicide situations: collateral murders. Many men are also victims of domestic homicide by jealous men.¹⁷ Often the person killed out of jealousy and rage is not a female but instead is her male romantic partner.¹⁸ In fact, the original categorical provocation exception to murder was not available if a husband killed his wife but instead applied to his killing her lover.¹⁹ Today such killings continue to be far too common.²⁰ They may not be included in statistics on domestic homicide, but they result from the same inexcusable homicidal conduct that should be treated as murder, not manslaughter.

Others and I²¹ continue to search for a more just way for American criminal law to treat domestic killings. It is obvious what the law *should* do. Killing because of jealousy and possessiveness should be treated as murder regardless of the genders of the parties.²² In contrast, those who

16. The other set of provoked killings that should be murder are “gay panic” killings where the reason for committing homicide is that the victim, who was of the same sex as the killer, made non-violent sexual advances. This use of provocation has been shockingly common in Australia. Of the seventy-five people who successfully used provocation between 1990 and 2004 in New South Wales, eleven were “gay panic” cases. See Forell, *Gender Equality*, *supra* note 3, at 29-30 (quoted in Gruber, *Provocative*, *supra* note 3, at 313 n.272); KATE FITZ-GIBBON, HOMICIDE LAW REFORM, GENDER AND THE PROVOCATION DEFENCE: A COMPARATIVE PERSPECTIVE 153 (2014) [hereinafter, FITZ-GIBBON, HOMICIDE LAW REFORM]; see also *Lindsay v. The Queen*, [2015] 255 C.L.R. 272 (Austl.) (quashing a conviction for murder in a gay panic case). Today only two states, South Australia and Queensland, retain the “gay panic” basis for provocation.

17. See Forell, *Gender Equality*, *supra* note 3, at 28 (citing Jenny Morgan, Critique and Comment, *Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them*, 21 MELB. U.L. REV. 237, 256 (1997)).

18. See *id.*

19. See *R v Mawgridge* (1707) 84 ER 1107, 1114-15 (“When a man is taken in adultery with another man’s wife, if the husband shall stab the adulterer or knock out his brains, this is bare manslaughter: for jealousy is the rage of man, and adultery is the highest invasion of property.”).

20. See FITZ-GIBBON, HOMICIDE LAW REFORM, *supra* note 16, at 27 (reporting that three out of eighteen cases in New South Wales where a provocation defense was successful involved a man killing his estranged wife’s lover); see also, DOBASH, *supra*, note 13, at 254.

21. See, e.g., Ramsey, *supra* note 9.

22. Aya Gruber agrees: “I will fully accept the claim that sexist men who kill their partners are culpable for murder.” Gruber, *Provocation*, *supra* note 3, at 308.

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kill their batterers out of fear often should not be held criminally responsible, and when they are held criminally responsible, they should rarely be found guilty of murder. Such outcomes satisfy formal equality by treating like conduct alike for men and women. Murder convictions for jealous killers and acquittals for domestic violence survivors who kill out of fear also satisfies substantive equality by condemning the mostly male domestic homicides that are based on possessiveness and excusing the mostly female domestic homicides that are based on fear of death or serious injury.²³ Empirical evidence indicates that such outcomes comport with how social norms have been evolving²⁴ and history shows that the law's sympathy for people who kill out of jealousy is an aberration that developed in the early twentieth century and may no longer be the norm.²⁵ Our laws should reflect our values.

III. THE NEED FOR A PROVOCATION DEFENSE

In her article, Gruber defends retaining the current rules surrounding provocation because we live in a system where criminal law already is too punitive and brutal.²⁶ Gruber's criticism of America's criminal justice system is fair. Like her, I want American jurisdictions to end the current un-nuanced and overly harsh treatment of convicted killers and, in particular, to abandon draconian mandatory sentencing.²⁷

In many U.S. jurisdictions, a successful provocation defense that results in manslaughter carries a substantially shorter sentence than the jurisdiction's mandatory minimum sentence for murder²⁸ that is often a life sentence.²⁹ This presents a dilemma for those of us who seek to reform criminal law to ensure that domestic violence survivors who kill are treated justly, while at the same time eliminating the jealous heat of passion basis for a manslaughter verdict. Without the provocation defense those who kill their batterers and those who kill out of jealous possessiveness *both* risk lengthy murder sentences.³⁰ Furthermore, as Gruber notes, without the

23. See Forell, *Gender Equality*, *supra* note 3, at 29-30.

24. See *id.* at 36, 68 (examining jury preference for manslaughter over murder for domestic violence survivors who kill and jury preference for murder over manslaughter for killing out of jealousy).

25. See Ramsey, *supra* note 9, at 44.

26. See Gruber, *Provocation*, *supra* note 3, at 325.

27. See Forell, *Gender Equality*, *supra* note 3, at 44.

28. This is also true of the extreme emotion disturbance (EED) defense enacted in the minority of U.S. jurisdictions that follow the Model Penal Code. See *id.*

29. See Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241 (2011).

30. See *id.* at 1289.

provocation defense, other killers also face the overly punitive outcomes.³¹

People who kill their batterers are particularly deserving of a choice other than acquittal or murder. Whether male or female, at a minimum, they should be entitled to a partial defense and a shorter sentence, while also avoiding being labeled “murderers.” Moreover, domestic violence survivors who kill their batterers often should not be treated as criminally culpable at all. However, unless self-defense is modified to more accurately account for the impact of domestic violence on why people kill their abusers, a partial defense for such killers may still be needed to prevent the extreme injustice that can result when murder is the only option.³² For domestic violence survivors who kill, provocation provides a fallback. It is necessary because self-defense remains biased. The element of imminence³³ and the failure of assessments of reasonableness to comport with an understanding of the dynamics of family violence create persistent problems for people who kill their batterers out of fear. Thus, provocation is currently an important option when a domestic violence survivor is charged with homicide and may not meet a jurisdiction’s requirements for proving self-defense.³⁴

Mandatory sentencing and unenlightened self-defense laws continue to make revising or abolishing provocation undesirable.³⁵ Even those who kill out of jealousy and rage or for other indefensible reasons, and who therefore should be found guilty of murder, will not always deserve life

31. Gruber, *Provocation*, *supra* note 3, at 312.

32. See Simon, *supra* note 29, at 1282-83, 1296.

33. In contrast, imminence is not an element of self-defense in any Australian jurisdiction but a matter to be considered in determining whether the accused’s defensive force was necessary. See *Osland v The Queen* (1998) 197 CLR 316, 382 (Austl.); see also *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662 (Austl.) But see Elizabeth Sheehy et al., *Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand*, 34 SYDNEY L. REV. 467, 470-71 (2012) (“Furthermore, there have now been a series of cases involving battered accused where the Australian courts have been sensitive to the need to look past the question of imminent attack in deciding whether lethal defensive force was necessary in such cases.”).

34. Forell, *Gender Equality*, *supra* note 3, at 30, 60 (citing Rebecca Bradfield, *The Treatment of Women Who Kill Their Male Partners Within the Australian Criminal Justice System* 104-08 (2002) (unpublished Ph.D. thesis, University of Tasmania) (on file with the *American University Journal of Gender, Social Policy & the Law*).

35. Current law in the Australian state of Victoria now has no mandatory minimum sentence for murder, has abandoned the “imminence” requirement for self-defense; has abolished provocation; and attempts to educate jurors about family violence in domestic homicide cases. It will be interesting to see if this combination results in acquittals of more domestic violence survivors who kill and convictions for murder of men who kill out of jealousy. See discussion *infra*.

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sentences.³⁶ As I noted in my 2006 *Gender Equality* article: “Until judges are given greater discretion in sentencing, and the law and application of self-defense is more understanding of battered women’s situations, current provocation law, as applied, may be the best that it can be.”³⁷

Mandatory sentencing has frozen the law of provocation in the United States.³⁸ It is therefore not surprising that the lack of mandatory minimums in four out of six Australian states³⁹ is a critical factor that has made feasible their limiting or abolishing provocation and their experimentation with alternatives.⁴⁰

IV. AUSTRALIA’S REFORMS

Before discussing the potential for some domestic violence survivors who kill to use the popular but controversial American Stand Your Ground/Castle doctrine reforms, I examine Australian states’ most recent attempts to provide justice for both sets of domestic homicides. Australia’s ongoing struggle to find a satisfactory alternative to common law provocation demonstrates that getting the treatment of domestic homicide right, without unintended consequences, remains challenging and may require further experimentation.

Australia is an ideal legal laboratory. The geographical size of the United States, it has fewer than twenty-five million people living in its six

36. I agree with Aya Gruber on this point. See Gruber, *Provocative*, *supra* note 3, at 312; see also Marc Mauer & David Cole, Opinion, *How to Lock Up Fewer People*, N.Y. TIMES, (May 23, 2015), <https://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html?>

We could cut sentences for violent crimes by half in most instances without significantly undermining deterrence or increasing the threat of repeat offending. Studies have found that longer sentences do not have appreciably greater deterrent effects; many serious crimes are committed by people under the influence of alcohol or drugs, who are not necessarily thinking of the consequences of their actions, and certainly are not affected by the difference between a 15-year and a 30-year sentence. For the same conduct, the U.S. imposes sentences on average twice as long as those the British impose, four times longer than the Dutch, and five to 10 times longer than the French. One of every nine people in prison in the United States is serving a life sentence.

37. Forell, *Gender Equality*, *supra* note 3, at 68.

38. *Id.* at 42.

39. New South Wales, Victoria, Tasmania and Western Australia.

40. Mandatory minimums have explicitly been given as the reason why South Australia chose to retain common law provocation. See LEGISLATIVE REVIEW COMM., PARLIAMENT OF S. AUSTL., 53 PARLIAMENT, *Rep. of the Legislative Review Committee into the Partial Defence of Provocation* 9 (Comm. Print 2014).

states.⁴¹ The two states with the most people, Victoria and New South Wales, have fewer than six and eight million people respectively. It is therefore relatively easy to track all the domestic homicides in each state. In addition, the practice in most Australian states of relying on law reform commissions to guide the legislators in their law making is a helpful feature.⁴² One of the law reform areas that most Australian states have been actively engaged in for more than a decade is domestic homicide.⁴³ During that time Australia has become a leader in experimenting with alternatives to the traditional provocation doctrine.⁴⁴

In every Australian state, lawmakers have recently confronted, and responded to, the justice problems presented by the partial defense of provocation;⁴⁵ most have also modified their self-defense laws.⁴⁶ Furthermore, unlike the Stand Your Ground/Castle doctrine reforms enacted in the majority of American states,⁴⁷ the impetus for Australian states making changes in the criminal law affecting domestic homicides has been distinctly feminist.⁴⁸

In 2003, with almost no discussion, the small island state of Tasmania became the first common law jurisdiction in the world to abolish provocation.⁴⁹ In 2005, after a thorough consideration of various alternatives by the Victoria Law Reform Commission (VLRC), Victoria followed Tasmania's lead and abolished the provocation defense.⁵⁰ However, Victoria also created a lesser offense of defensive homicide,⁵¹ and amended its self-defense statute.⁵² The express reason for these additional changes was to help assure that the abolition of provocation

41. The populations are approximately as follows: Queensland (4.8 million), Tasmania (519,000), New South Wales (7.7 million), South Australia (1.7 million), Western Australia (2.6 million), Victoria (6.1 million). AUSTRALIAN BUREAU OF STATISTICS, <http://www.abs.gov.au> (last visited January 16, 2017).

42. See Forell, *Gender Equality*, *supra* note 3, at 52-53.

43. *Id.* at 49-50.

44. *Id.* at 50.

45. See FITZ-GIBBON, HOMICIDE LAW REFORM, *supra* note 16, at 91.

46. See *id.* at 93.

47. See Mary Ann Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, (2014) [hereinafter Franks, *Real Men Advance*]

48. See, e.g., Forell, *Gender Equality*, *supra* note 3, at 54 (examining Victoria's express purpose of helping battered women).

49. *Id.* at 56-58.

50. *Id.* at 57.

51. *Id.* at 55 n.154.

52. See *id.* at 56 n.159.

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would not mean that those who kill out of fear would be at greater risk of being held guilty of murder.⁵³ For the same reason, in 2009 Western Australia abolished provocation, replacing it with excessive (imperfect) self-defense.⁵⁴ It is no coincidence that all three of these states allow judicial discretion in sentencing. Neither murder nor manslaughter carries a mandatory minimum sentence;⁵⁵ this lack of mandatory minimums allows judges to tailor sentences that fit the situation.⁵⁶

Because of Tasmania's small population, it experiences very few homicides per year.⁵⁷ Therefore, more time will be needed before it is known whether Tasmania's abolition of provocation, without making other changes, has had its intended purposes of helping domestic violence survivors while condemning those who kill out of jealousy.⁵⁸ Similarly, Western Australia has not had a sufficient number of homicides since 2009 (when it abolished provocation) to provide meaningful data. In contrast, Victoria's population is large enough that, since its 2005 reform, there have

53. *See id.* at 54.

54. *See Criminal Law Amendment (Homicide) Act Num. Acts No. 29 2008 (W. A.) s 12 (Austl.)*. The only other common law jurisdictions to abolish provocation are New Zealand and, oddly enough, Texas. *See also Crimes (Provocation Repeal) Amendment Act 2009, ss 1-5 (N.Z.); S.B. 1067, 73rd Leg. Reg. Sess. (Tex. 1994)*. Since 1994, instead of heat of passion being a partial defense, Texas Penal Code § 19.02 expressly allows provocation to be raised in sentencing and if the defendant proves it by the preponderance of evidence, "the offense is a felony of the second degree." *But see TEX. PENAL CODE ANN. § 19.02 (West 2015)*. In reality, however, the level of sentencing if heat of passion is found in the sentencing phase is the same as it was when it was a partial defense to murder. Because of other aspects of Texas law, it was still possible for a jealous husband who killed his wife and injured her new partner to receive only four months in jail! CYNTHIA LEE, MURDER AND THE REASONABLE MAN 42-43 (2003) (discussing the *Watkins* case).

55. Paige Darby et al., *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, RESEARCH BRIEF NO. 8 (Parliamentary Libr. & Info. Serv. Dep't. of Parliament Serv., Vic, Austl.) July 2014, at 22-23 [hereinafter Darby, *Victoria Crimes Amendment 2014*].

56. Concerns have been raised about the consideration of provocation in sentencing as merely shifting victim blaming to another setting. *See FITZ-GIBBON, HOMICIDE LAW REFORM, supra* note 16, at 252-54.

57. *See Forell, Gender Equality, supra* note 3, at 58 n.170; *see also Darby, Victoria Crimes Amendment 2014, supra* note 55, at Appendix B.

58. Today provocation may be considered as a form of mitigation in the sentencing phase. *See Tyne v Tas [2005] 15 Tas. R. 221, (Ct. of Criminal App.) (Austl.)* If provocation is at issue, the accused has the burden of proving mitigating circumstances by the preponderance of evidence in the sentencing phase instead of the prosecution having to prove no provocation beyond a reasonable doubt prior to abolition of the defense in 2003. *See Darby, Victoria Crimes Amendment 2014, supra* note 55, at 19.

been a substantial number of homicides where defensive homicide was charged, including a few cases where women have killed their partners.⁵⁹ I therefore turn my focus to Victoria's 2005 law, what the post-reform reported cases have revealed, and the additional law reform that resulted in 2014.

A. Victoria

Like the partial defense of excessive self-defense/imperfect self-defense, defensive homicide requires that killers subjectively but unreasonably believe their actions are necessary to defend against death or "really serious injury."⁶⁰ From November 2005 (when the offense of defensive homicide first became available) through August 2013, it was successfully used twenty-eight times, both at trial and through plea-bargaining.⁶¹ In a stark example of unintended consequences, twenty-four of the twenty-eight killers who pled to or were found guilty of defensive homicide were men; only two of these cases involved intimates or former intimates.⁶² In

59. See Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at Appendix B.

60. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 3 (stating self-defense is available when the killer meets two elements: (1) believes her actions are necessary against the infliction of death or really serious injury, and (2) has reasonable grounds for holding that belief). For a description on an American version of imperfect self-defense, see *People v. Beltran*, 301 P.3d 1120, 1131 (Cal. 2013) (distinguishing imperfect self-defense from provocation). This partial defense is available in a minority of American jurisdictions. LEE, *supra* note 55 at 134-35 (2003).

Victoria chose to abolish provocation and enact defensive homicide as a separate offense instead of reinstating the partial defense of excessive self-defense that VLRC had recommended that also would similarly have resulted in manslaughter for killing out of unreasonable fear. Some commentators criticized this decision as leading to unnecessary complexity and confusion. See Oliver Milman, *Victoria Will Scrap 'Defensive Homicide' and Offer Simpler Test for Self-Defence*, THE GUARDIAN (June 22, 2014), <https://www.theguardian.com/world/2014/jun/22/victoria-will-scrap-defensive-homicide-and-offer-simpler-test-for-self-defence>; see also Kellie Toole, *Defensive Homicide on Trial in Victoria*, 39 MONASH U. L. REV. 473, 479 (2013) [hereinafter Toole, *Defensive Homicide*] (arguing that the separate offense limits transparency in the plea bargaining process). But see Ramsey, *supra* note 9, at 76 (describing the difference between excessive self-defense and defensive homicide as "mostly expressive."),

61. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 28 (Appendix B: Defensive Homicide Convictions).

62. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 28. One of the domestic homicides committed by a man was the killing the new lover of his former partner. *R v Edwards* [2008] Vict. Sup. Ct. 297 (Austl.). The other highly controversial case is *R v Middendorp*, where a man killed his female domestic partner. *R v Middendorp* [2010] Vict. Sup. Ct. 202. (Austl.). See *infra* note 72 and accompanying text.

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contrast, of the four women guilty of defensive homicide, three killed an intimate or former intimate.⁶³ Thus, defensive homicide led to pleas of, or convictions for, manslaughter (instead of acquittal or conviction for murder) mainly for men who committed nondomestic homicides against other men.⁶⁴

There was public outcry because the main use of defensive homicide was not by domestic violence survivors (the intended beneficiaries of the 2005 reform). News articles complained that habitually violent offenders had hijacked the new offense;⁶⁵ some academic commentators, most notably Professor Kate Fitz-Gibbon,⁶⁶ criticized it similarly.⁶⁷ In 2014, Victoria's legislature abolished defensive homicide, less than ten years after this new crime had been created.⁶⁸ As a result, Victoria, like Tasmania, now has no intermediate manslaughter option between acquittal and murder for intimate homicides. Instead, again like Tasmania, judges can now consider provoking conduct in the sentencing process after a conviction for murder and have the discretion to impose the sentence they deem appropriate.⁶⁹

The reasons defensive homicide was abolished in Victoria deserve

63. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 28.

64. Marie Virueda & Jason Payne, AUSTL. INST. OF CRIMINOLOGY, *Homicide in Australia: 2007-08 National Homicide Monitoring Program Annual Report* 25 (2010) (stating that men commit about eighty percent of homicides in Australia).

65. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 8 n.35.

66. See, e.g., *id.*, at 8 n.36-37; Kate Fitz-Gibbon, *Abolishing Defensive Homicide Will Benefit Female Victims and Offenders*, THE CONVERSATION (Oct. 3, 2013, 11:33 PM) <http://theconversation.com/abolishing-defensive-homicide-will-benefit-female-victims-and-offenders-18484>.

67. See Kellie Toole, *Self-Defense and the Reasonable Woman: Equality Before the New Victorian Law*, 36 MELB. U. L. REV. 250, 286 (2012) [hereinafter Toole, *Reasonable Woman*].

68. The Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 received Assent in September 2014. It took effect on November 2, 2014. VICTORIAN LEGISLATION AND PARLIAMENTARY DOCUMENTS, <http://www.legislation.vic.gov.au> (last visited February 15, 2016); see Darby, *Victoria Crimes Amendment 2014*, *supra* note 55.

69. Victorian judges use the "instinctive synthesis" approach to sentencing. See SENTENCE ADVISORY COUNCIL, SENTENCE APPEALS IN VICTORIA, SUMMARY PAPER, 3 (Aug. 2012):

Under the 'instinctive synthesis' approach set out in Australian common law and followed in Victoria, the sentencing judge must identify all the factors that are relevant to the sentence, discuss the significance of each factor and then make a decision as to the appropriate sentence given all the facts of the case. Only at the end of this process does the judge determine the sentence. While judges are encouraged to state the factors that they have taken into account in determining the sentence, they are discouraged from quantifying the precise weight given to any single factor.

further scrutiny. One concern leading to abolition was the belief that the players in the legal system were using it as a “catch-all” middle-ground offense for the purpose of plea deals.⁷⁰ As a result, in some cases the defendant might never have even asserted facts meeting the elements of defensive homicide but negotiated manslaughter in the process of plea-bargaining. A few trial outcomes also indicated that defensive homicide sometimes benefited male abusers the same way provocation had done before the 2005 reforms.⁷¹ The most cited example of this was Luke Middendorp who stabbed his petite female partner in the back and then successfully asserted a claim of defensive homicide at trial.⁷² Similarly, Kevin Roy Edwards pled guilty to defensive homicide after he killed his female ex-partner’s new lover in a typical “jealous killing” scenario.⁷³ These cases suggest that, in practice, the law’s treatment of male violence retained at least some of the pre-reform status quo in Victoria.⁷⁴

Another criticism of defensive homicide was that it relied on the premise that many domestic violence survivors who kill out of fear do so unreasonably; in reality, reasonable people might kill to protect themselves if faced with repeated violence.⁷⁵ Therefore, some claim that, like the use of Battered Women’s Syndrome, domestic homicide tends to pathologize battered women.⁷⁶ Instead, critics argued that it is often society’s lack of

70. Kellie Toole believes that it is what began to happen. Toole, *Defensive Homicide*, *supra* note 61, at 503; *see also* Asher Flynn & Kate Fitz-Gibbon, *Bargaining with Defensive Homicide*, 35 MELB. L. REV. 905, 931 (2011).

71. Elissa Hunt, *Defensive homicide law hijacked by career criminals, drug addicts and drunks*, HERALD SUN (Oct. 3, 2013, 10:00 AM), <http://www.heraldsun.com.au/news/law-order/defensive-homicide-law-hijacked-by-career-criminals-drug-addicts-and-drunks/news-story/2e57a435cbc4559c5e52927f582f8e85>.

72. Paul Anderson, *Girlfriend killer Luke John Middendorp loses appeal bids*, HERALD SUN (Mar. 22, 2012, 4:30 AM), <http://www.heraldsun.com.au/archive/news/girlfriend-killer-luke-john-middendorp-loses-appeal-bids/news-story/8b8e33228329f6cf7472ecceb874ed96>. For a detailed description of this case, *see* FITZ-GIBBON, *HOMICIDE LAW REFORM*, *supra* note 15, at 181-88.

73. Elissa Hunt, *Man who kicked ex-partner’s new boyfriend to death jailed*, HERALD SUN (Aug. 12, 2008, 10:00 AM), <http://www.heraldsun.com.au/news/victoria/jail-for-kicking-murder/story-e6frf7kx-111117182718>.

74. At least one “gay panic”/homosexual advance killing successfully pled defensive homicide *See* Toole, *Defensive Homicide*, *supra* note 61, at 497-98.

75. *See* Ramsey, *supra* note 9, at 35, 75-76.

76. *See id.* at 74; *see also* Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN’S RTS. L. REP. 213, 216-17 (1992).

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understanding of the dynamics and dangers of domestic violence that make it appear that the conduct was unreasonable when, in fact, it was reasonable under the circumstances.⁷⁷ As a result, defensive homicide was viewed as failing to remedy poor judge and jury understanding of family violence.⁷⁸

Commentator Kellie Toole closely examined the four domestic homicides committed by women in Victoria during the period from 2005, when defensive homicide became available, through 2012, two that were not prosecuted and two that resulted in the women being found guilty of defensive homicide.⁷⁹ She concluded that these cases indicated that, even for domestic violence survivors, defensive homicide was often not achieving the legislature's intended results.⁸⁰

The first two domestic homicides Toole examined were not pursued to a plea or conviction. "SB" killed her sexually abusive stepfather, making this case an atypical "domestic homicide" because the deceased was not a romantic partner but, instead, a parent. Although the charges initially included defensive homicide, prosecutors chose not to pursue the case.⁸¹ Eighteen-year-old SB had been sexually abused by the deceased on a near daily basis for years before she shot him.⁸² It is not surprising that prosecutors believed that a jury would refuse to convict her of anything. A few months later, Freda Dimitrovski killed her abusive husband with a knife after he hit her in the face and then attacked their daughter.⁸³ There was ample evidence of long-term domestic violence.⁸⁴ The trial court

77. See Toole, *Reasonable Woman*, *supra* note 67, at 286 (examining twenty-four cases of defensive homicide between 2006 and 2012; eighteen offenders were men who killed other men, two were women who killed men, and one, Luke Middendorp, was a man who killed his female intimate partner); see also Darby, *Victoria Crimes Amendment 2014*, *supra* note 55 (giving a later summary of the twenty-eight cases through August 2013 where defensive homicide was used before it was repealed.).

78. FITZ-GIBBON, *HOMICIDE LAW REFORM*, *supra* note 16, at 201-04.

79. Two more women were prosecuted for domestic homicides subsequent to Toole's article but before Victoria repealed this crime in 2014: Jemma Edwards who pled to defensive homicide of her husband in 2012 and Angela Williams who was convicted of defensive homicide of her husband in 2014. See *R v. Edwards* [2012] VSC 138 (Victoria Supreme Court) (Austl); see also *DPP. v Williams* [2014] VSC 304 (Victoria Supreme Court) (Austl.).

80. Toole, *Reasonable Woman*, *supra* note 67, at 250.

81. See *id.* at 267-268; see also Michael Turtle, *Charges Dropped against Teenager Who Killed Her Stepfather*, ABC LOCAL RADIO PM, (Mar. 27 2009, 6:26 PM), <http://www.abc.net.au/pm/content/2008/s2528412.htm>.

82. Michael Turtle, *supra* note 81.

83. Toole, *Reasonable Woman*, *supra* note 67, at 268.

84. *Id.* at 269.

dismissed the charges, which included defensive homicide.⁸⁵ In both of these cases defensive homicide was unnecessary because the women were able to show they acted in self-defense and therefore were legally guiltless.⁸⁶ For this reason, Toole argued that the existence of defensive homicide was not important for them:

Neither immediacy nor proportionality were at issue in either of the discontinued cases, and so neither is an example of a situation in which an abused woman has traditionally been disadvantaged.⁸⁷

In contrast to Toole, Victoria's Department of Justice concluded that the outcomes for SB and Dimitrovski showed that enacting defensive homicide provided a major improvement "to the criminal justice system in dealing with situations in which a woman kills in response to long-term family violence."⁸⁸

For the domestic homicides committed by Karen Black⁸⁹ and Eileen Creamer,⁹⁰ defensive homicide was clearly relevant. However, Toole argued that these cases demonstrated that the availability of this crime created more problems than it solved.⁹¹ Black killed her male live-in partner after both had been drinking and it became evident that he was going to rape her, as he had done before.⁹² Black and her son provided ample history of sexual abuse, physical abuse, control and threats.⁹³ However, during those same accounts, Black said her partner "was never physically violent towards [her]," and that she "could not justify what happened."⁹⁴ Black's conflicting testimony indicates that she may not have been willing to accept that the violence done to her was, in fact, violence. In the end, Black pleaded guilty to defensive homicide even though a jury might have reasonably found complete self-defense.⁹⁵ According to Toole, the availability of defensive homicide proved problematic here because

85. *Id.*

86. *Id.* at 270.

87. *Id.*

88. CRIMINAL LAW – JUSTICE STATEMENT, DEFENSIVE HOMICIDE: REVIEW OF THE OFFENCE OF DEFENSIVE HOMICIDE: DISCUSSION PAPER 32-33 (VICTORIA DEP'T OF JUSTICE 2010) (Austl.) [hereinafter DISCUSSION PAPER].

89. *See R v Black* [2011] VSC 152, 3 (Vic Sup. Ct.) (Austl.); *see also* Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 31.

90. *See R v Creamer* [2011] VSC 196, 1 (Vic Sup. Ct.) (Austl.); *see also* Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 31.

91. Toole, *Reasonable Woman*, *supra* note 67, at 271.

92. *Id.* at 272.

93. *Id.* at 272-73.

94. *Id.* at 275.

95. *Id.* at 278.

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women like Black may plead to this crime even though they have a good chance of succeeding on complete self-defense.⁹⁶ Black received a sentence of nine years in prison.⁹⁷

Toole may be right in Black's case, but it is often unclear that providing an intermediate option is necessarily bad for women who may (or may not) be able to prove complete self-defense. Whether to opt for a middle ground between acquittal and murder is a difficult calculus to assess and very fact specific. Furthermore, when there is sentencing discretion, as exists in Victoria, pleading to defensive homicide in a case where the killer is a domestic violence survivor and the victim was her abuser, may lead to a short or suspended sentence without going through the trauma of a trial where the outcome could be a murder conviction.⁹⁸

In the fourth case discussed by Toole, Eileen Creamer killed her estranged husband during a fight about their sexual relationship, and then initially denied her involvement.⁹⁹ The Creamers did not fit the usual pattern of a domestic violence relationship even though there was evidence that the deceased had previously hit Creamer.¹⁰⁰ It lacked both the control and isolation factors that might cause an abuse victim to see killing the abuser as the only way out. Specifically, the deceased was preparing to move away to remarry his first wife and Creamer had been living with another partner.¹⁰¹ The Creamers' open marriage and unconventional sexual conduct made it difficult to predict how a judge or jury might view Eileen Creamer. Thus, in Creamer's case, if she really was in danger, defensive homicide may have been a shield against harsh value judgments of Creamer's lifestyle.¹⁰² More problematic, however, defensive homicide may have allowed a woman who killed out of jealousy to plead to manslaughter even though murder was the more appropriate crime.¹⁰³

96. *Id.* (discussing the tendency of domestic violence victims to self-blame, to underestimate the danger of their situation, and to otherwise view their self-defense as not reasonable).

97. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 31.

98. It is not clear whether they would have done better without it from the very few cases involving women who killed their intimates and were found guilty of manslaughter based on defensive homicide. Their sentences were comparable to the men who committed non-domestic homicides. *See* Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 28.

99. Toole, *Reasonable Woman*, *supra* note 67, at 279.

100. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 31.

101. Toole, *Reasonable Woman*, *supra* note 67, at 279.

102. For example, a juror might mistake Creamer's sexual habits for de facto consent to abuse; it would be interesting to research this case from an evidentiary point of view. *See id.*

103. Toole, *Reasonable Woman*, *supra* note 67, at 281 (discussing Creamer's

The *Creamer* and *Black* cases indicate that defensive homicide does not necessarily serve its intended purpose even when domestic violence survivors kill their intimates. These decisions thus provided some support for those who sought to repeal defensive homicide. However, the impact of defensive homicide for domestic violence survivors remains sufficiently ambiguous. The concern about men getting away with murder was likely the more persuasive reason for abandoning this short-lived experiment.

There was serious opposition to the abolition of defensive homicide. Virtually all the domestic violence support services groups, the Law Institute of Victoria, and a substantial number of prominent academics opposed the repeal of defensive homicide.¹⁰⁴ They noted the continuing risk that the many women who might be found guilty of manslaughter based on defensive homicide would be unable to make out a self-defense claim.¹⁰⁵ They used Angela Williams' case as an example.¹⁰⁶ Williams killed her long-term partner, Kally, by hitting him in the back of the head with a pick-ax numerous times after they had been in a fight.¹⁰⁷ Evidence clearly showed that Williams was a victim of repeated physical, sexual, and emotional abuse during their twenty-three year relationship.¹⁰⁸ Nevertheless, the jury rejected Williams' claim of self-defense and convicted her of defensive homicide; she was sentenced to eight years.¹⁰⁹ The Domestic Violence Resource Centre Victoria (DVRCV) voiced their concern that "[h]ad defensive homicide been abolished at the time of her trial, Angela Williams may have been unjustly convicted of murder."¹¹⁰

credibility at trial).

104. See Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 10-13; see also Charlotte King, Lorana Bartels, Patricia Esteal & Anthony Hopkins, *Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis*, 42 MONASH U. L. REV. 138, 147 (2016); Nicola Wake, 'His home is his castle. And mine is a cage': *A New Partial Defence for Primary Victims Who Kill*, 66(2) N. IR. LEGAL Q. 151, 158 (2015).

105. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 11; *Defensive Homicide an Essential Safety Net*, DOMESTIC VIOLENCE RES. CTR. VICTORIA (DVRCV) (June 23, 2014), <http://www.dvrcv.org.au/knowledge-centre/our-blog/defensive-homicide-essential-safety-net-victims> [hereinafter *Defensive Homicide*].

106. See Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 11; see also *DPP v Williams* [2014] VSC 304, 1 (Vic Sup. Ct.) (Austl.). See generally King, *supra* note 104 (analyzing *DPP v. Williams*, [2014] VSC 304 (Vic. Sup. Ct.) (Austl) as a case study).

107. *DPP v Williams* [2014] VSC 304, 1 (Vic Sup. Ct.) (Austl.).

108. *Id.* at 4.

109. *Id.* at 1, 7, 11.

110. The flip side is that without the option of defensive homicide, the jury may have found her not guilty based on self-defense. See *id.*; see also King, *supra* note 104, at 175.

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Despite the broad coalition of defenders who provided evidence that some battered women likely benefited from having defensive homicide available, Victoria's legislature repealed it. It appears that the Victorian legislature decided that the social cost of the frequent reliance on defensive homicide by violent men, in much the same way they had previously used provocation in both domestic and non-domestic violence cases, outweighed the law's possible benefit to a small number of women who killed their abusers but were unable to prove they acted in self-defense.¹¹¹ Instead, Victoria's lawmakers sought other means of assisting domestic violence survivors who killed their batterers through revising evidentiary rules¹¹² and providing better access to complete self-defense for people who kill out of fear.¹¹³ The revised language in the self-defense statute made it more subjective than the previous version.¹¹⁴ It is meant to be deferential to domestic violence victims; the defendant's belief about the threat only needs to be reasonable "in the circumstances as the person perceives them."¹¹⁵

When Victoria's legislature abolished defensive homicide, it also revised evidence laws in an attempt to limit "victim blaming" at trial.¹¹⁶ Likewise, the Jury Directions were amended to educate juries on the effects of domestic violence, and encourage acquittal when the killer was a victim of

Critics of the repeal also were concerned that the availability of defensive homicide was particularly beneficial to indigenous women who, due to discrimination, poverty and distrust of the justice system, were less likely to have equal access to justice. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 11; *cf.* Aya Gruber, *When Theory Met Practice: Distributional Analysis*, 83 *FORDHAM L. REV.* 3211, 3222 (2015) (quoting Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 *COLO. L. REV.* 129, 185 (2014) ("[G]iven the demographics of murder defendants [in the US], 'the group most likely to be burdened by the elimination or limitation of the provocation defense is young men of color accused of non-intimate homicides and facing murder charges in one of the most punitive systems on earth.'").

111. *Id.* at 12.

112. *Id.* at 16.

113. *Id.* at 14.

114. The statute reads: "322K Self-defence (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence. (2) A person carries out conduct in self-defence if — (a) the person *believes that the conduct is necessary in self-defence*; and (b) the *conduct is a reasonable response* in the circumstances *as the person perceives them*. (3) This section only applies in the case of murder if the *person believes that the conduct is necessary to defend the person* or another person from the infliction of death or really serious injury." *Id.* at 15 (emphasis added); *see also Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 4 (Austl.) [hereinafter *Crimes Amendment*].

115. *See* Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 15.

116. *Id.* at 7.

domestic violence.¹¹⁷ Equally important, Victoria's self-defense statute that codified the common law¹¹⁸ already did not require that the threat be "imminent," or that the response be "proportionate," elements that have often been problematic for victims of domestic violence.¹¹⁹ Supporters of the repeal of defensive homicide, therefore, hope that domestic violence survivors who kill their abusers out of fear will view the 2014 changes, in addition to the lack of imminence or proportionality, sufficient to justifiably make them more willing to assert complete self-defense, where in the past they felt doing so was too risky.¹²⁰

B. Reform in Other Australian Jurisdictions

The legislatures of the other three Australian states, New South Wales, Queensland, and South Australia,¹²¹ while not abolishing provocation, have each examined it in the past decade. Both New South Wales and Queensland have modified common law provocation;¹²² only South Australia has retained traditional common law provocation.¹²³ All three states' criminal codes also include the partial defense of excessive self-defense (imperfect self-defense) akin to defensive homicide.¹²⁴

1. New South Wales

New South Wales, the Australian state with the largest population, has

117. *Id.* at 17.

118. *Id.* at 2 (citing *Zecevic v DPP (Vic)* [1987] 162 CLR 645, 661 (Austl.)).

119. *Id.* at 2.

120. *Id.* at 8.

121. South Australia's examination of provocation has been focused on another highly problematic use of provocation - gay panic cases - and it concluded that no change was necessary. See LEGISLATIVE REVIEW COMMITTEE, *Report of the Legislative Review Committee into the Partial Defence of Provocation 5* (PARLIAMENT OF SOUTH AUSTRALIA) 2014 [hereinafter South Australia Report 2014]; see also FITZ-GIBBON, *HOMICIDE LAW REFORM*, *supra* note 16, at 99.

122. FITZ-GIBBON, *HOMICIDE LAW REFORM*, *supra* note 16, at 92-93.

123. The 2014 South Australia report concluded that changes to provocation were unnecessary were based on the South Australia appellate decision in *R v Lindsay* which concluded that there no longer was a gay panic basis for provocation in South Australia. See South Australia Report 2014, *supra* note 122, at 6 (citing *R v Lindsay* [2014] SASCFC 56 (Austl.)). The High Court of Australia reversed *R v Lindsay* in 2015. Nevertheless, as of the publication of this Article, the legislature in South Australia has retained provocation in its traditional form. See *Lindsay v The Queen* [2015] HCA 16 (Austl.); see also Kate Fitz-Gibbon, *Dr. Kate Fitz-Gibbon Responds to High Court's Judgment in R v Lindsay*, CRIMINOLOGY@DEAKIN: JUSTICE & HOMICIDE LAW (May 7, 2015), <https://blogs.deakin.edu.au/criminology/dr-kate-fitz-gibbon-responds-to-high-courts-judgment-in-r-v-lindsay>.

124. See *infra* Table, page 21.

no mandatory minimum sentence for murder.¹²⁵ Its legislature has considered abolishing provocation on multiple occasions.¹²⁶ Nevertheless, after exhaustive consideration of the pros and cons, New South Wales has retained provocation with substantial restrictions.¹²⁷ The partial defense, as amended in 2014, is now called “extreme provocation.”¹²⁸ This defense is only available if “the conduct of the deceased is a serious indictable offence (punishable by five years’ imprisonment or more).”¹²⁹

Extreme provocation will rarely if ever be satisfied when a domestic killing is committed out of jealousy since the homicide victim is unlikely to have been engaged in “a serious indictable offense.”¹³⁰ However, there will often be situations where a battered woman kills her abuser that also does not meet the requirements for extreme provocation. The New South Wales legislature therefore also provided domestic violence survivors who kill with the partial defense of excessive self-defense which is analogous to defensive homicide when their fear is found to be unreasonable.¹³¹ Recently, a domestic violence survivor successfully argued this defense in *R v. Silva*.¹³² Of course, others accused of murder can also argue excessive self-defense. It remains to be seen whether the availability of excessive self-defense will result in a repeat of the experience in Victoria, where most of the killers claiming unreasonable fear were not battered women but men committing nondomestic homicides and, if so, how New South Wales will respond.¹³³

125. AUSTRALIAN BUREAU OF STATISTICS, *supra* note 41; *see also* Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 22-23 (stating the population of New South Wales is 7.6 million people).

126. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 22-23.

127. *Id.*

128. *Id.* at 23.

129. *Crimes Act 1900* (NSW) pt 3, s 23 (Austl.). In addition, it is now the objective test for the loss of self-control by an “ordinary person,” as opposed to the previous subjective test of “an ordinary person in the position of the accused.” *See* CRIM. TRIAL CTS. BENCH BOOK: DEFENCES [6-444] (2016) (Austl.) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html>; *see also* *R v Turnbull* [No. 25] (2016) NSWSC 831 at 80, 91 (Austl.).

130. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 23.

131. *Id.* at 22-23.

132. *See* [2015] NSW 148 (Austl.); *see also* King, *supra* note 104, at 174. Silva was sentenced to only a two-year suspended sentence, which suggests that the trial judge believed she came close to proving complete self-defense.

133. King, *supra* note 104. More research is needed concerning the effectiveness of this partial defense. The states that have excessive self-defense introduced it by statute within the last 15 years. It is not clear whether men committing non-domestic homicides have been using the defense frequently as occurred in Victoria, when the analogous crime of defensive homicide was instituted.

2. Queensland

Taking yet a different approach, in 2009, Queensland, in addition to restricting its provocation defense,¹³⁴ also introduced a new partial defense explicitly for victims of domestic violence. It provides:

Killing for preservation in an abusive domestic relationship[:]

(1) A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—

(a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and

(b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and

(c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.¹³⁵

There was concern that this specific defense might lead to pleas or convictions for manslaughter when acquittal was more appropriate, which was worrisome since murder has a mandatory life sentence in Queensland.¹³⁶ However, notwithstanding the availability of the new partial defense, at least two juries acquitted women who killed their abusers, suggesting that “Killing for Preservation” may not hinder access to complete self-defense.¹³⁷

“Killing for Preservation” may be a model for jurisdictions seeking to provide substantive equality for domestic violence victims who kill abusers where, like many U.S. jurisdictions, there is a mandatory life sentence for murder. This novel partial defense may allow manslaughter where a complete defense is unlikely, but still neither discourage seeking an acquittal based on complete self-defense in deserving cases, nor protect unmeritorious defendants by casting too wide a net as Victoria concluded regarding defensive homicide.¹³⁸

134. Two restrictions were placed on provocation claims: words alone will not suffice and provocation is not available when the killing was because a domestic partner sought to end the relationship. *Criminal Code Act 1899* (Qld) sch 1, s 304(2), s 304(3) (Austl.).

135. See *id.* at s 304B; *id.* (providing definitions for each element); see also Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 21 (citing *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3 (Austl.), <https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2010/10AC001.pdf>).

136. Darby, *Victoria Crimes Amendment 2014*, *supra* note 55, at 20-21.

137. Sheehy, *supra* note 33, at 479 (criticizing partial defenses for killers who are domestic violence victims).

138. FITZ-GIBBON, *HOMICIDE LAW REFORM*, *supra* note 16, at 98.

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One change to Queensland’s partial defense should be made. Unless self-defense no longer requires imminence and the experiences of battered women are factored into what is reasonable, the requirement in (c) that “the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case” is too demanding.¹³⁹ Victims of serious domestic violence who kill their batterers out of actual fear should not have to prove that their fear was reasonable in order to have murder reduced to manslaughter.

COMPARISON OF RELEVANT LAWS IN AUSTRALIAN STATES

Australia					
New South Wales	Queensland	South Australia	Tasmania	Victoria	Western Australia
No mandatory sentence	Mandatory life for murder	Mandatory life for murder	No mandatory sentence	No mandatory sentence	Presumptive life sentence
Self-Defense (SD): Silent on imminence but case law suggests it is not required	SD: Silent on imminence but case law suggests it is not required	SD: Silent on imminence but case law suggests it is not required	SD: no imminence	SD: no imminence	SD: Silent on imminence but case law suggests it is not required
Provocation restricted: “extreme” provocation	Provocation restricted: excludes “jealousy killings,” words not enough; burden of proof on defendant.	Common law provocation unchanged	Provocation abolished 2003; may be considered during sentencing	Provocation abolished in 2005; may be considered during sentencing	Provocation abolished 2008
Excessive (imperfect) SD	Partial defense “killing for preservation in an abusive relationship”	Excessive (imperfect) SD	No partial defenses	No partial defenses	Excessive (imperfect) SD

139. See *Criminal Code Act 1899* (Qld) sch 1, s 304(2) (Austl.).

V. ASSESSING FLORIDA'S CASTLE LAW AS A PARTIAL SOLUTION FOR DOMESTIC VIOLENCE SURVIVORS WHO KILL

I now turn from Australia's enlightened experimentation with partial defenses and reforming self-defense with its explicit intent to both benefit domestic violence survivors who kill and punish killings out of jealous possessiveness. My final focus is on the more vengeful and distinctly male "castle" laws in a legal regime where mandatory minimum sentencing for murder is the norm.¹⁴⁰ Castle laws are not designed to remedy problems with the law of domestic homicide; however, they provide a strong basis for self-defense for the rare domestic violence survivor who kills her former intimate when he attempts to invade her home or vehicle, and even explicitly do so if there is a protective order in place.¹⁴¹ An opportunity exists to do more to provide substantive equality for those who kill out of fear. I suggest modifying Queensland's partial defense specifically designed for battered women (described earlier) to turn it into an additional basis for presuming a killing in the home was justifiable self-defense under Florida's castle doctrine. But first, I examine how most U.S. jurisdictions view "no duty to retreat," Stand Your Ground, and the castle doctrine.

In this area, American criminal law is unique. The United States is culturally and legally very different from other common law countries in how it views and treats the duty, or lack of duty, to retreat when confronted with deadly violence. Unlike everywhere else in the common law world, the majority rule in the United States, even prior to the recent law reform, has been that there is no duty to retreat in any place one is legally entitled to be. Stand Your Ground is nothing new for America.

In contrast, other common law countries, including Australia, impose a duty to retreat unless there is necessity based on self-defense *except* in castle cases of home invasion.¹⁴² Thus, the rule everywhere, except the United States, is that only in your home may you stand your ground and not retreat even if it is safe to do so. Furthermore, recent U.S. reforms to the universally recognized "no duty to retreat in your castle" law, that expand this to occupied vehicles and create a presumption of self-defense, have had no traction in other countries. In fact, to others, America's Stand Your Ground law and castle doctrine reform is viewed as very troubling and

140. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 25 (5th ed. 2009); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 360-61 (2009).

141. FLA. STAT. § 776.013(2) (2014).

142. *See Criminal Code Act 1899* (Qld) sch 1, s 272(1)-(2) (Austl.); *see also* Caroline Forell, *What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403 n.5 (2010) [hereinafter, Forell, *What's Reasonable?*].

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bizarre.¹⁴³ Nevertheless, since these changes in the castle doctrine have been made in most American states, these laws should at least be modified to benefit some domestic violence survivors who kill in their homes. Otherwise, these women will have to prove self-defense, most likely by claiming they are suffering from Battered Women's Syndrome, thereby pathologizing themselves.¹⁴⁴

By 2014, at least thirty three states had enacted castle doctrine reform, modeled on Florida's 2005 statute.¹⁴⁵ Three main changes to traditional castle doctrine are now in effect in most American jurisdictions. First, the places covered have been expanded, most notably to include any kind of occupied vehicle.¹⁴⁶ Second, if one is entitled to self-defense, one is also immune from criminal prosecution and civil liability.¹⁴⁷ Finally, and most importantly, there is a presumption that killing an intruder entering one's occupied home or vehicle is self-defense.¹⁴⁸ In contrast, this presumption does *not* apply when the person killed was entitled to be in the home or vehicle.¹⁴⁹ This means domestic violence survivors who kill their batterers at home or in a car will usually be denied the reformed castle doctrine's presumption of self-defense. An example of this is Callie Eudora Adams' case where she shot her husband, Rodney Adams, while they were both in their car.¹⁵⁰ Ms. Adams claimed that she had been repeatedly battered during her marriage and responded with deadly force when her husband choked her and hit her in the back of the head, saying he would kill himself and her.¹⁵¹ Her Stand Your Ground claim was rejected in an immunity

143. See Kumuda Simpson, 'Stand Your Ground': America's Violent Culture Written into Law, *THE CONVERSATION* (Feb. 5, 2014 10:03 PM) <http://theconversation.com/stand-your-ground-americas-violent-culture-written-into-law-22776>. Of course, many legal commentators find this reform to be deeply problematic too. See e.g., Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 67 U. MIAMI L. REV. 827, 858 (2013).

144. Franks, *Real Men Advance*, supra note 47, at 1122.

145. Mary Anne Franks, *How Stand Your Ground Laws Hijacked Self-Defense*, in 3 GUNS AND CONTEMPORARY SOCIETY: PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY 141, 141 (Glenn H. Utter ed., 2015) [hereinafter Franks, *Stand Your Ground*].

146. FLA. STAT. § 776.013(1)(a).

147. *Id.* § 776.032(1).

148. *Id.* § 776.013(1)(a).

149. *Id.* § 776.013(3).

150. Larry Hannan, *Stand Your Ground Denied to Jackson Woman Who Killed Husband*, *FLORIDA TIMES UNION* (June 13, 2014, 3:47 PM), <http://jacksonville.com/news/crime/2014-06-13/story/stand-your-ground-denied-jacksonville-woman-who-killed-husband>.

151. *Id.*

hearing and she was charged with second-degree murder.¹⁵² No presumption that she acted in self-defense was available to her because, instead of being attacked by a stranger, she was attacked by her husband who had a right to be in the car.¹⁵³

The brainchild of the National Rifle Association (NRA) and the American Legislative Exchange Council (ALEC),¹⁵⁴ these Stand Your Ground reforms were misleadingly touted as woman-friendly.¹⁵⁵ In reality, they are of little or no assistance in the most common situations where women actually are at risk.¹⁵⁶ Marion Hammer, the first woman president of the NRA and main proponent of the Florida castle doctrine reform, fully recognized that the new castle presumption that killing is justifiable when one kills an intruder is *not* available to domestic violence survivors who kill their batterers unless the batterers are also unlawful intruders.¹⁵⁷ Instead, domestic violence survivors who kill have to prove they acted in self-defense.¹⁵⁸ According to Hammer when promoting the NRA's castle reform in Florida in 2005:

The way the law is written, when it comes to domestic violence situations there is some prevailing law that is still in place but the law attempts to say that if in a domestic violence situation you are being beaten you may use self-defense, but you can't simply take action against an estranged spouse who breaks into the home if they own the home. You have to be under attack before you use force in those situations.

There was an effort by some of the attorneys on the Justice Committee to try to be sure that in restoring your self-defense rights and your right to protect your home that they did not set up scenarios where people could murder people they did not like and claim it was lawful self-defense.¹⁵⁹

In order to understand the impact of the new castle laws, it is useful to take a closer look at Florida's law that has been the model for other

152. *Id.*

153. *Id.*

154. John Nichols, *How ALEC Took Florida's 'License to Kill' National*, THE NATION (Mar. 22, 2012), <http://www.thenation.com/article/how-alec-took-floridas-license-kill-law-national>.

155. Franks, *Real Men Advance*, *supra* note 47, at 1101.

156. *Id.*

157. *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's 'Castle Doctrine' Law*, CTR. FOR INDIVIDUAL FREEDOM (Nov. 3, 2005), http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/marion-hammer-nra-interview.htm.

158. FLA. STAT. § 776.031(2) (2014).

159. CTR FOR INDIVIDUAL FREEDOM, *supra* note 158.

states.¹⁶⁰ First, Florida's self-defense law permits deadly force under section 776.012(2) without the necessity of retreating even if retreat is reasonable and safe. This is quite representative of the law of self-defense in the United States.¹⁶¹

Florida law states:

A person is *justified* in using or threatening to use *deadly force* if he or she *reasonably believes* that using or threatening to use such force is *necessary to prevent imminent death or great bodily harm* to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens deadly force in accordance with this subsection does *not have a duty to retreat* and has a right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.¹⁶²

Like self-defense throughout the United States, Florida's self-defense law is male-focused.¹⁶³ Unlike some of the more recent Australian self-defense laws,¹⁶⁴ it is not designed to benefit battered women. The common barriers to complete self-defense for battered women remain under this typical test: the requirements of "imminence" and the difficulty in establishing that her belief is "reasonable" because most decision makers involved are unfamiliar with the dynamics of domestic violence.¹⁶⁵

Turning from ordinary self-defense to killings in the home, Florida's modified castle law presumes a killing was in self-defense under certain circumstances that focus on the traditional basis for the universal "no duty to retreat" rule when the killing occurs in the home: i.e., a reasonable belief (whether or not correct)¹⁶⁶ that an intruder is trying to break in. While home invasion historically focused on a man defending his family, home, and self from other men attempting forcibly to enter his private domain,¹⁶⁷ some women may benefit since it justifies their killing intruders as well. Thus, formal equality that has made the historically male castle defense

160. See FLA. STAT. §§ 776.012-.032 (2014).

161. See, e.g., OR. REV. STAT. § 161.209 (2015).

162. FLA. STAT. § 776.012(1) (2014) (emphasis added).

163. See *id.* § 776.013(3) (offering no presumption of self-defense if the person killed was entitled to be in the home or vehicle, favoring the abuser).

164. For example, Victoria and other Australian states have removed the "imminence" requirement and created evidentiary rules and jury instructions with battered women in mind.

165. See FLA. STAT. § 776.031(2) (2014).

166. See Forell, *What's Reasonable?*, *supra* note 143, at 409-13, 1428-32 (describing men's mistaken but justified defense of home and family).

167. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 252 (2008).

gender-neutral helps women who kill men breaking into their home or their vehicle.

The presumption set out in section 776.013(1) reads as follows:

(1) *A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:*

(a) *The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle; and*

(b) *The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry . . . was occurring or had occurred.*¹⁶⁸

The statute, however, also expressly states in 776.013(2) that the presumption is *not* available when:

The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person . . .¹⁶⁹

This exclusion from the presumption covers situations when a domestic violence survivor kills a live-in intimate; it clearly has domestic violence in mind. Thus, domestic violence survivors who kill their violent husbands and boyfriends will usually have to raise the claim of self-defense, even if the killing is in the course of an attack by the deceased in the woman's castle.

In order to achieve substantive equality, people who kill their batterers should be treated more sympathetically than they are now. Instead, the 2005 castle doctrine reform created an ambiguity about whether domestic violence survivors who killed someone who was lawfully present in the home even had the right to stand their ground!¹⁷⁰ The statute's language providing a presumption of self-defense for killing intruders, combined with the language denying the presumption if the person killed had some form of property right to be there, except if there was a protective order against them, implied that perhaps a battered woman was required to retreat if she could do so safely before she would be justified in using deadly force.¹⁷¹ In contrast, before the statute was enacted, the Florida Supreme Court had expressly held that under the then existing law, battered women

168. FLA. STAT. § 776.013(1) (2014) (emphasis added).

169. *Id.* § 776.013(2).

170. *Id.* § 776.013(3).

171. *Id.* § 776.013(1)-(3).

in such a situation did not have to retreat even if the person attacking them had a right to be in the home.¹⁷²

Fortunately, in 2014 the Florida Legislature cleared up this ambiguity by amending section 776.013(3) so that it now says: “[A] person who is attacked in his or her dwelling, residence, or vehicle has no duty to retreat and has the right to stand his or her ground and use or threaten to use force, including deadly force” in accordance with Florida’s statutory test for self-defense.¹⁷³ With this clarification, Florida’s reform provides a domestic violence survivor who kills a live-in batterer some potential to avoid prosecution. If she asserts self-defense and if (this is a big if) her claim is found to be credible by someone in authority, she may have the benefit of the immunity provided by section 776.032:

Immunity from criminal prosecution and civil action for justifiable use or threatened use of force[:]

(1) *A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person . . . against whom the force was used or threatened. . . . As used in this subsection, the term “criminal prosecution” includes arresting, detaining in custody, and charging or prosecuting the defendant.*¹⁷⁴

This immunity applies if a police officer chooses not to arrest the killer or, if she is arrested, the District Attorney decides not to prosecute.¹⁷⁵ Furthermore, even if arrest and prosecution ensue, the Florida Supreme Court has held that a person claiming self-defense can now demand a hearing in which, based on the preponderance of evidence, she can try to prove she was entitled to immunity.¹⁷⁶ This immunity can mean the difference between freedom and life in prison, and domestic violence

172. *Weiland v. State* 732 So.2d 1044, 1051 (Fla. 1999) (overruling *State v. Bobbit*, 415 So.2d 724 (Fla. 1982)).

173. FLA. STAT. § 776.013 (2014). The revisions to Florida’s 2005 Stand Your Ground/castle doctrine reforms came in response to the highly publicized case of Marissa Alexander. After being physically threatened, she fired a warning shot at her abusive husband in front of his two children. She was initially sentenced to 20 years in prison in 2012, but her conviction was overturned. She faced another trial with a possible penalty of sixty years before she agreed to a plea deal in November 2014. In support of the 2014 amendments, Marion Hammer said: “That’s abuse, that’s wrong, that’s what this bill is designed to stop.” Alexander was released from a Jacksonville jail in January 2015 under a plea deal of three years time served. *See Franks, Real Men Advance*, *supra* note 47, at 1118-19; Matt Galka, *Warning Shot Bill Passes Legislature*, CAPITOL NEWS SERVICE (Apr. 3, 2014), <http://www.flanews.com/?p=21239>.

174. FLA. STAT. § 776.032 (2014) (emphasis added).

175. *Id.*

176. *Dennis v. State*, 51 So.3d 456, 462 (Fla. 2010).

survivors who kill can have immunity too *if* they can convince someone with authority that they acted in self-defense. But that's the rub.¹⁷⁷

The continuing difficulty for many domestic violence survivors who kill to prove self-defense, when that is what justice calls for, makes it important that the law find ways to help some of them make their case. For those who kill their batterers at a time of non-confrontation, the lack of imminence will make a successful claim of self-defense very difficult.¹⁷⁸

For those who kill their batterers during a confrontation, something less controversial than eliminating the imminence requirement, but more empowering and self-respecting than showing she suffered from Battered Women's Syndrome, should be considered. I therefore propose that in Florida and other reformed castle doctrine states, Queensland's partial defense for domestic violence survivors who kill¹⁷⁹ be modified. This would create a presumption that the killing was in self-defense when a survivor kills her batterer and the following is proved:

- (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
- (b) the person believes that it is necessary for the person's or another's preservation from imminent death or grievous bodily harm to do the act or make the omission that causes the death.

Thus, section 776.013 would be amended to add another basis for a presumption that the killing was justified, in addition to the existing one for killing an intruder.¹⁸⁰ Most people who kill women are men the women know, not strangers.¹⁸¹ Enacting this additional presumption would show that the all too common threats and attacks by intimates are taken just as seriously as the far rarer threats and attacks from strangers¹⁸² and that

177. See Hannan, *supra* note 151.

178. See FLA. STAT. § 776.031 (2014).

179. *Criminal Code Act 1899* (Qld) sch 1 s 304B (Austl.); see *supra* note 136, and accompanying text.

180. See Hannan, *supra* note 151 and accompanying text. If this presumption had been in effect when Eudora Adams shot her husband in their car, she would have been presumed to have acted in self-defense.

181. *When Men Murder Women*, VIOLENCE POL'Y CTR., (Sept. 2014), <http://www.vpc.org/studies/wmmw2014.pdf> ("The U.S. Department of Justice has found that women are far more likely to be the victims of violent crimes committed by intimate partners than men, especially when a weapon is involved. Moreover, women are much more likely to be victimized at home than in any other place.").

182. See *The Truth About Guns and Self-Defense*, THE WEEK (Nov. 1, 2015), <http://theweek.com/articles/585837/truth-about-guns-selfdefense> ("[T]he annual per capita risk of death during a home invasion [has been estimated] at 0.000002 percent – essentially zero."); see also Stephanie Zvan, *How Well Does Your Gun Protect You?* ALMOST DIAMONDS (June 21, 2010), <http://almostdiamonds.blogspot.com/2010/06/how-well-does-your-gun-protect->

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domestic violence is real violence. Substantive equality would be served by providing women with the right to defend their homes, their castles, from those most likely to do them harm.

VI. CONCLUSION

Domestic homicides cover both killing out of jealous possessiveness and domestic violence survivors who kill out of fear and despair. Australia continues to experiment with ways to provide real justice for both kinds of killings through the abolition or modification of the provocation defense; providing partial defenses that are intended for domestic violence survivors who kill; and making self-defense more hospitable to domestic violence survivors who kill. Much of this has been possible because many Australian states do not have mandatory minimum sentencing.¹⁸³

Until mandatory minimums are abolished in the United States, the provocation defense is likely to survive in its current form in order to provide imperfect justice for both groups of domestic killers as well as non-domestic killers.¹⁸⁴ However, more can be done for domestic violence survivors when they kill their batterers to give them a fair chance at proving justifiable homicide and thereby provide them with a more perfect form of justice. In the majority of states that have enacted statutes like Florida's 2005 Stand Your Ground/castle doctrine reform, a simple way to provide domestic violence survivors who kill with substantive equality is to create a presumption that the killing was justified. Enacting a presumption like the one I propose would show that those who support these statutes also support gender equality.

you.html). Sadly, the person killed as an intruder may not be one. *See e.g.*, Patrick Brennan et al., *Police Investigate Death of Teen Shot by Dad*, CINCINNATI.COM (last updated Jan. 13, 2016, 5:42 AM), <http://www.cincinnati.com/story/news/2016/01/12/police-teen-mistaken-intruder-shot/78672506/>.

183. Any states in the U.S. that don't have mandatory minimums should follow Australia's lead and make self-defense more available to domestic violence survivors who kill, and eliminate provocation for people who kill out of jealousy and rage.

184. *See* Forell, *Gender Equality*, *supra* note 3, at 30 and accompanying text (stating that while the provocation defense may still be necessary, the Model Penal Code's more subjective defense of Extreme Emotional Disturbance should be eliminated.).