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I. INTRODUCTION

Karla Porter felt she had no way out.[1] Whether her husband had a gun to her head or made comments about feeding her to the alligators in Florida, the fear of death had become a constant in her life.[2] In her mind, it was only a matter of time

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1. Porter v. State, 445 Md. 220, 250 (2017).

2. *Id.* at 228.

until her husband would murder her: "It was getting so bad that I knew that Ray was going to kill me and I just wanted to kill him first."[3]

Karla indeed struck first with the help of a contract killer.[4] After unsuccessful attempts to obtain potassium cyanide, Karla eventually met a man who offered to do the job for $400.[5] The two then coordinated a staged break-in at the gas station Karla and her husband owned.[6] Early one morning, Karla told her husband someone triggered their gas station's alarm.[7] The contract killer entered and shot Ray Porter twice as he investigated the break-in.[8] According to plan, Karla immediately called 911 and reported a man had just killed her husband during a robbery.[9]

Karla Porter asserted she had her husband killed in self-defense.[10] She presented evidence of his abuse and expert testimony to the jury to show she suffered from battered spouse syndrome ("BSS").[11] Her case strayed from the usual trajectory of cases where abused individuals kill their spouses.[12] Commonly, those individuals either successfully present BSS evidence to persuade a jury their killing was in self-defense, or they receive a sentence for murder.[13] Karla's case, however, carved out a middle ground with her appeal focusing on *imperfect* self-defense and the extent of BSS application.[14] The appellate court remanded after finding the trial court's misrepresentation of imperfect self-defense's subjective elements was not harmless.[15]

Porter v. State marks a pivotal approach to BSS cases because it embraced theoretical approaches and reexamined self-defense law.[16] The circumstances of Ray Porter's murder could never meet a reasonable standard of imminence—a contract killer shot him in cold blood—yet the court acknowledged expert BSS testimony could show the appellant's irrational actions were necessary in her mind.[17] Maryland's imperfect self-defense law guaranteed Karla Porter jury

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Porter*, 455 Md. at 228.
8. *Id.*
9. *Id.*
10. *Id.* at 230.
11. *Id.* at 230.
12. *Id.* at 255–56; *but see* State v. Norman, 378 S.E.2d 8, 16 (N.C. 1989) (reversing the appellate court to uphold a conviction for first-degree murder); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 396 (1988) (describing BSS perfect self-defense claims).
13. *Norman*, 378 S.E.2d at 16; Kinports, *supra* note 12, at 396 (discussing successful perfect self-defense claims).
14. *Porter*, 455 Md. at 250.
15. *Id.* at 255–56.
16. *Id.* at 247.
17. *Id.*

instructions with subjective elements—ones that allow the jury to consider an honest, even if unreasonable, belief for the need to use deadly force.[18]

The involvement of a hired killer in Karla Porter's case complicated her theory of self-defense.[19] Contract killers are not novel, but applying BSS evidence to the scenario posed new questions about the extension of the defense.[20] The fact that Karla was not present at the time her husband died made a self-defense analysis, even for a battered spouse, particularly strained.[21] Given Porter's months of planning prior to hiring the killer, the state argued the facts were incompatible with either imperfect or perfect self-defense.[22] Porter's preparation convinced the state, as well as dissenting judges, that BSS could play no role in premeditated murder—particularly when the defendant hires a killer.[23]

Traditional or perfect self-defense is a complete bar to a criminal charge and results in an acquittal.[24] In contrast, imperfect self-defense is a mitigating factor that can reduce a charge of murder to the lesser charge of voluntary manslaughter.[25] The Porter majority opinion managed to narrow the BSS self-defense analysis by focusing on imperfect self-defense.[26] The defense's subjective elements grant room for "unreasonable beliefs," effectively allowing the jury to fully take the defendant's mental state into account.[27] The court incorporated BSS research into its understanding of the defense's subjective elements to find a solution reflective of culpability.[28] When facing a conviction for first-degree murder, the reduced sentence from a finding of imperfect self-defense can fill the chasm between exoneration and execution.[29]

This lapse between conduct and culpability is the product of perfect self-defense law and its conflict with the circumstances that define BSS killings.[30] The

18. *Id.* at 239; *see also* Faulkner v. State, 54 Md. App. 113, 115, 118 (1984) (explaining the subjective elements of imperfect self-defense and finding Faulkner was entitled to an instruction on the defense).

19. *Porter*, 455 Md. at 250–51.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 256 ("Even if a battered spouse has a subjective belief that death or serious bodily harm at the hands of her abuser is inevitable, a murder planned weeks or months in advance can at most be considered a response to a generalized threat or expected future threat, but not a response to an imminent or immediate threat.").

24. MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962); Judy E. Zelin, *§ 35: Perfect Self-Defense*, *in* 12 MARYLAND LAW ENCYCLOPEDIA, HOMICIDE (2020).

25. *Porter*, 455 Md. at 235; MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962); Rachel M. Kane et al., *§ 27: Self-Defense—Imperfect Self-Defense*, *in* 7 MARYLAND LAW ENCYCLOPEDIA, CRIMINAL LAW (2020).

26. *Porter*, 455 Md. at 257.

27. *Id.* (quoting State v. Faulkner, 301 Md. 482, 500–01 (1984)).

28. *Id.* at 249; Kinports, *supra* note 12, at 412.

29. People v. Wallace, 44 Cal. 4th 1032, 1099–1100 (2008); People v. Humphrey, 13 Cal. 4th 1073, 1082 (1996) ("To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable.").

30. Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARVARD J. ON LEGIS. 17, 25 (2015) ("Of the five requirements of [self-defense], female defendants facing prosecution for killing their aggressive intimate partners will at most satisfy two."); Kinports, *supra* note 12, at 416.

rigid, objective elements of self-defense imagine scenarios where a person kills to stop an imminent life-threatening attack—not to escape recurring patterns of violence.[31] BSS deprives the abused of their autonomy and places them on unequal footing with their abuser.[32] The abused, therefore, almost never kill while their abuser is awake or aware and instead tend to seek an opportunity where the abuser is unlikely to fight back.[33] This opportunity comes when their partner is asleep or, in some novel cases, when a battered spouse hires a killer.[34] This Comment explains that, in hired-killer scenarios involving BSS, an imperfect self-defense claim resulting in a voluntary manslaughter conviction best balances BSS evidence and the state of self-defense law.[35]

This proposed result hinges on imperfect self-defense, a defense not available in all U.S. jurisdictions.[36] This Comment proposes a model statute to incorporate both BSS and imperfect self-defense; it also analyzes the statute's application in hired-killing battered spouse cases.[37]

Part II of this Comment explores the history of BSS, how the law adopted it, and the court procedure for utilizing testimony and evidence at trial.[38] It also addresses self-defense laws, both perfect and imperfect, to explore their divergence.[39] Part III introduces justification and excuse theories that commonly support self-defense and addresses how BSS's doctrinal foundation can impact its application.[40] Part IV analyzes a proposed model statute for non-confrontational BSS cases.[41] Part V concludes with a call for uniform statutory adoption to promote continuous protection of battered spouses.[42]

31. Dayan & Gross, *supra* note 30, at 25. *See generally* MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962) (describing circumstances in which use of force is justifiable).

32. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 328 (1992).

33. *See id.* at 324–325 (discussing common opportunities for battered spouses to strike).

34. *Id.*; *see* Porter v. State, 455 Md. 220, 228 (2017) (involving a hired killer).

35. *Infra* Part III; *see* Jones v. State, 357 Md. 408, 430 (2000) (describing the reasonableness of self-defense and why use of force is justifiable).

36. *Porter*, 455 Md. at 259 (explaining that the Maryland statute permitting BSS evidence would be rendered obsolete without a way to incorporate the evidence into the ruling); *see also* Walker, *supra* note 32, at 328 (explaining that only some states provide for imperfect self-defense).

37. *Infra* Part IV.

38. *Infra* Part II.

39. *Infra* Part II.

40. *Infra* Part III.

41. *Infra* Part IV.

42. *Infra* Part V.

II. SCIENTIFIC AND LEGAL FOUNDATION

Legal and social theorists propelled BSS from its roots in clinical psychology in 1979 to its modern status as a viable criminal defense.[43] Its legal application has undergone significant development over the intervening years, incurring expert scrutiny and celebration as a theory.[44] Section A explains the origins of BSS and its incorporation into law.[45] Section B explores self-defense law and theories of provocation.[46]

A. Origins of BSS

In law, BSS is a condition that causes continuous, generalized fear from recurring abuse by an intimate partner.[47] The introduction of BSS evidence at trial has been a common practice since the early 1980s.[48] However, the viability of defenses based on BSS evidence has fluctuated over the years.[49] Recent decisions highlight how over-indulgence in BSS evidence undermines the theory's credibility and fuels criticism of its utility.[50] Subsection 1 introduces the roots of BSS research and the legal system's integration of the theory.[51] Subsection 2 explores the practical application of BSS at trial.[52] Subsection 3 revisits *Porter v. State* to explain the significance of the ruling for BSS cases.[53]

1. History of BSS in the Legal Field

BSS is a sub-category of post-traumatic stress disorder, which describes altered cognitive processing based on repeated exposure to severe trauma.[54] The psychological underpinnings of BSS granted it greater respect in the legal community but did not render it immune from criticism.[55]

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43. Walker, *supra* note 32, at 334; *see, e.g.*, Porter v. State, 455 Md. 220, 237–38 (2017) (asserting BSS as part of self-defense theory).

44. *See, e.g.*, Joshua Dressler, *Battered Woman and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 458 (2006); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 211–12 (2002); Kinports, *supra* note 12, at 396.

45. *Infra* Section II.A.

46. *Infra* Section II.B.

47. Walker, *supra* note 32, at 327.

48. *See* Moran v. Ohio, 469 U.S. 948, 950 (1984) (Brennan, J., dissenting from denial of cert.) ("[T]he battered woman's syndrome as a self-defense theory has gained increasing support over recent years.").

49. IBN-Tamas v. United States, 407 A.2d 626, 640 (D.C. 1979) (refusing to rule whether expert testimony on BSS was admissible but that it was not harmless error if the evidence was erroneously excluded).

50. *See* Dressler, *supra* note 44, at 458 (explaining BSS evidence's declining credibility as it is over-relied on).

51. *Infra* Subsection II.A.1.

52. *Infra* Subsection II.A.2.

53. *Infra* Subsection II.A.3.

54. Walker, *supra* note 32, at 327.

55. Burke, *supra* note 44, at 240.

Lenore Walker first introduced the idea of the battered spouse in her 1979 book, *The Battered Woman*.[56] Her analysis of the condition centered on patterns of violent cycles Walker identified throughout her study of intimate partner abuse.[57] The publication served as one of the first empirical approaches to the lasting psychological impacts of continuous abuse and laid the foundation for its transplantation to the legal field.[58]

Walker drew from other areas of clinical psychology and used the theory of "learned helplessness" to explain much of the behavioral anomalies of battered women.[59] Learned helplessness explains how animals conditioned to expect unavoidable painful stimuli quickly give up attempts to escape.[60] Psychologists developed the theory by studying how dogs react to painful electric shocks within their cage.[61] Researchers observed that animals would naturally panic and seek all possible avenues of escape from the shocks.[62] However, these pain-avoidant behaviors were completely absent in animals conditioned to have no control—these dogs endured the pain even when given easy opportunities to escape it.[63]

Researchers in the first study on learned helplessness extrapolated their findings to depression and maladaptive behaviors in humans.[64] Walker went further, however, rooting her approach and presentation of BSS in learned helplessness and the irrational—even pain-perpetuating—behaviors an individual may come to accept.[65]

The Battered Woman was a product of field psychology research.[66] But even at the term's inception, there was an inseverable link to the law and our legal response to battering.[67] Walker identified "legal alternatives" that she considered necessary to protect battered women, including the need for "legitimate legal procedures for battered women as defendants."[68] Walker articulated the shortcoming of self-defense claims that require minimal application of force or no safe means of escape—elements that may be nearly impossible to meet for one suffering from BSS.[69] BSS research did not produce a new defense specifically for

56. LENORE E. WALKER, THE BATTERED WOMAN (1979).

57. *Id.* at xiii.

58. Porter v. State, 455 Md. 220, 237 (2017) (quoting from Walker in its explanation of BSS); WALKER, *supra* note 56.

59. WALKER, *supra* note 56; Martin E.P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407, 408 (1972) (describing the theory of learned helplessness and its application to humans).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 411.

65. WALKER, *supra* note 56.

66. *Id.*

67. *Id.* at 206.

68. *Id.*

69. *Id.*

battered partners, but it spurred a new consideration for victims of intimate abuse in criminal defense.[70]

2. In-Court Application of Battered Spouse Syndrome

Widespread adoption of BSS in jurisdictions across the U.S. brought the theory to practice.[71] There was considerable backlash to the doctrine as well.[72] Critics were fearful the blending of psychology and law would diminish or explain away nearly all culpability and only encourage defendants to invoke an informal status of "victim" or "battered."[73]

The first defense attorneys to handle BSS cases found tell-tale signs of a medical disorder and treated BSS as an extension of insanity.[74] In an early illustrative case, Francine Hughes burned her husband alive by setting him alight while he slept.[75] Hughes did not assert self-defense at trial, a decision reflective of the culture surrounding battered partners at the time.[76] There was also no precedent for BSS defensive killings, and a sleeping victim would plainly not fit in a favorable self-defense theory.[77] Defense counsel's insanity plea is illustrative of how the law did not treat those suffering from BSS as a protected class—but a cognitively impaired one.[78]

However, court application of BSS evidence did not become an immunity as some feared.[79] BSS is not itself a defense, rather it is a recognized condition to which courts permit experts to testify to and offer foundation for the court's understanding.[80] This testimony serves primarily to explain behaviors and thought processes that may appear irrational and unreasonable to the average person yet

70. *See* Dressler, *supra* note 44, at 462.

71. *See* Moran v. Ohio, 469 U.S. 948, 950 (1984) (Brennan, J., dissenting from denial of cert) ("[T]he battered woman's syndrome as a self-defense theory has gained increasing support over recent years.").

72. *See, e.g.*, Dressler, *supra* note 44, at 457; Burke, *supra* note 44, at 240.

73. *See* State v. Norman, 378 S.E.2d 8, 15 (N.C. 1989) (arguing that a more flexible view of imminence would "weaken [the law's] assurances that justification for the taking of human life remains firmly rooted in real or apparent necessity").

74. *See* State v. Hundley, 693 P.2d 475, 467 (Kan. 1985) ("Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war.").

75. Kinports, *supra* note 12, at 393.

76. Dressler, *supra* note 44, at 462 (discussing the demeaning implication of the insanity excuse); Kinports, *supra* note 12, at 394; *see* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 55–56 (1994) (arguing that battered spouses are more akin to the legally insane because of their psychological condition).

77. *See* Dressler, *supra* note 44, at 464 ("There is simply no basis for suggesting that J.T. Norman *in reality* represented an imminent threat to Judy Norman, as traditional law defines 'imminence.'").

78. *Id.* at 262; *see* Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 317 (2003) (explaining the applicable M'Naghten insanity test); Walker, *supra* note 32, at 321.

79. *E.g.*, State v. Norman, 378 S.E.2d 8, 16 (N.C. 1989) ("[T]he [battered spouse] evidence in this case did not entitle the defendant to jury instructions on either perfect or imperfect self-defense.").

80. Walker, *supra* note 32, at 321–22; Kit Kinports, *The Myth of Battered Woman Syndrome*, 24 Temp. Pol. & Civ. Rts. L. Rev. 313, 313 (2015).

are consistent with established psychological principles.[81]

Providing the jury with the technical elements of a self-defense theory is not enough in BSS cases because of the psychological complexity motivating the conduct.[82] Courts consider BSS testimony so vital to a self-defense case that failure to admit expert testimony on the point is reversible error.[83] The Supreme Court has explained that, in the context of reasonableness, a defendant's perception of when defensive action is necessary can depend on even the slightest of cues.[84] BSS evidence provides the jury with the necessary background to properly analyze the reasonableness of a defendant's actions.[85]

The U.S. justice system integrated BSS research largely through evidentiary procedure.[86] Rather than craft an independent "battered spouse defense," the defendant presents evidence of abuse at trial with expert opinion from a psychologist to lend backing to the seemingly inexplicable behaviors of the battered defendant.[87] In this way, the science and self-defense are largely left to mesh through the interpretation of the presiding judge and the understanding of the jurors.[88]

3. Porter v. State

Karla Porter expressed a sense of helplessness characteristic of battered spouses.[89] During trial, she testified that she had little hope for escape: "I knew he would follow me. I knew there was no getting away."[90] Her expert psychologist testified that her coping method was to avoid and repress rather than to retaliate.[91] To survive the abuse throughout the course of the twenty-four year marriage,

81. Walker, *supra* note 32, at 321–22.

82. Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992) ("Dr. Walker's testimony as to how Appellant's particular experiences as a battered woman . . . affected her perceptions of danger, its imminence, what actions were necessary to protect herself and the reasonableness of those perceptions are relevant to prove Appellant's defense of self-defense.").

83. *Id.* ("We find the trial court's failure to allow [BSS] testimony amounts to reversible error requiring a new trial.").

84. Allison v. United States, 160 U.S. 203, 216 (1895) ("What is or is not an overt demonstration or violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger.").

85. *Bechtel*, 840 P.2d at 10.

86. *E.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2020) (creating a statutory defense of imperfect self-defense that permits use of BSS evidence).

87. *Id.* (exemplary of many state statutes).

88. Porter v. State, 455 Md. 220, 238 (2017) (explaining how a jury can use BSS evidence to reach a verdict).

89. *Id.* at 229; Walker, *supra* note 32, at 326–27 (discussing the "learned helplessness" typical of victims experiencing BSS).

90. *Porter*, 455 Md. at 228.

91. *Id.* at 229.

Porter would attempt to diminish the harm to avoid alarm by others.[92] BSS is a psychological condition particular to the victim of the violence—Porter attempted to shield others from the true nature of the abuse because they would not rationalize the behavior as she had.[93] While Porter presented this evidence to the jury, the court failed to equip the jury with the tools to reach a verdict based on imperfect self-defense.[94]

The trial court allowed expert testimony on Porter's BSS but refused to read the Maryland BSS statute despite the jury's explicit request during deliberations.[95] The state contended that no form of self-defense was applicable to Porter, yet offered jury instructions in case it found they were necessary:

> If the Defendant actually believed that she was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, and the Defendant used no more force than was reasonably necessary to defend herself in light of the threatened or actual force, and that retreat from the threat was unsafe, and that she was not the aggressor, the Defendant's actual, though unreasonable belief, is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.[96]

The court agreed with the state that the "pattern instruction on imperfect self-defense 'could be misleading'" and chose instead to read the state's version.[97]

At the intermediate appellate level, a Court of Special Appeals did not reach the question of whether the instruction on imperfect self-defense constituted harmless error.[98] Instead, it ruled that Porter had presented insufficient evidence to be entitled to any instruction of self-defense reasoning, "Porter thus never should have received an instruction on self-defense, and cannot now complain that the court's instruction was improper."[99]

Porter then appealed to the highest court in the state, which reached a different conclusion.[100] The Maryland Court of Appeals held the trial court was required to give the instruction but had done so improperly.[101] The error was not harmless and the case was remanded on all charges.[102] The trial court's instruction properly asked whether Porter subjectively believed, even if unreasonably, that she was in

92. *Id.* at 230.
93. *Id.*; Walker, *supra* note 32, at 326.
94. *Porter*, 455 Md. at 255–56.
95. *Id.* at 232.
96. *Id.* at 230–31.
97. *Id.* at 231.
98. Porter v. State, 148 A.3d 1, 24 (Md. Ct. Spec. App. 2016).
99. *Id.* at 24.
100. *Porter*, 455 Md. at 255–56.
101. *Id.*
102. *Id.*

imminent danger—but presented all other elements with objective criteria.[103] The construction of the jury instruction wrongly suggested that Porter had to be reasonable, or objectively correct, in her perception about the degree of force necessary and whether she could safely retreat.[104] The state conceded on secondary appeal that this instruction was improper.[105]

The error prevented the jury from properly evaluating the availability of imperfect self-defense, which could have acted as a mitigating partial defense for first-degree murder.[106] The court also interpreted the record notably differently and disagreed with the intermediate appellate court's finding that the facts did not raise self-defense, devoting much of its analysis to BSS's interplay with "imminence."[107]

The case highlighted the plain need for subjective elements for legal defenses in BSS cases.[108] The Maryland Court of Appeals emphasized that introducing BSS evidence at trial is futile if the only defenses available require objective analysis.[109]

Although the trial court agreed that imperfect self-defense applied to the inchoate and solicitation charges, on appeal the state maintained that the defense was unavailable because of the hired-killer element.[110] The appellate court dismissed Porter's use of a contract killer as irrelevant to Porter's subjective belief at the time the killer shot her husband.[111] It chose to analyze her subjective beliefs, as an element of imperfect self-defense, independently of how she chose to assert force against her husband.[112] The decision preserved BSS's core subjective standard, including a defendant's altered threat perception, and avoided unnecessary contortion of perfect self-defense's elements.[113]

4. The Hired Killer and Non-Confrontational Killings

Non-confrontational killings are a type of homicide in which there is no triggering event at the time of the killing, and the killer strikes during a period of calm.[114] These killings are closely tied to BSS in self-defense claims because BSS killings necessarily involve cycles of violence and recurring periods of relative

103. *Id.* at 253–54.

104. *Id.* at 239.

105. *Id.*

106. *Porter*, 455 Md. at 239.

107. *Id.* at 240–41.

108. *Id.* at 246.

109. *Id.*

110. *Id.* at 249.

111. *Id.* at 251 ("[W]e see no principled reason to distinguish contract killings from other forms of non-confrontational defensive action.").

112. *Porter*, 455 Md. at 250.

113. *Id.* at 249.

114. Walker, *supra* note 32, at 321.

calm.[115] The traditional "kill or be killed" situation involves a present threat, usually by physical presence, which must be responded to for safety.[116] The same threat may exist in a non-confrontational killing, but it is absent at the moment of death.[117]

There is a dramatic imbalance of power in BSS relationships.[118] This imbalance deprives severely abused partners of the means to defend or retaliate, particularly during a cycle of physical abuse.[119] This limits the battered spouse's ability to physically defend themselves to non-confrontational settings where the abuser is sleeping or otherwise incapacitated.[120] To avoid a great risk of further harm, the battered spouse strikes during the calm in a non-confrontational setting.[121] The attack is not in direct response to abuse but to preempt the next cycle of abuse, which she knows will occur and will be unable to quell.[122]

Given the necessity of killing when the abuser is not provoked, there is a close connection between BSS killing and hired killers; hired killers serve the very purpose of conflict avoidance.[123] Yet there are few cases involving a hired killer and BSS evidence.[124]

The *Porter* court noted only four previous cases from other jurisdictions with similar issues when deciding whether imperfect self-defense was available to a defendant accused of hiring a killer.[125] All four of these prior cases resolved the issue against the defendant, depriving them of self-defense.[126] However, only one of those prior cases involved a battered spouse statute, and the court noted that the statute permitting BSS included only the issue of *perfect* self-defense.[127] *Porter* triggered a new inquiry in the application of BSS: does a hired-killer alter the calculus of self-defense elements?[128]

The Maryland Court of Appeals answered with an emphatic "no," finding no "reason to distinguish contract killings from other forms of non-confrontational

115. *Id.* at 330 (describing recurring cycles in three phases: tension building, battering, and absence of battering).

116. Rachel M. Kane et al., *§ 26: Self-Defense*, *in* 7 MARYLAND LAW ENCYCLOPEDIA, CRIMINAL LAW (2020); Burke, *supra* note 44, at 229.

117. Walker, *supra* note 32, at 325.

118. *Id.* at 325–26.

119. *Id.*

120. *Id.*

121. *Id.* at 324.

122. *Id.*

123. *E.g.*, People v. Yaklich, 833 P.2d 758, 759 (Colo. App. 1991) ("The defense also contended that [the defendant] believed and had reasonable grounds to believe that there was a real or apparent necessity to act to avoid the imminent danger of death or great bodily harm.").

124. *See, e.g.*, Porter v. State, 455 Md. 220, 249 (2017) (extending a self-defense jury instruction despite the defendant hiring someone to kill her husband, contrary to the actions of three other jurisdictions).

125. *Id.*

126. *Id.* at 250.

127. *Id.* at 250–51.

128. *See id.* at 249–50 (discussing whether self-defense is ever available to a defendant who hires a killer).

defensive action."[129] The refusal to delineate the scenarios cleared the threshold to present imperfect self-defense to the jury.[130] The court reasoned that categorizing contract killers as a distinct form of non-confrontational killings would not serve the purpose of imperfect self-defense or the BSS statute.[131] The distinction is critical for the very reason BSS naturally pairs with contract killings: a defendant can never reasonably fear an imminent attack when they intentionally engage their target during a period of safety or calm.[132]

The strong back-and-forth with the dissent over imminence requirements in *Porter* emphasized the interpretative crux of imperfect self-defense.[133] To find someone took a life defensively, they must generally be reactionary in their attack.[134] A literal approach to imminence draws the doctrine into perfect self-defense and justifies the victim's conduct.[135] The dissent followed a line of cases that narrowly defined imminence and restricted the timeframe for a threat to qualify.[136] Its definition of imminence necessarily excluded any situation where the defendant had time to prepare or arrange for the killing.[137]

The court's divergence turned not on overlooking elements but contextual interpretation.[138] The majority read imperfect self-defense as only requiring a subjective expectation of an imminent threat as evaluated through the lens of BSS research.[139] Therefore, a strict definition of imminence, based on a reasonable timeframe or otherwise objective standard, was not appropriate to test the defendant's actual belief in the need for force.[140] Subjective BSS evidence does not rewrite objective elements, it merely helps explains irrational or unreasonable behavior.[141]

Contract killings push the bounds of defenses in BSS cases and have renewed the debate on how much interpretative leeway imminence deserves.[142] With few cases on-point to consider, the rules regarding contract killings with BSS

129. *Id.* at 248–49.

130. *Porter*, 455 Md. at 250.

131. *See id.* at 249 ("We admit expert testimony as to battered spouse syndrome in part to thwart the assumption that if the relationship was truly abusive, the woman would have left or sought help from law enforcement.").

132. *See id.* at 250 (rejecting the distinction and finding: "The means by which a woman takes defensive action against her abuser does not affect whether she actually believed she was in imminent danger at the time of the killing.").

133. *Id.*

134. MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962).

135. *Porter*, 455 Md. at 252; MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962).

136. *Porter*, 455 Md. at 257.

137. *Id.* at 250.

138. *Id.*

139. *Id.* at 249.

140. *Id.*

141. *See* Walker, *supra* note 32, at 325–326 ("But a mental health expert can testify to her or his opinion and can add context to the explanations provided it is used as part of what the expert opinion is based upon.").

142. *Porter*, 455 Md. at 249.

defendants are still in development.[143] This gap in authority leaves the boundaries of a case to statutes and the result to interpretation.[144]

B. Criminal Defense Law

Self-defense as people traditionally know it is more precisely termed complete or *perfect* self-defense.[145] The lesser-known form called imperfect self-defense is both newer to criminal law and less developed, but it occupies a critical place in defense theories.[146] Subsection 1 covers the scope and elements of perfect self-defense.[147] Subsection 2 discusses imperfect self-defense.[148] Subsection 3 analyzes provocation as a mitigating factor and the role voluntary manslaughter plays in defense law.[149]

1. Perfect Self-Defense

The complete form of self-defense has objective elements and results in a full acquittal of the murder charge if met.[150] Self-defense presents a looming obstacle in BSS cases because the objective elements often leave no room for consideration of specific psychological conditions.[151] The infamously unclear, and at times subjective, reasonable person standard also plagues what should be a balancing of objectivity.[152]

Despite the confusion, the defense demands no less than an objectively reasonable belief in the need to assert force and in the amount asserted.[153] The burden to disprove the elements of self-defense rests with the prosecution.[154]

Most BSS literature has centered on the application of perfect self-defense.[155] Defense attorneys often use BSS as a defense theory of absolute justification to seek an acquittal for their client's defensive action.[156] For a defendant that felt that

143. *See id.* at 251 (refusing to follow reasoning of prior contract killing cases).

144. *E.g.*, *id.* at 249 (noting that in a prior contract killing case the statutes for use of BSS evidence limited application for imperfect self-defense).

145. *See* MODEL PENAL CODE § 3.04 (AM. LAW. INST. 1962) (describing use of force as "justifiable").

146. *See* Faulkner v. State, 54 Md. App. 113, 115 (1984) (quoting Evans v. State, 28 Md. App. 640, 658 n.4 (1975)) (describing imperfect self-defense as "little more than an academic possibility").

147. *Infra* Subsection II.B.1.

148. *Infra* Subsection II.B.2.

149. *Infra* Subsection II.B.3.

150. People v. Humphrey, 13 Cal. 4th 1073, 1074 (1996) ("To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable.").

151. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1236 (2001).

152. *Id.* at 1240.

153. Kane et al., *supra* note 116.

154. Dykes v. State, 319 Md. 206, 217 (1990); Kane et al., *supra* note 116.

155. *E.g.*, Kinports, *supra* note 12, at 396 (arguing for application of "the standard self-defense claim").

156. *See id.* ("No substantial extension of self-defense doctrine is required to justify the acquittal of battered women on self-defense grounds.").

there was no option but to kill their abuser, self-defense theory seems to properly reflect that defendant's assertion to her right to life.[157] Afterall, self-defense exists as a last-resort exemption to ordinary homicide.[158] The seminal cases that established BSS evidence as a viable factor in defense theories centered on those types of scenarios.[159]

2. Imperfect Self-Defense

Imperfect self-defense is a functionally distinct form of self-defense marked by subjective elements.[160] Courts analyze each element of imperfect self-defense from the perspective of the defendant: did the defendant honestly believe each element to be true at the time of the killing?[161] The subjective standard allows the defendant to unreasonably hold such a belief and still merit the defense.[162] The partial defense has far less recognition and is a more recent development in criminal law.[163] Its growing usage marks it as a nascent but promising theory in criminal defense.[164] As a theory, imperfect self-defense fills the "all-or-nothing" gap left by perfect self-defense.[165]

Subjective belief is the core reason the mitigating characteristic of imperfect self-defense exists.[166] It recognizes an unreasonable but honestly held belief.[167] The *Porter* court explained in an earlier case on BSS that "a defendant's actual, though unreasonable, belief that he is in imminent danger 'negates the presence of malice, a prerequisite to a finding of murder.'"[168]

In a consideration of culpability, the court further discussed that "the defendant is nevertheless to blame for the homicide and should not be rewarded for his unreasonable conduct."[169] The court acknowledged that imperfect self-defense

157. *See* Dressler, *supra* note 44, at 457 ("The temptation is to say that a nonconfrontational "self-defense" homicide is morally justifiable.").

158. *See generally* MODEL PENAL CODE § 210.3 (AM. LAW. INST. 1962) (describing the necessity and lack of alternatives that justifies use of force.)

159. *E.g.*, State v. Norman, 378 S.E.2d 8 (N.C. 1989) (involving a battered spouse who killed her abuser while he slept).

160. *See* Faulkner v. State, 54 Md. App. 113, 115 (1983) ("Imperfect self-defense, however, requires no more than a subjective honest belief on the part of the killer that his actions were necessary for his safety, even though, on an objective appraisal by a reasonable man, they would not be found to be so.").

161. *Id.*

162. *Id.*

163. *Id.* (quoting Evans v. State, 28 Md. App. 640, 658 n.4 (1975)) (describing imperfect self-defense as "little more than an academic possibility").

164. Faulkner v. State, 54 Md. App. 113, 115 (1983).

165. *See id.* at 115–16 (1983) (noting that by negating malice, imperfect self-defense can dispel other included non-murder charges where specific intent of malice is required).

166. *Id.* at 115.

167. *Id.*

168. Porter v. State, 455 Md. 220, 236 (2017) (quoting Faulkner v. State, 54 Md. App. 113, 115 (1983)).

169. *Id.*

rests on principles of excuse that fail to outweigh the societal harm of the killing.[170] Balancing the residual culpability of the crime in hired-killer scenarios without ignoring the BSS evidence requires a middle ground.[171]

3. Provocation and Voluntary Manslaughter

Mitigating factors reduce the severity of charges by accounting for extenuating circumstances.[172] As a defense to murder, another common mitigating element is a claim of provocation.[173] If the jury finds that the defendant was adequately provoked so that her act was a "crime of passion," then her punishment falls under a less severe category of manslaughter.[174]

Provocation sheds light on the law's ability to reduce culpability based on the actor's state of mind.[175] The defense's history can also serve as an example, and cautionary tale, for imperfect self-defense.[176] Provocation, from its 19th century English roots, began as a defined list of four distinct situations that were deemed the only events outrageous enough to warrant the defense.[177] Over time, the categories gave way to a more generalized provocation defined by how reasonable person would be expected to react.[178]

The modern approach, exemplified by the Model Penal Code ("MPC"), grants far more latitude in defining adequate provocation: "Homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[179] While reasonableness is included in the code, the appropriateness of the defendant's actions are "determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[180] This method leaves

170. *Id.*

171. *Id.*

172. *See, e.g.*, William H. Burgess, III, *§ 6:21. Alternatives to, and Mitigation of, Criminal Punishment Code Sentencing, in* WEST'S FLORIDA PRACTICE SERIES, SENTENCING (2019–2020 ed.) ("Mitigation permits the sentencing court to align a defendant's sentence with the defendant's culpability as measured against prevailing community and moral standards.").

173. *See, e.g.*, GA. CODE ANN. § 16-5-2 (West 2020).

174. *See, e.g., id.* ("A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.").

175. *See* Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 675 (2001) (explaining why state of mind could be relevant to the jury's inquiry).

176. *See* Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 302–05 (2015) (discussing both benefits and draw backs of provocation law's expansion and particularly how it may be disproportionally applied based on gender).

177. *Id.* at 280 (The common law included categories "considered highly offensive . . . namely, mutual combat, sudden injury, false arrest, and adultery.").

178. *Id.* at 280–81 (2015) (noting only two states, Illinois and Alabama, that retain variations on the four-categories of provocation.).

179. MODEL PENAL CODE § 210.3 (AM. LAW. INST. 1962).

180. *Id.*

it to the jury to determine whether the explanation, regardless of the provoking action, is sufficient.[181]

A strong limit on provocation is that there can be no "cooling off period" between provocation and the crime.[182] Jurisdictions do not expressly say how much time may lapse but instead extend the defense only as long as the emotional state persists.[183] The defendant must still actually be in such a severe emotional condition and have yet to regain normal reasoning.[184] This standard accepts the irrational actor's present state of mind but does not permit unrestricted retribution.[185]

Under provocation, the defendant is still punished, but not held as culpable as the person who commits the same killing with a clear head.[186] Even though the person intended to kill and knew there was no need to kill, provocation is the law's sympathy for the overwhelming powers of emotion.[187]

III. ANALYSIS

The law of self-defense in the U.S. almost entirely reflects principles of justification.[188] Excuse theories better explain the inclination toward reduced punishment for defendants who act outside of their control.[189] Section A introduces theories of justification and excuse to explain how criminal law approaches different acts.[190] Section B applies these theories to imperfect self-defense in the context of BSS killings.[191]

181. Miller, *supra* note 175, at 668–69.

182. John Bourdeau et al., *§55. Effect of Cooling of Passions on Mitigation to Manslaughter*, *in* 40 AMERICAN JURISPRUDENCE, HOMICIDE (2d ed. 2020); *e.g.*, GA. CODE ANN. § 16-5-2 (West 2020) (describing the inapplicability of the defense when a defendant has time to "cool off").

183. *E.g.*, § 16-5-2 ("[H]owever, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.").

184. *See* Bourdeau et al., *supra* note 182 ("Sudden passion, for purposes of the offense of voluntary manslaughter, must arise at the time of the offense and there must not have been a cooling-off period.").

185. *Id.* (explaining how a colling-off period negates the provocation).

186. *Compare* § 16-5-2 (punishing voluntary manslaughter with no more than 20 years in prison), *with* GA. CODE ANN. § 16-5-1 (West 2020) (punishing first degree murder with death or life in prison).

187. Gruber, *supra* note 176, at 279.

188. *See* 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, 23–24 (1986) (discussing the different theories for excuse and justification and why self-defense falls under the latter).

189. Kinports, *supra* note 12, at 465; *see* Rosen, *supra* note 188, at 18 (listing categorical situations where a killer's lack of choice renders them inculpable).

190. *Infra* Section III.A.

191. *Infra* Section III.B.

A. The Morality of Taking a Life

Justification and excuse are the broadest categories of defenses; each represents a different school of thought on why the law should punish certain conduct to different degrees.[192] Subsection 1 discusses justification and its sub-theories.[193] Subsection 2 analyzes excuse theory.[194]

1. Justification

Justification is often the preferred theory of defenses because it implies a rightness, a moral good.[195] Viewed from a utilitarian lens, justified actions cause the least harm and are the right ones to take.[196] Perfect self-defense is exemplary as it appeals on a survival level.[197] When a killing is justified, it was not only acceptable but the correct thing to do.[198]

Self-defense embodies society's calculus that the armed intruder is right to die at the hands of the man defending his family.[199] While it feels right to imagine this balance, the implication of this theory is that the intruder has actually extinguished his life's value through his actions, warranting his death.[200] The aggressor has no right to life under the "forfeiture" theory of justification and self-defense because he placed others in harm so the law no longer defends him.[201]

Forfeiture is a pessimistic theory of human calculus, but it effectively explains the threshold of justification.[202] It is also a persuasive theory that deters the too-rapid utilization of justification in BSS cases.[203] An abusive spouse loses his right to life, at any time, under a proper self-defense claim where the battered spouse is justified in killing her abuser.[204] Many BSS killing cases involve a history of torture, rape, abuse, and mutilation making such a forfeiture seem proper.[205]

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192. Burke, *supra* note 44, at 242–43.

193. *Infra* Subsection III.A.1.

194. *Infra* Subsection III.A.2.

195. Burke, *supra* note 44, at 242–43.

196. *See* U.S. v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991) (discussing a weighing of social harm).

197. *See* Burke, *supra* note 44, at 229 (describing a "'kill or be killed' moment").

198. *Id.* at 242–43.

199. *Schoon*, 971 F.2d at 196 (noting necessity maximizes "social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime"). *See generally* MODEL PENAL CODE § 210.3 (AM. LAW. INST. 1962) (describing the defense as a justification).

200. Dressler, *supra* note 44, at 465.

201. *Id.*

202. *See id.* at 466 (describing when an abuser loses their right to life or dignity).

203. *Id.* (rejecting the "forfeiture theory as morally unacceptable").

204. *See id.* at 466 (comparing the abuser to trash or a bug that has given up rights to life); John W. Roberts, Comment, *Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides*, 27 L. & PSYCHOL. REV. 135, 155 (2003) (questioning whether it is a favorable result to allow battered spouses to kill their abusers at any time regardless of threat).

205. *See* Dressler, *supra* note 44, at 465–66 (analogizing the brutal abuser in *Norman* to "vermin" under the forfeiture theory).

Under a theory of justification, the act is proper, and the law relieves the defendant of liability.[206] When the crime or act is covered by a defense of justification, the law grants co-conspirators the same protections as the responsible defendant.[207] Applied to hired killers, a battered spouse's protections extend to all involved, and the law justifies each actor's participation.[208]

If BSS defense fully embraces justification as a theory, the legal consequences may be counterproductive to public and legal reception of BSS.[209] If a woman is justified in planning the killing of her husband, then the hired killer is likewise justified in participating in the murder plot.[210] This expansion in turn undermines perception of BSS theory by reducing the reach of accountability.[211] Self-help and vigilante justice are strengthened, at the cost of careful culpability deliberations, when society condones the taking of a life.[212]

2. Excuse

On the other end of criminal defense is excuse, a theory that understands wrongful action but does not condone it.[213] It allows society to exempt certain actors from punishment not because their actions were proper, but because they are not blameworthy.[214] Excuse is why the legally insane do not face penal sentences.[215] It is why the law does not consider those who commit crimes under gunpoint culpable.[216] But where excuse extends, accountability recedes.[217]

Some theorists push for maintaining self-defense for BSS cases but modifying

206. Burke, *supra* note 44, at 242–43.

207. *See* Dressler, *supra* note 44, at 465–66 (suggesting that nothing prevents extension of defendant's self-defense claim to the hired killer).

208. *See id.* at 465–66 (explaining how the justification follows the act, not only the actor).

209. *Id.* (criticizing extension of defense protection to hired-killer); Burke, *supra* note 44, at 279 (describing how the theory has been criticized as condoning vigilante justice and self-help).

210. Dressler, *supra* note 44, at 465–66 (criticizing extension of defense protection to hired-killer); *see* Burke, *supra* note 44, at 279 (explaining why a justification defense should not rest on timing by nature of self-defense theory).

211. Dressler, *supra* note 44, at 465–66 (criticizing extension of defense protection to hired-killer); *see* Burke, *supra* note 44, at 279 (arguing that self-defense would merely operate as an excuse if the element of time is strictly required).

212. Dressler, *supra* note 44, at 465–66 (arguing against the expansion of self-defense to cover hired-killer); *see* Burke, *supra* note 44, at 279 (discussing how a lack of police availability is presumed to increase likelihood of resorting to self-help).

213. Dressler, *supra* note 44, at 463; Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1394 (1997) ("Conventional understandings of criminal law place defenses in two mutually exclusive categories: as excuse or justification.").

214. Burke, *supra* note 44, at 242–43.

215. *Id.* at 218 n.19.

216. *Id.* at 252–53.

217. *See* Dressler, *supra* note 44, at 467 ("[T]he more we permit early use of force, the greater the risk that the force used was not necessary.").

the distinction between excuse and justification.[218] The idea is to dismantle the arbitrary distinction between the theories that inhibit progress in the field.[219] Advocates of an excuse theory cite the too rigid approach to culpability required by justification.[220] If justification requires BSS defenses to only follow perfect self-defense, self-defense law may be preserved, but BSS will again lose credibility and utility.[221]

However, shifting BSS legal theory towards excuse may not be a step forward.[222] A BSS theory that excuses the defendant projects a different view of the abused but may diminish their standing as a "reasonable" person.[223] Acknowledging the murder of an abuser through an excuse theory shifts the blame back to the abused.[224] It is reminiscent of the original insanity approach to BSS as it conveys to the battered that society is sympathetic, but the condition is a defect.[225]

The defect theory focuses on the correct logic in battered spouse analysis but is unacceptable in its moral undertones.[226] The approach also undermines much of BSS's development as a respectable phenomenon by reducing it to little more than a lack of capacity excuse.[227] At the very least, taking the psychological condition to the forefront of the discussion emphasizes why battered spouses who kill deserve a space in defense law.[228]

It is important to contrast the extension of excuse theory when applied to contract killers.[229] While justifications are generally applicable, excuses are personal.[230] The individual and subjective circumstances of the defendant are the root of excuse defenses; neither those circumstances nor the defenses are imputable to co-actors.[231] This doctrine flatly bars hired killers from asserting a legal defense

218. *See* Rosen, *supra* note 188, at 51 ("[S]ociety is neutral with respect to the killing.").

219. *See id.* (describing how oscillation between theories of excuse and justification distract from applying legal theory to fact); Nourse, *supra* note 151, at 1236 (arguing the distinction between justification and excuse has largely dissolved in self-defense).

220. *See* Rosen, *supra* note 188, at 50–51 (describing how a non-culpable aggressor, such as in BSS cases, voids classic justification elements and makes application arbitraty to the facts).

221. *See id.* at 51 ("Thus, there is no reason for the law affirmatively to encourage such conduct. To the contrary, classification of self-defense as a justification may be detrimental to society.").

222. *See* Dressler, *supra* note 44, at 462 (describing how excuse in BSS cases is dismissive of defendants).

223. Burke, *supra* note 44, at 212.

224. *Id.*

225. *See* Dressler, *supra* note 44, at 462 (describing how excuse theory treats the defendant as if she is "crazy and deserves a compassionate and potentially demeaning pat on the head").

226. *See id.* ("The criminal law should send the proper moral messages. . ."); Rosen, *supra* note 188, at 51 (explaining that even abusers are not "entirely morally reprehensible").

227. Dressler, *supra* note 44, at 464.

228. *See generally* Nourse, *supra* note 213, at 1338–39 (discussing how a focus on emotion of defendant places blame on the victim).

229. *See* Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH L. REV. 273, 297 (2009) (contemplating whether defense to murder should be extended to hired killers under the excuse theory).

230. *Id.* at 280.

231. *See id.* at 302 ("Situations of excuse present no reason to encourage third-party intervention.").

if that defense is grounded in excuse theory because the killer does not carry the excuses of their contractor.[232] In the hired-killer scenario, a battered spouse who contracts the killing would be excused of liability, but the killer would face the full liability for the murder.[233]

B. Distinguishing Imperfect Self-Defense

Imperfect self-defense, particularly in the context of BSS, can carry negative connotations.[234] Subsection 1 discusses stereotypes of BSS and their impact on the law.[235] Subsection 2 explains voluntary manslaughter's niche in criminal law and how it relates to the theory of provocation.[236]

1. The Stereotypes of BSS

Defenses based on BSS evidence can only succeed where the jury fully appreciates the underlying condition because an effective defense centers on the subjective belief of the defendant.[237] Intimate partner abuse brings with it a set of assumptions and stereotypes that can color a jury's perception of a defendant and their mental state.[238] These stereotypes were so disruptive to the science and law of abuse that Lenore Walker detailed the most common ones in her early research of BSS.[239] A court and jury will more readily apply BSS defenses to hired killing scenarios when they overcome the stereotypes that may have made the defendant's actions seem so irrational.[240]

Many BSS myths reflect society's perception of the battered woman as a pitiful stereotype who voluntarily subjects themselves to abuse.[241] For example, the myth that "battered women are masochistic" acknowledges the presumption of blame placed on the abused and suggests a desire or pleasure derived by battered spouses.[242] Other myths, such as "battered woman deserve to be beaten," "the batterer is not a loving partner," and "battered women can always leave home,"

232. *See id.* at 297 (explaining how excuses are personal a third-party would not be acting under the same circumstances that give rise to an excuse defense).

233. *Id.* at 301.

234. Kinports, *supra* note 12, at 412.

235. *Infra* Subsection III.B.1.

236. *Infra* Subsection III.B.2.

237. Walker, *supra* note 32, at 321–22.

238. WALKER, *supra* note 56, at 18.

239. *Id.*

240. *See* Porter v. State, 455 Md. 220, 251 (2017) (referencing Walker's myths, "the Dissent's claim perpetuates a dangerous myth about intimate partner violence"); State v. Kelly, 97 N.J. 178, 196 (1984) (explaining why a jury must hear the scientific background in order to properly consider a battered spouse's state of mind).

241. WALKER, *supra* note 56, at 20.

242. *Id.*

reject the superficial defenses of abusers and recognize that an outside positive appearance can be dangerously misleading.[243]

These myths' impact on a jury's evaluation of the evidence can be critical to a case.[244] While each jurisdiction establishes its own procedure, some courts have been more emphatic about ensuring proper presentation and reception of BSS evidence.[245] In *State v. Kelly*, the court held that the jury must first consider the factors restraining a battered woman before looking to the conduct of the defendant.[246] The court said:

> Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood.[247]

The *Porter* court also took the myths into consideration, specifically to rebut the dissent's arguments against consideration of BSS evidence.[248] The court highlighted that despite the progress in battering cases, a refusal to acknowledge the psychological barriers to escape diminishes the reality of the battered.[249] By specifically requiring subjective analysis of the use of force and ability to safely retreat, it marked two elements of imperfect self-defense that were specifically critiqued by Walker fifty years earlier.[250] Courts must carefully handle and acknowledge these myths to ensure defense of battered spouses remains rooted in reality.[251]

2. Voluntary Manslaughter and Provocation

Voluntary manslaughter is a testament to a society concerned with culpability.[252] In the scheme of severity, a first-degree killing with premeditation and deliberation is the worst.[253] Second-degree killings lacking premeditation

243. *Id.* at 18.

244. *See Kelly*, 97 N.J. at 196 (discussing the scientific theory required to decide if a battered spouse is reasonable).

245. *E.g.*, *id.* (discussing the "long-standing and reasonable fear" of battered spouses).

246. *See id.* (explaining a how BSS can be misunderstood if not presented with expert testimony).

247. *Id.*

248. Porter v. State, 455 Md. 220, 251 (2017) (accusing the dissent of "perpetuat[ing] a dangerous myth about intimate partner violence").

249. *Id.* at 251.

250. WALKER, *supra* note 56, at 20.

251. *Porter*, 455 Md. at 251–52 (2017).

252. *See* Gruber, *supra* note 176, at 307–08 (discussing the role of morality and culpability in society's assessment of what is wrong).

253. *See* Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) ("Maine divides the single generic offense of felonious homicide into three distinct punishment categories—murder, voluntary manslaughter, and involuntary

follow—such as a sudden, but unprovoked, killing without prior planning.[254] The next killing in line is usually voluntary manslaughter depending on the jurisdiction.[255] The Supreme Court has been explicit about weighing culpability saying, "criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."[256]

Imperfect self-defense functions similar to a claim of provocation or heat of passion.[257] However, the traditional scenario for provocation—a state of overwhelming emotion frequently in the context of a revelation of infidelity—is remarkably dissimilar from BSS cases.[258] Particularly given the non-confrontational context of most BSS killings, the lack of a triggering event is precisely what makes them harder to understand.[259] While the scenarios that give rise to provocation and BSS killings are different, the culpability of the killers are comparable.[260]

Both provocation and imperfect self-defense rest on the same underlying principle for applying a lesser degree of culpability and less severe punishment to result in voluntary manslaughter.[261] In both cases, the defendant acts under extenuating circumstances and a state of mind directly impacted by preceding trauma, even if only subjectively perceived.[262]

The reason the law lowers culpability from second-degree murder to voluntary manslaughter is the same reason why the law should consider BSS killings under imperfect self-defense: an actor's irrationality.[263] BSS killings with premeditation may appear more similar to first-degree murder when a defendant meticulously plans and executes a killing[264] Nonetheless, the cases derive their culpability difference from the surrounding circumstances prompting the murder rather than

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manslaughter.").

254. *Id.* at 698.

255. *See* Windham v. State, 602 So. 2d 798, 801 (Miss. 1992) (finding degrees of homicide are "distinguishable simply by degree of mental state of culpability").

256. *Mullaney*, 421 U.S. at 697–98.

257. *See* Evans v. State, 329 A.2d 300, 309 (Md. Ct. Spec. App. 1975) (describing an early case of imperfect self-defense as "excusable self-defense").

258. *Compare* State v. Robinson, 643 A.2d 591, 592 (N.J. 1994) (involving "passion/provocation" killing spurred by mutual combat), *with* State v. Norman, 378 S.E.2d 8, 10 (N.C. 1989) (involving a non-confrontational killing in the context of severe marital abuse).

259. Walker, *supra* note 32, at 324.

260. *See* Nourse, *supra* note 213, at 1395 (describing how the defendant's emotion can be protected, regardless of the circumstances that gave rise to it).

261. *See id.* at 1333 (explaining provocation as a defense for "losing control").

262. *See id.* at 1394–95 (giving examples of how a non-excuse theory is applicable to situations even where the defendant is mistaken).

263. Burke, *supra* note 44, at 266 ("[The] actor making a reasoned decision based upon an evaluation of her viable escape options and the value she assigns to competing priorities.").

264. *See* Porter v. State, 455 Md. 220, 250 (2017) (describing intricate planning in the weeks leading up to the murder).

merely the actions taken by the killer.[265] Ordinary claims of provocation must not have premeditation because it is the sudden "heat of passion" that prompts the killer to take action they would not have ordinarily done.[266]

BSS killings parallel the provocation distinction with only a change in the timeline.[267] Provocation often focuses on a single, contemporaneous event that triggers the killing.[268] BSS, in contrast, looks to the history of severe abuse that created a constant state of fear for the partner—the entire relationship is a form of provocation.[269] Non-confrontational killings will almost always fall outside the category of traditional provocation.[270] The delay between an abuser's violence and the battered spouse's killing is reflective of the cyclical nature of partner abuse.[271]

The culpability parallels certainly do not make all BSS killings equivalent to those provocation killings.[272] Charges consistent with the actions of the accused are still necessary to produce an organized approach to homicide prosecution and defense.[273] However, imperfect self-defense's parallels to the adjacent defense of provocation reveals how objective and subjective elements blend in theory and practice.[274]

IV. MODEL STATUTE ANALYSIS

A battered spouse charged with murder for hiring a killer faces significant hurdles to any claim of imperfect self-defense.[275] Jurisdictions without a framework to incorporate BSS evidence into contract-killer cases deprive defendants of an important defense.[276] *Porter's* remand was only possible because of an improper jury instruction on imperfect self-defense, an instruction that depended on a Maryland statute specifically addressing BSS.[277]

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265. *See* Nourse, *supra* note 213, at 1394–95 (describing a focus on the defendant's state of mind rather than the objective acts of the decedent).

266. *See id.* at 1333 (describing a loss of control as an explanation for a defendant's actions).

267. Roberts, *supra* note 204, at 146 (describing the lull in violence that defines non-confrontational killings).

268. *E.g.*, GA. CODE ANN. § 16-5-2 (West 2020).

269. Burke, *supra* note 44, at 292.

270. *See* Dayan & Gross, *supra* note 31, at 28 ("[T]he MPC contains legal rules that create fundamental obstacles when applying the doctrine in cases of domestic violence.").

271. Porter v. State, 455 Md. 220, 251 (2017).

272. Mullaney v. Wilbur, 421 U.S. 684, 697–98 (1975) ("First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been . . . almost the single most important factor in determining the degree of culpability attaching to an unlawful homicide.").

273. People v. Elder, 579 N.E.2d 420, 424 (Ill. App. Ct. 1991) (finding no provocation in part because of a lack of "sudden and intense passion").

274. *See* Dressler, *supra* note 44, at 458 (advocating for a shift away from self-defense in BSS cases).

275. *Porter*, 455 Md. at 252.

276. *Id.* at 248–49 (explaining that the Maryland statute permitting BSS evidence would be rendered obsolete without a way to incorporate the evidence into the ruling).

277. *Id.* at 248–49 (2017); *see* MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (West 2020) (serving as a model statute).

To ensure that courts handle BSS cases competently and completely, nationwide adoption of a uniform statute is necessary.[278] The statute must provide jurisdictions with the power to consider alternate solutions and a mandate that critical BSS evidence play a role.[279]

First, it is critical for the statute to define and explicitly mention BSS to unambiguously signal the applicability of the condition as evidence to the defense.[280] For a uniform statute to be effective, jurisdictions must not only adopt it universally but also apply it consistently.[281] The model statute also serves the purpose of recognizing the existence of the very condition of BSS so that all jurisdictions permit evidence regarding it.[282]

The statute defines the term "unavoidable" and integrates it to provide special recognition to the reality of spousal abuse.[283] Its inclusion addresses the challenge of battered spouses who have no practical means of escape either due to dependence, lack of opportunity, or psychological effects of learned helplessness.[284] The inclusion of this term should not diminish or discourage efforts to first seek alternate means of help.[285] The term's inclusion does, however, ensure that the defense is not made unavailable merely because a battered spouse was unsuccessful in disengaging from the relationship.[286]

The statute does not mention non-confrontational killings, but it is constructed to ensure imminence of threat is not dispositive of the defense.[287] The defense should critically be available in unprovoked or contract killings scenarios.[288]

Imperfect self-defense is a defense with subjective elements.[289] The very purpose of the defense is to provide recourse to defendants who act according to their experiences and perception of necessity.[290] It is therefore imperative that a traditional test of reasonableness not impair the defendant's belief in the state of the circumstances.[291] Rather, the statute instructs a court to consider the need for force by the defendant's honestly held belief for it and allow for the defendant to

278. People v. Reese, 815 N.W.2d 85, 87 (Mich. 2012) ("[T]he doctrine of imperfect self-defense does not exist in Michigan law as a freestanding defense.").

279. Porter v. State, 455 Md. 220, 248–49 (2017).

280. Rosen, *supra* note 188, at 16.

281. *Porter*, 455 Md. at 248–49.

282. Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992) (finding reversible error for lack of instruction on BSS).

283. *Porter*, 455 Md. at 248–49 (2017); Walker, *supra* note 32, at 325.

284. *Id.*

285. *Id.* at 333.

286. *See, e.g.*, State v. Norman, 378 S.E.2d 8, 11 (N.C. 1989) (declining to permit self-defense despite defendant's testimony about failed attempts to leave her partner).

287. *See infra* Section VI (specifically addressing the lack of imminent as a requirement).

288. *E.g.*, *Porter*, 455 Md. at 228 (involving a contract killer).

289. *Id.* at 235.

290. *Id.*

291. *Id.*

be wrong in her perception of necessity.[292] This modification to how BSS evidence is applied to perfect self-defense also accounts for the recognized altered perception for long-term victims of violence.[293] With this guarantee, a jury may properly evaluate whether a defendant's sincerely believed self-defense was necessary in the situation.[294]

The statute includes the first aggressor rule—barring application to defendants who initiate a violent exchange—to maintain a preference of last resort.[295] Many critics of BSS fear the theory not only widens the range of defendants that juries may acquit, but also that it threatens the basic premise of self-defense.[296] Ensuring that courts properly apply the model statute only to cases with compelling BSS evidence will limit the scope of change to existing self-defense law.[297] Except for situations in which a battered spouse initiates and kills unprovoked, this rule prevents unwarranted expansion of defense for those who intentionally agitate others with deadly consequences.[298]

V. CONCLUSION

Continuing considerations, from philosophical to clinical questions, demonstrate that U.S. law has yet to reach a consensus on BSS—let alone a coherent legal theory.[299] Unifying theories and practice through standardized defenses may at least yield consistency.[300] This consistency would better ensure defendants have a fair and carefully plotted path through complicated BSS criminal proceedings.[301] Minimizing disadvantages to defendants requires a foundation reflective of the physiological conditions and immutable legal principles at play.[302]

Imperfect self-defense marks a reasonable middle ground, void of the philosophical compromise of a first-degree murder verdict or the unrealistic

292. *Infra* Section VI.

293. Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992).

294. *See* Allison v. United States, 160 U.S. 203, 207 (1895) (explaining why all of the context of abuse is required for a jury to evaluate whether acts were reasonable).

295. *Infra* Section VI, MODEL STATUTE § (c)(3); Dressler, *supra* note 44, at 471.

296. *See* Dressler, *supra* note 44, at 458 (arguing self-defense expansion in light of BSS evidence is "a 'reform' society ultimately will regret").

297. *See id.* (critiquing how an expansion of self-defense to embrace BSS would lead to undesirable results).

298. *See id.* (theorizing that expansion of self-defense would promote more self-help and send the wrong moral message).

299. *Compare* People v. Reese, 815 N.W.2d 85, 87 (Mich. 2012) (declaring there is no independent imperfect self-defense in state law), *with* Porter v. State, 455 Md. 220, 251 (2017) (choosing to depart from precedent to allow imperfect self-defense in a hired–killing case).

300. *See* Dayan & Gross, *supra* note 31, at 17 (arguing for consistent application of legal theory in BSS defense law).

301. *Id.*

302. *See* Kinports, *supra* note 80, at 314 (calling for plain recognition of the situational danger a battered spouse lives in); Dressler, *supra* note 44 at 458 (staunchly defending preservation of self-defense elements).

definitional stretching necessary for a full acquittal by perfect self-defense.[303] It is a partial defense with a lower burden that is offered to counter elements and mitigate a charge for murder.[304] Voluntary manslaughter carries a far shorter penal sentence than first-degree murder.[305] It also provides a more nuanced approach to homicide—one capable of weighing subjective beliefs in the face of repugnant facts that no "reasonable person" should ever be forced to endure.[306]

VI. PROPOSED MODEL STATUTE

Battered Spouse Syndrome Statute

Definitions:

(a)(1) In this section, the following words have the meanings indicated.

(2) "Battered Spouse Syndrome" means the psychological condition of a victim of repeated physical and psychological abuse by a spouse, former spouse, cohabitant, or former cohabitant which is also recognized in the medical and scientific community as the "Battered Woman's Syndrome."

(3) "Unavoidable" means any situation that poses such great risks or burdens that a reasonable person would be without a rational or safe choice to not engage in the behavior.

(4) "Defendant" means an individual charged with:

(A) First-degree murder, second-degree murder, manslaughter, or attempt to commit any of these crimes; or

(B) First-degree assault.

Evidence and Expert Testimony

(b) When the Defendant raises the issue that the Defendant was-suffering from Battered Spouse Syndrome at the time of the alleged offense as a result of the victim's past, the court may admit for the purpose of explaining the Defendant's motive or state of mind, or both, at the time of the commission of the alleged offense:

(1) Evidence of repeated physical and psychological abuse of the Defendant perpetrated by an individual who is the victim of a crime for which the Defendant has been charged; and

(2) Expert testimony on Battered Spouse Syndrome.

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303. *See* Dressler, *supra* note 44, at 458 (2006) (critical of allowing BSS evidence to modify self-defense elements); Kinports, *supra* note 80, at 317 (discussing how even non-confrontational killings can still be viewed as perfect self-defense).

304. Faulkner v. State, 54 Md. App. 113, 116 (1984).

305. *Compare* GA. CODE ANN. § 16-5-2 (West 2020) (punishing voluntary manslaughter with no more than 20 years in prison), *with* GA. CODE ANN. § 16-5-1 (West 2020) (punishing first degree murder with death or life in prison).

306. Porter v. State, 455 Md. 220, 248–49 (2017); *see* State v. Norman, 378 S.E.2d 8, 11 (N.C. 1989) (detailing one of the more repulsive patterns of abuse and torture).

Imperfect Self-defense

(c)(1) A Defendant is entitled to the affirmative defense of imperfect self-defense if they use force intended or likely to cause death or great bodily harm to defend their person or another from unlawful force.

(2) The Defendant must have honestly, though not reasonably or correctly, believed at the time of the incident:

(A) the use of force was necessary, and the amount of force used was no greater than necessary to prevent imminent death or severe bodily harm; or

(B) the use of force was necessary to terminate otherwise Unavoidable and severe abuse by the victim, given:

(i) a pattern of physical violence or behavior by the victim against the Defendant giving rise to Battered Spouse Syndrome in the Defendant; and

(ii) the Defendant has exhausted safe opportunities, if any, to disengage from the relationship or abuser so that their continued contact is Unavoidable.

(3) Imperfect self-defense is unavailable to a Defendant who was the first aggressor in the interaction, notwithstanding situations applicable under (c)(2)(B) involving Battered Spouse Syndrome.[307]

307. *See* 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2020) (consulted for self-defense elements and construction) (acting as a self-defense model).

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