SURVIVAL HOMICIDE

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A significant number of women who are incarcerated in American prisons for homicide offenses have been subjected to various forms of domestic abuse, including physical, sexual, and psychological abuse. This Article coins the term "survival homicide" to refer to cases where survivors of substantial and repeated domestic abuse kill abusive intimate partners or other abusive family members in circumstances where the abuse significantly contributed to their act. Abuse survivors are often prosecuted for murder and are over-punished by the criminal legal system.

Existing legal frameworks underlying survival homicide rest on exercising considerable discretion by various institutional actors, including prosecutors, juries, and sentencing judges, resulting in inconsistent outcomes. Since the law does not recognize a separate defense to mitigate survival homicide defendants' criminal responsibility, they can only raise general self-defense claims. Yet, domestic abuse survivors often fail to prevail on self-defense grounds when the deceased did not pose an imminent threat of deadly force at the time of the killing. Existing sentencing mitigation models provide only a partial solution to survival homicide defendants. While judges have the discretion to consider past abuse as a mitigating factor at the penalty phase, survivors' sentences are not only excessive and unduly harsh, but also carry a host of collateral consequences.

This Article's main thesis is that survival homicide should be treated under a mitigated criminal responsibility model instead of existing sentencing mitigation

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models. Its argument is twofold: First, it posits that domestic abuse survivors' criminal responsibility should be relative and shared with states' responsibility for failing to take adequate measures to prevent domestic abuse and support survivors. Second, it argues that survivors' culpability is lower when they kill abusive family members out of fear and survival motives and therefore their criminal responsibility should be mitigated. To reflect survivors' comparative responsibility, this Article proposes that state legislatures pass a designated homicide offense, titled "survival homicide," for prosecuting domestic abuse survivors. Survival homicide would be graded lower than manslaughter, carry a non-carceral penalty, and not trigger any collateral consequences.

This Article makes three contributions to the literature. First, it decouples the law's treatment of survival homicide from self-defense's restrictive elements. A specialized offense for survival homicide shifts away from problematic excusatory defenses toward a mitigated responsibility offense. Second, it challenges three of criminal law's conventional wisdoms: that mitigating factors should not be considered at the guilt phase of the trial but be relegated to the penalty phase, that defendants' motives do not affect their criminal responsibility, and that mercy has no role for determining criminal liability. Third, it opens the door toward using survival homicide as a case study for recognizing additional forms of prior abuse beyond the domestic setting that contribute to offending by revising definitions of other core crimes committed by abuse survivors.

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INTRODUCTION

In September 2017, Nicole Addimando fatally shot Christopher Grover, her live-in boyfriend and the father of her two children.[1] She was charged with second-degree murder under New York law. Addimando's central defensive claim at her jury trial was that she had killed Grover in self-defense. She established, through lengthy testimony, photographs, and other evidence, that Grover repeatedly physically and sexually abused her, and her account was supported by several witnesses who testified at trial. But the jury was not persuaded that Addimando killed Grover in self-defense and in April 2019, they convicted her of second-degree murder.[2]

Before sentencing, Addimando's defense counsel filed a motion that the trial court apply the Domestic Violence Survivors Justice Act (DVSJA), which the New York State Legislature had passed in 2019, giving sentencing judges the discretion to mitigate the sentences of domestic violence survivors who were convicted of a host of crimes.[3] The

1 People v. Addimando, 152 N.Y.S.3d 33, 37 (App. Div. 2021).

2 Jericka Duncan, *Self-Defense or Murder? Shooting Death Divides a Community*, CBS NEWS (Aug. 7, 2021, 11:02 PM), https://www.cbsnews.com/news/nicole-addimando-murder-case-chris-grover-48-hours [https://perma.cc/BEH2-B22D]; People v. Addimando, 120 N.Y.S.3d 596, 598 (Cnty. Ct. 2020).

3 *Addimando*, 120 N.Y.S.3d at 598–99; *see* N.Y. PENAL LAW § 60.12(1) (McKinney 2023) (providing that the law does not apply to aggravated and first-degree murder, murder committed

statute requires proof, by a preponderance of the evidence, that the defendant was a victim of domestic violence at the time of the offense; that the abuse significantly contributed to the commission of the crime; and that "having regard for the nature and circumstances of the crime and the history, character and condition of the defendant," a sentence in accordance with the customary statutory sentencing guidelines "would be unduly harsh."[4] The trial court refused to mitigate Addimando's sentence based on the statute and sentenced her to "an indeterminate term of imprisonment of 19 years to life."[5] But the appellate court held that the trial court abused its discretion and reduced Addimando's sentence to a "determinate term of imprisonment of 7½ years to be followed by 5 years of postrelease supervision."[6]

While the DVSJA sometimes results in more lenient sentences in individual cases, arguably, the sentencing mitigation framework that underlies the statute does not offer an adequate legal response to the problem of domestic abuse survivors who kill intimate partners or other abusive family members following substantial cumulative abuse. This is because even when survivors' sentences are mitigated, their murder or manslaughter convictions—and the ample collateral consequences that are triggered by such convictions—remain intact.[7]

Addimando's story—as well as similar stories of other domestic abuse survivors—challenges existing conceptual frameworks that treat defendants who killed abusive intimate partners or other abusive family members, where their self-defense claims have been rejected, as "murderers." Societal pronouncement of domestic abuse survivors who committed survival acts as "murderers," a label that carries moral condemnation and stigma, poignantly illustrates the criminal legal system's unfair treatment of these defendants, because the very nature of a murder conviction in these circumstances is inherently unjust.

This Article coins the term "survival homicide" to refer to cases where survivors of domestic abuse become criminal defendants after killing abusive intimate partners or abusive family members, such as children killing abusive parents or other abusive people who live with them in the same household, even when they are not related by blood,

in the course of committing rape, or any offense that would require the defendant to register as a sex offender, including an attempt or conspiracy to commit any such offense).

4 PENAL LAW § 60.12(1); *see also Addimando*, 120 N.Y.S.3d at 600–01 (determining preponderance of the evidence to be the standard of proof used for the DVSJA).

5 *Addimando*, 152 N.Y.S.3d at 37. *See generally Addimando*, 120 N.Y.S.3d 596. The court further sentenced Addimando to "a concurrent determinate term of imprisonment of 15 years to be followed by 5 years of postrelease supervision on the conviction of criminal possession of a weapon in the second degree." *See Addimando*, 152 N.Y.S.3d at 37.

6 *Addimando*, 152 N.Y.S.3d at 46.

7 *See infra* Section I.B.

marriage, or adoption.[8] While most survival homicide cases involve women who killed abusive male partners, men, transgender people, and non-binary people may also fall prey to domestic abuse, either at the hands of intimate partners or other members of their household.[9] This Article's analysis of the survival homicide phenomenon encompasses all domestic abuse survivors regardless of their gender, making the proposed

[8] A few terminological clarifications are warranted at the outset. This Article uses the terms "survivor" and "victim" interchangeably to reflect a disagreement among those who endure domestic violence and to capture their distinct narratives. The term "victim" implies vulnerability and weakness, which often results in failure to perceive those who do not fit the stereotype of "helpless" victims as "real" victims. By contrast, the term "survivor" connotes empowerment and resilience and better captures many survivors' preference for describing their experiences. This Article prefers the term "survivor" whenever possible but recognizes that sometimes use of the term "victim" is inevitable. This duality is also reflected in some statutes, such as the DVSJA, which uses the term "survivor" in its title but the term "victim" in its provisions. *See* PENAL LAW § 60.12(1). The interchangeable use of the terms "survivors" and "victims" is also common in scholarship addressing sexual violence. *See, e.g.*, Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 STAN. J. C.R. & C.L. 217, 219–220, 220 n.8 (2005). Additionally, this Article uses the terms "domestic violence" and "domestic abuse" interchangeably but largely prefers the term "domestic abuse" to better capture the notion that physical violence is merely one form of domestic abuse, which also includes psychological and emotional abuse. Moreover, in this Article, I adopt a functional definition of domestic abuse by including not only abusive family members but also other abusive household members for the purposes of applying the survival homicide statute. A functional definition of family eschews legal formalities as the sole path toward defining families by recognizing additional forms of relationships that mimic formal families, such as stepparents and functional parents. *See* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1484 (2014) ("Function and performance of 'family' have become important criteria for legal recognition, diminishing the once exclusive emphasis on formalities, such as ceremonial marriage."). *See infra* Appendix for a flexible, functional definition of domestic abuse survivors who killed abusive family or household members. I deliberately choose not to use the term "intimate partner violence" because survival homicide covers not only abuse between intimate partners but also between other family members.

[9] *See infra* note 13; MICHAEL MUNSON & LOREE COOK-DANIELS, FORGE, GENDER-INTEGRATED SHELTERS: EXPERIENCE AND ADVICE 7 (2016), https://perma.cc/9MWQ-G2ZG. Most survival homicide cases involve defendants who killed their intimate partners, but there are also cases where children killed abusive family members. *See, e.g.*, Jonah Engel Bromwich, *Bresha Meadows, Ohio Teenager Who Fatally Shot Her Father, Accepts Plea Deal*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/us/bresha-meadows-father-killing.html (last visited Jan. 15, 2023) (describing the case of Bresha Meadows, a fourteen-year-old girl who shot her abusive father to death while he was sleeping); Menendez v. Terhune, 422 F.3d 1012 (9th Cir. 2005) (deciding the murder prosecution of the Menendez brothers who killed their allegedly abusive parents); Jahnke v. State, 682 P.2d 991 (Wyo. 1984) (deciding the case of a sixteen-year-old who killed his father with a shotgun in the driveway of their home); State v. Janes, 822 P.2d 1238 (Wash. 1992) (deciding the case of a seventeen-year-old boy who killed his stepfather as he was returning from work); TEDx Talks, *Beyond the Mask: Overcoming Abuse and Trauma*, YOUTUBE (May 18, 2022), https://www.youtube.com/watch?app=desktop&v=7mvpqAVeMtM (last visited Apr. 1, 2023) (describing the case of David Garlock and his brother, who were each sentenced to twenty-five years after killing the man who physically, sexually, and emotionally abused them as children, whereafter Garlock was released on parole in 2013 after serving thirteen years in prison).

designated offense to prosecute survivors of domestic abuse a gender-neutral one.

While the rate of survival homicide has declined in the past thirty years[10] as a result of greater availability of shelters and other support services for domestic abuse survivors,[11] it remains a disconcerting problem.[12] Research shows that the majority of incarcerated women have experienced some form of abuse throughout their lives.[13] Likewise, abuse experiences from childhood, adolescence, and adulthood are correlates of women's perpetration of violence against intimate partners.[14] Further, among women who were convicted of homicide crimes, many have killed

10 *See* MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 58–59 (2008) ("From 1976 to 2004 there was a 71 percent decline in the number of men killed by their intimate partners.").

11 *See* Andrea L. Dennis & Carol E. Jordan, *Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes*, 15 NEV. L.J. 1, 7–8 (2014) (observing that battered women's shelters today provide survivors "outreach services; legal, financial, and medical advocacy; job and career counseling; substance abuse services; children's programming; transitional housing; and prevention efforts").

12 *See* Justine van der Leun, *"No Choice but to Do It": Why Women Go to Prison*, NEW REPUBLIC (Dec. 17, 2020), https://newrepublic.com/article/160589/women-prison-domestic-violence-survivors [https://perma.cc/Z7B5-ZZZ9] ("Forty-three percent [of surveyed women incarcerated for murder and manslaughter] reported experiencing intimate partner violence, nearly double the rate of the general populace. Of those, 41 percent—nearly 18 percent of all respondents—said they were in prison for killing a romantic partner."); *see also infra* notes 13–15.

13 On the correlation between incarcerated women's prior victimization and perpetration of violence against others, including intimate partners, see generally Preeta Saxena & Nena Messina, *Trajectories of Victimization to Violence Among Incarcerated Women*, HEALTH & JUST., July 27, 2021, at 1 (describing studies that show a much higher prevalence of adverse childhood experiences, continued victimization into adulthood, and lifelong trauma exposure in incarcerated women in comparison to women in the general population); MELISSA E. DICHTER & SUE OSTHOFF, VAWNET, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION: A RESEARCH UPDATE (2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf [https://perma.cc/7262-8B68]; DANIEL ERNESTO ROBELO, ANTI POLICE-TERROR PROJECT & JUST. TEAMS NETWORK, INTERRUPTING INTIMATE PARTNER VIOLENCE: A GUIDE FOR COMMUNITY RESPONSES WITHOUT POLICE (2022), https://static1.squarespace.com/static/5cf978a41393e70001434b2f/t/63688ee4f13a464e73fbbe06/1667796736528/Interrupting+IPV+%28APTP-JTN_FINAL-WEB%29.pdf [https://perma.cc/QX4V-BAES].

14 *See* ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, VERA INST. OF JUST. & SAFETY & JUST. CHALLENGE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7, 10–11 (2016), https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf [https://perma.cc/XRM4-SDSA] (observing that women in jails report very high rates of prior victimization, with 77% having experienced intimate partner violence and 86% having experienced childhood sexual abuse); *see also* SHANNON M. LYNCH, DANA D. DEHART, JOANNE BELKNAP & BONNIE L. GREEN, BUREAU OF JUST. ASSISTANCE, WOMEN'S PATHWAYS TO JAIL: THE ROLES & INTERSECTIONS OF SERIOUS MENTAL ILLNESS & TRAUMA 32–33 (2012), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women_Pathways_to_Jail.pdf [https://perma.cc/3W29-KJY5].

intimate partners who subjected them to physical, sexual, and psychological abuse.[15]

Survivors who killed abusive family members are therefore not merely perpetrators of homicide but also victims who have been subjected to substantial, cumulative domestic abuse.[16] This abuse significantly contributed to their acts because of their fear that the deceased would kill them, and thus the killing was necessary for

15 *See generally* Rachel Louise Snyder, *When Can a Woman Who Kills Her Abuser Claim Self-Defense?*, NEW YORKER (Dec. 20, 2019), https://www.newyorker.com/news/dispatch/when-can-a-woman-who-kills-her-abuser-claim-self-defense [https://perma.cc/9CXK-BXKW] ("Although there are no national statistics on how many women are jailed for killing their abusers, a 2005 study by the Department of Corrections and Community Supervision in New York found that sixty-seven per cent of women imprisoned for killing someone close to them (excluding children) had been abused by their victim."); NAT'L RES. CTR. ON JUST. INVOLVED WOMEN, FACT SHEET ON JUSTICE INVOLVED WOMEN IN 2016 (2016), https://cjinvolvedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf [https://perma.cc/9SB4-76QS] ("There is evidence that many women who do commit violent or aggressive acts often do so in self-defense (e.g., in situations of intimate partner violence), rather than in a calculated manner. Also violent offenses by women are often committed against family members or intimates in domestic settings." (footnote omitted)); SURVIVED & PUNISHED N.Y., PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 11 (2020), https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf [https://perma.cc/4ABB-6DPA] ("The vast majority of incarcerated women have experienced physical or sexual violence in their lifetime, and too often these women wind up in prison in the first place because they're protecting themselves from an abuser." (quoting Press Release, N.Y. State Off. of Child. & Fam. Servs., Governor Signs Domestic Violence Survivors Justice Act (May 14, 2019), https://ocfs.ny.gov/main/news/for-release.php?idx=10589#page-body [https://perma.cc/EJF2-ZBK2])). For example, twenty-one women out of more than 100 serving life sentences in Louisiana were all convicted for killing abusive domestic partners. Katie Moore, *Women Serving Life Sentences for Killing Their Abusers Are Getting a Second Chance*, WWL-TV (May 21, 2021, 11:06 PM), https://www.wwltv.com/article/news/investigations/katie-moore/women-serving-life-sentences-for-killing-their-abusers-are-getting-a-second-chance/289-c7830e4e-6c4b-4a8f-a12a-f3a202deb07c [https://perma.cc/DL5P-9EHL]. Additionally, statistics show that the overall number of women incarcerated for homicide crimes is significantly lower than men. In 2019, approximately 10,400 females were serving sentences in state prisons for murder or non-negligent manslaughter, compared with 152,600 males. *See* E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2020—STATISTICAL TABLES 29 (2021). However, there are no separate statistics on the number of women convicted of homicide crimes who killed abusive family members. The lack of such specific data is attributed in part to the fact that many survivors choose to take plea agreements rather than go to trial. *See Snyder*, *supra*.

16 Women defendants are often subjected to multiple forms of domestic abuse, not only by their current intimate partner, but also by former partners or family members. For a discussion of the dual status of survivors as both victims and offenders of crimes, see generally Leigh Goodmark, *Gender-Based Violence, Law Reform, and the Criminalization of Survivors of Violence*, 10 INT'L J. FOR CRIME JUST. & SOC. DEMOCRACY 13 (2021). In a new book, Professor Goodmark offers a broader conceptual framework addressing the multiple ways in which survivors of domestic violence are criminalized under the existing legal system after committing a variety of other crimes, including against third parties. *See* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023).

survival.[17] In these circumstances, neither murder nor manslaughter convictions are warranted. Yet existing laws fail to recognize survival homicide as a basis for mitigating abuse survivors' criminal responsibility when their acts fall short of self-defense.

Current legal framework underlying survival homicide consists of three stages: first, prosecutors charge defendants with murder; second, defendants introduce evidence that they acted in self-defense or that their actions were partially excused; and third, if the jury rejects their defensive claims, judges decide whether and to what extent sentencing mitigation is warranted.[18] Previous reform efforts primarily focused on the two latter stages, proposing to amend self-defense statutes to accommodate the lived experiences of domestic abuse survivors and mitigate sentences of convicted survivors whose self-defense claims have been rejected.[19]

Both excusatory defenses and sentencing mitigation, however, suffer from significant shortcomings. Since no American jurisdiction designates a specialized defense for survival homicide, defendants bear the burden to produce evidence that they acted defensively under general self-defense statutes.[20] Establishing self-defense's elements in survival homicide cases, however, is notoriously difficult and often fails due to the requirement that the abused defendant faced *imminent* threats by the deceased to use *lethal* violence at the time of the crime.[21]

While sentencing mitigation provisions sometimes reduce the punishment of survival homicide defendants, sentencing mitigation models, including the DVSJA, have their own drawbacks, thus offering an insufficient response to survival homicide and leaving intact the inequitable treatment of domestic abuse survivors. These models provide sentencing judges with ample discretion regarding whether and to what extent to take into account the mitigating factors related to past abuse. Since there is no agreement on the weight that should be given to these mitigating factors, outcomes are inconsistent and often unpredictable.[22]

Taken together, existing frameworks fail to provide justice to domestic abuse survivors because of the enormous amount of largely unstructured discretion that different institutional actors exercise at the various stages of the criminal process. It ranges from prosecutorial discretion to trial courts' discretion regarding what testimonies can be introduced at trial to juries' discretion regarding whether to accept the

17 *See generally* LINKLATERS LLP & PENAL REFORM INT'L, WOMEN WHO KILL IN RESPONSE TO DOMESTIC VIOLENCE: HOW DO CRIMINAL JUSTICE SYSTEMS RESPOND? (2016).

18 *See infra* Part I.

19 *See infra* Sections I.A, I.C.

20 *See infra* Section I.A.

21 *See infra* Section I.A.

22 *See infra* Section I.C.

defendant's self-defense account, culminating in sentencing judges' discretion regarding whether the defendant's sentence warrants mitigation.[23]

To address these drawbacks, this Article calls for shifting the reform focus away from excusatory defenses and sentencing mitigation toward a specialized offense. In contrast with previous proposals, this Article tackles prosecutors' preliminary choice to bring murder charges against survival homicide defendants by proposing the adoption of a separate criminal offense titled "survival homicide."

This Article's main thesis is that survival homicide should be treated under a mitigated responsibility framework instead of a sentencing mitigation model. Its argument is twofold: First, it posits that survivors' criminal responsibility should be relative or comparative to states' co-responsibility because survivors share at least some of the blame with the states that failed to provide them with safe living conditions.[24] The shared responsibility model acknowledges that survival homicide is far from being only a problem of individual survivors' culpability. Instead, this model draws on the idea that because domestic abuse is a broader societal, economic, and public health problem,[25] states have a duty to domestic abuse survivors to ensure that they are able to live dignified lives free of violence.[26] While in recent years states have vigorously relied on criminal law to punish batterers, they still fall short both in preventing domestic abuse as well as providing survivors who wish to end abusive relationships with adequate support that would allow them to become economically independent.[27]

In order to bring to bear its own failures in supporting domestic abuse survivors, states should embrace a criminal responsibility model that takes into account the background conditions underlying survivors' lives. This Article urges state legislatures to carve out a sui generis response to address the distinct problem of survival homicide by passing laws that craft a separate homicide offense specifically designated for prosecuting survivors who killed domestic abusers.

This Article's second key argument is that survivors' culpability is lower when they kill abusive family members out of fear for their lives and motivation for survival. Recognizing the effects of these motives should lead to mitigating survivors' criminal responsibility. A mitigated responsibility model for defendants in survival homicide cases

23 *See infra* Section I.A.

24 I thank Professor Michelle Madden Dempsey for suggesting that I use these terms.

25 *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018).

26 *See infra* Section III.B.1.

27 *See infra* Section III.A.

incorporates a host of factors—currently relevant only at the sentencing phase of the trial—into the framework for determining criminal responsibility itself.[28]

This Article makes three contributions to the literature. First, it disentangles the law's treatment of survival homicide from self-defense's elements. The mitigated criminal responsibility model shifts away from existing general defenses toward a designated offense that conceptualizes survival homicide under a sui generis framework.

Second, this Article challenges three of criminal law's conventional wisdoms: that mitigating factors should not be considered at the guilt phase of the trial and instead be relegated to the penalty phase, that defendants' motives do not and should not affect criminal responsibility itself, and that mercy has no role in determining criminal responsibility and may only be considered at sentencing. Instead, this Article argues that mitigating factors as well as defendants' motives should reduce defendants' criminal responsibility, and that mercy ought to play a more prominent role in shaping the scope of abuse survivors' criminal responsibility.

Third, this Article contributes to the debate among criminal law scholars about the shape and scope of criminal justice reform. At the heart of this debate stands the choice between the non-reformist (or abolitionist) approach—requiring deep transformation of the criminal legal system by discarding criminal institutions altogether—and the reformist approach—reforming the system from within, without completely abandoning criminal frameworks.[29] Siding with the reformist approach, this Article favors comprehensive changes in the definition and grading of core crimes like homicide. A survival homicide offense corresponds to a broader need to overhaul the overly harsh legal treatment of violent crimes in general, and homicide crimes in particular. While this Article focuses on survival homicide, it serves as a case study for recognizing variable levels of criminal responsibility in other areas too, where other forms of abuse, over and above the domestic context, contribute to offending. Adopting a survival homicide offense opens the door to considering broader legislative reforms that distinguish between actors based on their varying degrees of individual culpability.

At the outset, two preliminary clarifications are in order. First, the designated offense should not be construed in a way that undermines defendants' chances of being fully acquitted on self-defense grounds. Instead, the proposal aims to change the baseline offense with which

28 *See infra* Section III.D.2.

29 *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 273 (2018).

prosecutors could charge domestic abuse survivors, from murder or manslaughter to survival homicide. Its goal is to provide a basis for mitigating abuse survivors' criminal responsibility in cases where establishing self-defense claims is unlikely. The specialized offense, however, should be viewed as additive and supplementing rather than detracting from defendants' self-defense claims.

Second, the scope of this Article is limited to domestic abuse survivors who kill abusive intimate partners or other abusive family members. Nonetheless, domestic abuse survivors may commit a host of other crimes where abuse significantly contributed to their offending.[30] For example, domestic abuse survivors often become involved in the criminal legal system after committing crimes against third parties at the direction of their abusive partners, ranging from felony murder to an array of offenses other than homicide, like robberies and drug offenses.[31] Furthermore, abuse survivors who become involved in the criminal legal system include not only those who live in abusive households at the time of the crime but also additional groups of people who have been abused in non-domestic settings, such as men who have endured coercive pressures to commit crimes by other men higher up in the street hierarchy or criminal organization, people who have been abused in childhood, and people who grew up in impoverished conditions.[32] Criminal law's binary categorization of those involved in the criminal legal system as either "offenders" who are perceived as blameworthy or "victims" who are perceived as blameless is inherently flawed because reality is more nuanced than this binary account, and offenders are often themselves victims.[33] Indeed, the scope of the survivor-turned-criminal-defendant phenomenon exceeds the domestic abuse context. Offenders' underlying conditions, like past childhood traumas and the street abuse pervasive in inner-city neighborhoods, are often associated with crime perpetration[34]—a phenomenon documented in the literature and often referred to as the "abuse to prison pipeline."[35] The proposed statute for

30 *See* Goodmark, *supra* note 16, at 19–21.

31 *Id.*

32 *See infra* text accompanying notes 230–31.

33 *See* GOODMARK, *supra* note 16, at x–xi; *see also* Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217, 218–19 (2016) (observing that some victims "may be imperfect" and some killers "may be tragic," which blurs criminal law's binary classification of victims as pure and killers as ugly).

34 GOODMARK, *supra* note 16, at 12–13; *see also* Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 800–01 (2022). *See generally* I. India Thusi, *Girls, Assaulted*, 116 NW. U. L. REV. 911 (2022) (discussing past sexual and physical abuse of incarcerated girls).

35 *See* Charisa Smith, *#WhoAmI?: Harm and Remedy for Youth of the #MeToo Era*, 23 U. PA. J.L. & SOC. CHANGE 295, 313 (2020) (discussing the sexual abuse to prison pipeline).

which this Article advocates explicitly acknowledges survivors' dual status as both perpetrators and victims of crime as a basis for mitigating their criminal responsibility.[36] Yet, in this Article, I choose to carve out a specialized criminal responsibility model that is applicable only to survivors who kill abusive family members.

Advocating for domestic abuse exceptionalism will likely generate ample pushback from various perspectives, which this Article will address throughout.[37] But for now, suffice it to say that because survival homicide is a relational crime, where the abuse occurs between related persons living in the same household, it is qualitatively different than crimes occurring in other settings.[38] Moreover, survival homicide presents a more urgent need for legislative reform, given mandatory minimum sentences that apply in many jurisdictions for murder convictions, as well as other uniquely harsh sentences that are imposed on defendants convicted of homicide offenses.[39] Further, crafting a carefully circumscribed survival homicide statute is more politically feasible than proposing to adopt laws that broadly apply to all categories of abuse-survivors-turned-criminal-defendants. While this Article is sympathetic to similar reforms concerning other groups of abuse survivors, a proposal to amend only a limited category of cases will likely gain more political traction and bipartisan support than broader decriminalization and decarceration reform proposals.

This Article develops in three parts: Part I outlines the flaws in existing treatment of survival homicide by highlighting the vast discretion exercised by criminal law's institutional actors. It demonstrates how both excusatory defenses and sentencing mitigation models fail to provide equitable treatment to survival homicide defendants. Part II argues that findings from social science literature on domestic battering and its effects support the adoption of an alternative model for survivors' criminal responsibility. This model deemphasizes the prevailing behavioral-medicalized view of survival homicide defendants, emphasizing instead a social-ecological approach for addressing the

36 *See* Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319, 1320–21 (2022); Goodmark, *supra* note 16, at 14 (criticizing the criminal legal system's binary categorization of survivors into perpetrators or victims of crime and arguing that when these categories overlap, the system treats them unfairly by over-criminalization and over-punishment).

37 One key line of critique is that a survival homicide offense offers only a limited response to the broader phenomenon of criminalized survivors. *Cf.* GOODMARK, *supra* note 16, at 186, 194 (advocating for an abolition feminism framework for abuse survivors who become involved in the criminal legal system as defendants after committing a host of crimes, and supporting broad abolitionist reforms for all criminalized victims).

38 See *infra* Section III.A for additional justifications for exceptionalism in the domestic abuse context.

39 *See infra* Section I.B.

problem. Part III begins by explaining why domestic abuse exceptionalism is warranted and continues by elaborating on the theoretical normative justifications underlying the mitigated criminal responsibility model for survival homicide. It then delves into the doctrinal implications of adopting a designated homicide offense to prosecute these cases.

I. PROBLEMS WITH EXISTING LEGAL FRAMEWORKS

Criminal law's institutional actors, including prosecutors, juries, and sentencing judges, exercise an enormous amount of discretion that affects the outcomes of survival homicide cases.[40] While discretion is not unique to survival homicide, it proves especially problematic for abuse survivors, given the high stakes of homicide convictions. Prosecutors' standard practice is to bring murder charges against abuse survivors, which, in many jurisdictions, carry a mandatory minimum of life imprisonment.[41] This prosecutorial practice persists despite the growing phenomenon of progressive prosecutors who subscribe to reformist policies and practices in their treatment of other crimes.[42] Their reforms, however, stop short of homicide prosecutions.[43]

40 For a discussion of prosecutorial discretion in domestic violence cases, see MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS (2009).

41 *See* Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 644–49 (2019) (describing prosecutors' practice of overcharging abused women who killed their abusers, despite ample documented evidence of history of prior abuse by the deceased).

42 For a general discussion of progressive prosecution, see generally Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020), and Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021).

43 A recent New York case involving the prosecution of Tracy McCarter demonstrates this problem. McCarter, a forty-four-year-old Black woman, nurse, and mother of four children, was prosecuted for second-degree murder after allegedly stabbing to death James Murray, her estranged (white) husband. McCarter stated that on the day of the killing, Murray, who was an alcoholic and often became violent when intoxicated, had been physically aggressive toward her following an argument over money. McCarter said that when Murray kept coming at her, she picked up a knife and held it out in an attempt to ward him off. McCarter had told her work colleague that on multiple occasions, Murray had punched, kicked, and tried to choke her and that she was fearful of him. Yet two district attorneys insisted on bringing murder charges against McCarter. First, Manhattan's former District Attorney Cy Vance presented the case to the grand jury, asking them to return a murder indictment, and subsequently charged McCarter with second-degree murder. Vance's successor, Manhattan's District Attorney Alvin Bragg, a Black former civil rights attorney whose campaign platform emphasized reformist agenda in various areas of criminal enforcement, initially continued to pursue the murder charges in McCarter's case. Only ten days before McCarter's murder trial was scheduled to begin, Bragg filed a motion to dismiss the charges. In a letter to the trial judge, Bragg wrote that his office had reasonable doubt as to whether McCarter had the

A. *Self-Defense*

When domestic abuse survivors are charged with murder and try to prove that they acted in self-defense, they carry the burden to present facts that could be found by a reasonable jury to constitute valid defensive force.[44] Once the defendant has met the burden of production, the vast majority of state defensive-force statutes put the burden of proof on prosecutors to disprove at least one element of self-defense beyond a reasonable doubt.[45] If prosecutors fail to prove this, defendants will be fully acquitted of any homicide.

Survival homicide defendants mostly fail to prevail on self-defense grounds if they killed at a moment when the deceased did not pose an imminent threat to kill them.[46] Even in circumstances involving a pattern of past abuse, where the deceased had been repeatedly abusing the defendant, juries and judges often find the defendant's use of force to be excessive and disproportional, thus precluding a right to self-defense.[47] Moreover, to prevail on self-defense grounds, defendants must demonstrate that the deceased was on the brink of killing them at the moment they responded, as opposed to the deceased committing nonlethal acts of violence or threatening to inflict future harm.[48]

requisite intent to kill to support a conviction for second-degree murder. Subsequently, the court dismissed the murder charges against McCarter. *See* Victoria Law, *The Manhattan DA Finally Keeps His Campaign Promise Not to Prosecute a Domestic Violence Victim*, NATION (Nov. 21, 2022), https://www.thenation.com/article/society/manhattan-alvin-bragg-tracy-mccarter [https://perma.cc/QX8C-G268].

44 *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 231–32 (9th ed. 2022); John Pfaff, *Rittenhouse Didn't Have to Prove He Acted in Self-Defense*, WASH. POST (Nov. 19, 2021, 5:35 PM), https://www.washingtonpost.com/outlook/2021/11/16/rittenhouse-trial-self-defense [https://perma.cc/Y45D-JM33]. For examples of cases where survivors raised self-defense claims, see State v. Peterson, 857 A.2d 1132 (Md. Ct. Spec. App. 2004), and Smith v. State, 486 S.E.2d 819 (Ga. 1997). Duress is theoretically another possible defense that survival homicide defendants may raise, but these claims prove unhelpful to this category of defendants, among others, because the defense does not apply to intentional murder in most states. *See* GOODMARK, *supra* note 16, at 88–90.

45 Pfaff, *supra* note 44 (noting that the distinction between burden of proof and burden of production explains why some defendants, including Kyle Rittenhouse, are more likely to succeed in raising self-defense claims).

46 *See* DRESSLER, *supra* note 44, at 226–35. It is important to note that cases involving non-confrontational killings are the minority. The majority of survival homicide cases involve abusers who directly confronted survivors, threatening to inflict physical violence. However, in many of these cases, there was insufficient evidence to prove a threat to inflict lethal force. *See* GOODMARK, *supra* note 16, at 83–84.

47 *See, e.g.*, People v. Addimando, 120 N.Y.S.3d 596, 618 (Cnty. Ct. 2020); State v. McEndree, 159 N.E.3d 311, 328–30 (Ohio Ct. App. 2020); *see also* GOODMARK, *supra* note 16, at 82–88.

48 But see *Addimando*, 120 N.Y.S.3d 596, for an example of where the defendant failed to prevail on self-defense grounds.

Ample literature critiques the inadequacy of restrictive self-defense statutes in survival homicide cases; commentators highlight the male-oriented nature of the defense and propose modifying it by relaxing its temporal and reasonableness elements to accommodate the distinct circumstances of survivors who kill abusive intimate partners.[49] While no American jurisdiction has amended its self-defense laws by adopting a separate defense designed for survivors of domestic abuse, significant reforms have taken place regarding the type of evidence that could be introduced to buttress self-defense claims.[50]

Courts in past decades expanded the scope of expert opinion testimonies on domestic battering and its effects on survivors.[51] Most courts now routinely allow expert witnesses to testify about battering's impact on survivors and the typical dynamics of an abusive relationship to contextualize the circumstances underlying the survivors' lived experiences.[52] Courts recognize that such testimonies help juries understand the reasonableness of survivors' apprehension of harm and explain their perception regarding the necessity of using deadly force.[53]

But the judicial practice of liberally admitting these testimonies has unintended consequences that stem from their medicalized nature, as expert opinions in survival homicide cases are mostly offered by clinical psychologists and psychiatrists.[54] The main drawback of these expert opinions is their over-emphasis on defendants' psychological profiles by portraying the effects of battering as an individual problem of mental impairment, as captured by the use of the deeply problematic term "battered woman syndrome" (BWS).[55]

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49 *See, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1 (1994); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 263–65 (2002); Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225, 229–31 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2d ed. 2005); Kit Kinports, *Defending Battered Women's Self-Defense's Claims*, 67 OR. L. REV. 393 (1988); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1697–1700 (2003); *cf.* Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 470 (2006) (suggesting that given the shortcomings of self-defense, the duress defense should be expanded to cover cases where abused women kill their abusers on the theory that the defendant did not have a fair opportunity to avoid the killing).

50 *See, e.g.*, DRESSLER, *supra* note 44, at 238–42.

51 *Id.* at 239–40.

52 *See* GOODMARK, *supra* note 16, at 85–86; DRESSLER, *supra* note 44, at 239–40.

53 *See, e.g.*, People v. Samson, No. C089905, 2021 WL 3615569, at *5–6 (Cal. Ct. App. Aug. 16, 2021); Higginson v. State, 183 N.E.3d 340, 344–46 (Ind. Ct. App. 2022); Wallace-Bey v. State, 172 A.3d 1006, 1025 (Md. Ct. Spec. App. 2017).

54 *See* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 105 n.266, 107–10 (1997).

55 *See* Coughlin, *supra* note 49, at 54, 56–57.

Early research on domestic violence portrayed domestic abuse survivors as suffering from BWS and experiencing "learned helplessness" that traps them in abusive relationships and makes them unable to resist abuse. These dated concepts, however, have largely been discredited by more recent studies.[56]

Commentators have long critiqued courts' reliance on the "syndrome" language to excuse survivors' killing of abusive intimate partners.[57] They lament that this strategy serves to pathologize defendants' actions by portraying them as abnormal and irrational responses, which ultimately deprives their agency as rational decision-makers.[58] Instead, commentators suggest replacing the "syndrome" language with the phrase "battering and its effects."[59]

The capacious concept of "battering and its effects" acknowledges that there is no uniform theory or universal description of the multiple effects of battering on all survivors.[60] Studies show that no single preset "psychological profile" accurately characterizes battered people and describes their responses to battering and that there is considerable variation in the ways that survivors respond to domestic abuse.[61]

Moreover, social science studies have long reconceptualized survivors' disparate reactions to domestic abuse in a way that casts doubt on characterizing their behaviors as passive acquiescence. Social science researchers have developed the "survivor theory" account, which provides an alternative to the refuted "learned helplessness" account and better explains survivors' active reactions to domestic abuse.[62] The

56 *See, e.g.*, Regina Schuller & Caroline Erentzen, *The Battered Woman Syndrome and Other Psychological Effects of Domestic Violence Against Women: Scientific Status*, *in* 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 412, 422 (2022–2023 ed. 2022) (describing how social science studies refuted Dr. Lenore Walker's original theory on BWS).

57 For examples of scholarly critique, see *supra* note 49, and *infra* notes 59–68.

58 *See generally* Nourse, *supra* note 49, at 1697–1700 (noting that early reforms focused on individualized conception of the battered woman "to make their plight more and more individualized, more and more the product of a strange psychology, a rotten family background, or the effects of a peculiar syndrome").

59 *See* Martha R. Mahoney, *Misunderstanding Judy Norman: Theory as Cause and Consequence*, 51 CONN. L. REV. 671, 671–72, 677 (2019).

60 *See* BRENDA L. RUSSELL, BATTERED WOMAN SYNDROME AS A LEGAL DEFENSE: HISTORY, EFFECTIVENESS AND IMPLICATIONS 7, 23–26, 137 (2010); *see also* Schuller & Erentzen, *supra* note 56, at 467–68. Some courts recognize that the use of the BWS language is outdated. *See, e.g.*, State v. Curley, 250 So. 3d 236, 244–45 (La. 2018) ("'Battered Woman's Syndrome' is an inartful (and likely outdated) term for the condition defendant claims to suffer.").

61 *See* Schuller & Erentzen, *supra* note 56, at 466.

62 *See* JOHNSON, *supra* note 10, at 48–49; EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 30 (1988) (describing a major study that found that the majority of women who entered women's shelters "made extremely assertive efforts to stop the abuse"); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 85 (2008).

survivor theory account emphasizes that these responses include several stages, including consideration of various responses, selection of actions, and turning to safety strategies to remain free of abuse.[63]

Studies find that survivors' reactions to domestic abuse are characterized by taking multiple nonviolent and violent measures to actively resist the abuse[64] and that those who experienced more severe forms of violence reported greater efforts to get help and support.[65] Contrary to previous assumptions that women's reactions to their partners' abuse are submissive, most survivors' reactions employ ample measures to try to fend off and end the abuse, including actively turning to others by seeking help from agency sources and state institutions, including police, medical personnel, and counselors.[66]

While many domestic abuse survivors actively respond by taking nonviolent measures to extricate themselves from abusive relationships, some survivors' coping mechanisms in response to domestic abuse also include turning to violent actions of their own.[67] In most cases where women use force against intimate partners, their motivations include acting self-protectively.[68] Sociologist Michael Johnson refers to these responses as "violent resistance," defining this term as the use of self-protective actions by women who have been abused by intimate partners,

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63 *See* Kathleen J. Ferraro, *Battered Women: Strategies for Survival*, *in* VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES, AND EFFECTS 124 (Albert P. Cardarelli ed., 1997); Jessica G. Burke, Andrea Carlson Gielen, Karen A. McDonnell, Patricia O'Campo & Suzanne Maman, *The Process of Ending Abuse in Intimate Relationships: A Qualitative Exploration of the Transtheoretical Model*, 7 VIOLENCE AGAINST WOMEN 1144, 1151 (2001).

64 *See* Carol E. Jordan, James Clark, Adam Pritchard & Richard Charnigo, *Lethal and Other Serious Assaults: Disentangling Gender and Context*, 58 CRIME & DELINQ. 425, 449 (2012) (comparing women who have killed intimate partners to those who have killed others outside the intimate partner context and revealing that women who kill their partner do so "under a variety of circumstances, not just as passive abuse victims who conform to an 'ideal type'").

65 *See* Deborah L. Rhatigan, Amy E. Street & Danny K. Axsom, *A Critical Review of Theories to Explain Violent Relationship Termination: Implications for Research and Intervention*, 26 CLINICAL PSYCH. REV. 321, 333 (2006).

66 *See* JOHNSON, *supra* note 10, at 51.

67 *See generally* SUSAN L. MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN'S VIOLENCE IN RELATIONSHIPS (2005).

68 Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337, 397 (2015) ("The prevailing view . . . is that women arrested for domestic violence usually acted self-protectively, or in retaliation for past abuse, and that this fact differentiates them from male arrestees. As many as 60 to 80 percent of women mandated to complete [batterer intervention programs] used violence to respond to harm to themselves or their children." (footnote omitted)); Lisa Young Larance, *When* She *Hits Him: Why the Institutional Response Deserves Reconsideration*, 5 VIOLENCE AGAINST WOMEN NEWSL. 10, 14 (2007) ("The women's stated motivations for using force include: the desire to defend their self-respect against their partners' verbal and/or emotional attacks; to defend their children; a refusal to be victimized again; being passive did not work so maybe using violence will; and to gain short-term control over a chaotic/abusive situation.").

but emphasizing that these actions do not always qualify as self-defense under criminal law.[69]

Yet, despite the fact that social science research has made significant progress in understanding the cumulative effects of domestic abuse on survivors, the problems that commentators identified over thirty years ago still loom large in contemporary court decisions.[70] A review of recent court decisions reveals that courts today continue to use dated medicalized language to characterize abused defendants' responses to domestic abuse despite rejection of such language in social science studies.[71]

The 2019 Iowa Supreme Court decision in *Linn v. State* is illustrative.[72] The defendant was convicted of first-degree murder of her abusive husband, filed for post-conviction relief arguing ineffective assistance of counsel after her trial counsel failed to adduce BWS evidence, and requested that the court appoint a BWS expert at the public's expense.[73] The Iowa Supreme Court accepted the defendant's arguments and not only provided an unusually elaborate primer on the cumulative effects of domestic battering and the importance of admitting BWS testimony to support the defendant's self-defense claim, but also noted that experts have largely abandoned BWS's "learned helplessness" and cycle-of-abuse accounts.[74] Yet, despite conceding that there is no single understanding of an abuse survivor's psychological profile, the court repeatedly referred to the defendant as potentially suffering from BWS.[75] By continuing to rely on medicalized perceptions of domestic abuse survivors, the court perpetuates decision-makers' misconceived perceptions of survivors as afflicted with various psychological impairments or psychiatric disorders.

69 *See* JOHNSON, *supra* note 10, at 51–52, 55, 59 (noting that survivors' violent actions include various violent resistant acts, many of which are not lethal, and that a small number of abuse survivors resort to lethal violence, such as how in 2004, 385 women killed their abusive partners).

70 The judicial use of the "syndrome" language persists even when the law explicitly rejects such medicalized accounts. For example, California law incorporates the phrase "battering and its effects" in its statutory definition, thus arguably dispensing of the "syndrome" language. *See generally* CAL. EVID. CODE § 1107 (West 2023). Yet the 2021 California Third District Court of Appeals decision in *People v. Samson* continued to talk about "battered person's syndrome" as a series of characteristics. *See* People v. Samson, No. C089905, 2021 WL 3615569, at *4 (Cal. Ct. App. Aug. 16, 2021).

71 *See, e.g.*, State v. Elzey, 244 A.3d 1068, 1073 (Md. 2021); Wallace-Bey v. State, 172 A.3d 1006, 1033–34 (Md. Ct. Spec. App. 2017).

72 *See generally* Linn v. State, 929 N.W.2d 717 (Iowa 2019).

73 *Id.* at 720.

74 *See generally id.* But see *id.* at 742, for a discussion on introducing evidence of past abuse by people other than the deceased.

75 *See generally id.*

Likewise, the 2021 Maryland Court of Appeals decision in *State v. Elzey* further demonstrates the continued judicial use of discredited and medicalized "syndrome" language.[76] The defendant was charged with murder after stabbing her boyfriend to death during a heated argument. At trial, in support of her self-defense justification, the defendant introduced expert testimony from a psychiatrist who testified that her "*constellation of mental disorders was consistent with what he often sees in someone who suffers from Battered [Wife] Syndrome*."[77] The psychiatrist further described BWS as "*a psychological condition*," opined that "women with the Syndrome develop 'learned helplessness,'" and elaborated on the "cycles of abuse that are indicative of the Syndrome."[78]

The expert witness's continued use of dated concepts that social science studies had long refuted, including "learned helplessness," "cycle of abuse," and "BWS," was deeply disconcerting. Moreover, the court uncritically deferred to the expert's flawed opinion by repeatedly using the term "syndrome" to describe the defendant. This case, like many other recent court decisions, exemplified how current judicial language preserves the misconceived perception of the effects of domestic battering solely as a problem of individuals' psychological deficiency, which ultimately leads "mentally impaired" survivors to commit irrational acts of violence.[79]

Furthermore, evidence of BWS and expert opinions that do not use the "syndrome" language yet use medicalized terms that suggest survivors' mental impairments not only fail to help but, in fact, often harm certain survivors. Psychologists' and psychiatrists' testimonies portraying an abuse survivor's purported prototypical profile and opining on whether a specific defendant fits that profile might be helpful to defendants whom the jury perceives as fitting the victimhood narrative of a weak, helpless, and mentally impaired victim.[80] Yet this essentialist account purporting to lump all abused defendants' behaviors into one predetermined psychological profile is not only flawed but also

76 *Elzey*, 244 A.3d at 1073.

77 *Id.* at 1073, 1076 (emphasis added).

78 *Id.* at 1076 (emphasis added).

79 For another example illustrating a recent court's continued use of dated "syndrome" language, see People v. Addimando, 120 N.Y.S.3d 596, 618 (Cnty. Ct. 2020) ("[T]he defense team fully presented and argued the defendant's battered women's syndrome defense . . . . [but] the jury rejected [it] . . . .").

80 *But see* Goodmark, *supra* note 16, at 16–17 (criticizing criminal law's dichotomy between "offenders" and "victims," which largely perceives offenders as blameworthy and victims as mostly blameless but fails to account for the overlap between victimhood and criminal offending). Goodmark uses the term "criminalized survivors" to refer to the phenomenon of women who have been subjected to abuse, both in their childhood and families, as well as by their intimate partners who also perpetrate violence. *Id.* at 19.

detrimental to survivors whose behaviors do not fit the preconceived victimhood narrative.[81] Psychologists' and psychiatrists' medicalized accounts thus contribute to the jury's perception of certain survivors as strong, aggressive, and independent, resulting in jurors discrediting these survivors' self-defense claims.[82]

The problem is further exacerbated when domestic abuse survivors allegedly "deviate" from traditional gender norms and arguably fail to adhere to social expectations regarding feminine roles. As Professor Goodmark observes, when survivors actively resist their repeated abuse by reacting with violence of their own, their behavior is perceived as aggressive, as it does not conform to expected perceptions of femininity.[83] Ultimately, she continues, survivors who are not perceived as "perfect victims" are being punished more harshly by the criminal legal system.[84]

Moreover, intersectionality analysis demonstrates that Black women survivors are least likely to benefit from expert opinions on "profiles" of battered women as they are detrimentally affected by the various stereotypes, biases, and prejudices underlying the responses to their victimization. Black women in the United States experience domestic abuse at disproportionately higher rates than other ethnic groups and races.[85] Moreover, Black women fight back against abusive partners more than white women.[86] The realities and the stereotypes to which they are subjected sometimes differ from those of Black men and white women.[87] A prevalent stereotype that proves particularly harmful to Black women defendants concerns the "Angry Black Woman" trope that contributes to the misperception of Black women as aggressive.[88] One of the key

81 *See* Mindy B. Mechanic, *Battered Women Charged with Homicide: Expert Consultation, Evaluation, and Testimony*, 32 J. AGGRESSION MALTREATMENT & TRAUMA 198, 204 (2022).

82 *See* Goodmark, *supra* note 62, at 81–82, 116.

83 *See id.* at 82–83 (observing that the offender-victim binary is especially detrimental to women defendants because traditional scripts cast women in the role of weak and helpless victims and men as aggressive offenders).

84 *Id.* at 82, 116, 119 (noting that when women deviate from their expected passive role as victims, they are treated more harshly than men and punished for fighting back).

85 *See* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 238–41 (2007) (observing that while domestic abuse cuts through all segments of the population, low income, minority, and immigrant women are disproportionately represented in domestic violence cases).

86 *See* HILLARY POTTER, BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE 8, 38, 116, 125–27, 173, 178, 184 (2008).

87 *See* Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2021–22 (2017).

88 *See* Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 461 n.9, 513 (2021); Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN

requirements for successfully prevailing on self-defense grounds is that the defendant was not the initial aggressor in the encounter that resulted in the homicide.[89] The misperception that Black women are belligerent and thus lack the characteristics of "real victims" of domestic abuse not only impedes redress for and protection from abuse, but also contributes to the reluctance to view them as abuse survivors when they commit survival homicide.[90]

B. *Partial Excuses*

When the homicide cannot be fully justified on self-defense grounds, plea agreements, imperfect self-defense theories, and provocation doctrines sometimes offer legal bases for mitigating defendants' criminal responsibility from murder to manslaughter. Yet, manslaughter convictions in lieu of murder convictions prove an insufficient measure for providing equitable treatment of defendants in survival homicide cases. Given the risk of longer punishment if their case goes to trial, some defendants choose to plead guilty and accept a plea agreement that reduces murder to manslaughter. The problems associated with plea agreements have been thoroughly documented.[91] The prevalent practice results in convicting over 90% of criminal defendants without trial.[92] As Professor Carissa Byrne Hessick's recent book demonstrates, one of the key problems with plea agreements is the tremendous leverage they provide prosecutors in pressuring defendants to plead guilty to lesser included crimes.[93]

The pressure to plead guilty to a lesser form of homicide is especially exacerbated in survival homicide cases where murder charges serve as a baseline for negotiation. Abuse survivors are placed in an untenable position of choosing between pleading guilty to manslaughter to avoid the possibility of a murder conviction, accompanied by a harsh term of

& L. 39, 51–52 (2017); Amber Simmons, *Why Are We So Mad? The Truth Behind "Angry" Black Women and Their Legal Invisibility as Victims of Domestic Violence*, 36 HARV. BLACKLETTER L.J. 47, 53, 56–57 (2020). *See generally* Jones & Norwood, *supra* note 87.

89 *See* DRESSLER, *supra* note 44, at 220–21 (discussing self-defense's non-aggressor element).

90 Anita Bernstein, *Negative Liberty Meets Positive Social Change*, 114 NW. U. L. REV. ONLINE 195, 199 (2019).

91 *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

92 *Id.* at 5 (quoting Warren Burger, *The State of the Judiciary—1970*, 56 AM. BAR ASS'N J. 929, 931 (1970)).

93 *See id.* at 182 (positing that plea bargains not only strip criminal defendants of their right to jury trials but also "strip the criminal [legal] process of any moral messages"—circumventing the public's sense of right or wrong—and strip the public's participation in criminal trials).

imprisonment, or taking the risk of going to trial and trying to persuade the jury that they acted in self-defense and be acquitted altogether of any crime.[94] Furthermore, reliance on plea bargains as a mechanism for mitigating criminal responsibility in survival homicide cases does not offer a uniform doctrinal basis for treating these cases. Consequently, absent a principled legal construct to address survival homicide cases, outcomes are inconsistent, and different courts treat these cases differently.[95]

Likewise, the partial excuse of imperfect self-defense also provides only a partial solution to the problem of survival homicide. About half of U.S. states now recognize imperfect self-defense claims that allow the jury to convict a defendant of manslaughter instead of murder in cases where defendants used excessive force after subjectively but unreasonably believing that deadly force was necessary.[96] Yet, imperfect self-defense laws have their own drawbacks.[97] Just to name one, these laws' requirement that the actors faced an *imminent* threat to their lives remains a significant barrier for survival homicide defendants who raise imperfect self-defense claims.[98] One example where a court refused to

94 *See generally* Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1739, 1750 (2018) ("[H]omicide law is left in a state of doctrinal confusion, as [some cases] fail to neatly fit into existing doctrines of either self-defense or provocation.").

95 *See, e.g.*, Commonwealth v. Jones, 258 A.3d 519–20 (Pa. Super. Ct. 2021) (unpublished table decision) (affirming the defendant's conviction of third-degree murder and sentence of six to twelve years imprisonment) ("[Jones]'s defense was that she suffered from battered-woman syndrome as a result of years of abuse from [Decedent], and that she was in fear for her life when she stabbed him. The Commonwealth portrayed [Jones] as a jealous ex-girlfriend who stabbed [Decedent] in a fit of rage[, suspecting he was involved with another woman]." (alterations in original)), *appeal denied*, 276 A.3d 200 (Pa. 2022) (unpublished table decision); People v. Johnson, 164 Cal. Rptr. 3d 864 (Ct. App. 2013) (affirming the defendant's conviction of first-degree murder and sentence of fifty years to life); State v. Curley, 250 So. 3d 236 (La. 2018) (vacating the defendant's conviction of murder and sentence of life imprisonment—of which the defendant served eleven years before being acquitted of the crime in a new trial); State v. Malone, 998 So. 2d 322 (La. Ct. App. 2008) (affirming the defendant's conviction of second-degree murder and sentence of life imprisonment).

96 For an argument that imperfect self-defense laws provide an adequate solution to survivors of domestic violence who killed their abusers, see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 135 (2003). Additionally, some states recognize survivors' provocation claims as a basis for convicting the defendant of manslaughter instead of murder. *See, e.g.*, Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 599–600, 606 (2004) (reviewing LEE, *supra*). In other states, however, courts hold that provocation is an anger-based defense, which does not apply when survivors killed abusive intimate partners out of fear. *See id.* at 598 n.17.

97 For an argument that imperfect self-defense offers an insufficient framework for addressing these cases and that the provocation defense should be broadly used by survivors of domestic abuse who killed out of fear, see Buchhandler-Raphael, *supra* note 94, at 1766–70.

98 *See* Jane Campbell Moriarty, *"While Dangers Gather": The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 26–30 (2005).

instruct the jury on imperfect self-defense due to the lack of imminent threat was demonstrated in the infamous trial of Erik and Lyle Menendez, two adult brothers who killed their parents and testified that their father physically and sexually abused them in the past and that they feared for their lives.[99] The court held that the defendants did not introduce any evidence that at the moment of the killing, they feared imminent threats to their lives.[100] It further clarified that prospective fear due to threats to inflict future harm is insufficient to warrant a jury instruction on imperfect self-defense.[101] This feature explains why imperfect self-defense arguments are inadequate for domestic abuse survivors who kill. These defendants, such as Nicole Addimando, often kill because of a prospective fear of future risk to their lives rather than an imminent threat that caused them to fear immediate risk.[102] It is precisely this missing element that leads jurors to convict such abuse survivors of murder instead of manslaughter.

Moreover, existing provocation doctrines are also insufficient in providing a basis for mitigating the criminal responsibility of domestic abuse survivors from murder to manslaughter. Under the provocation defense, a jury could find that the defendant was provoked into a heat of passion by a legally adequate provocation and thus would acquit them of murder and convict instead of voluntary manslaughter, which carries a lighter sentence than a murder conviction.[103] But "[t]he critical question in provocation cases is whether the provocation was legally adequate or reasonable," and different jurors may disagree on that.[104] In the absence of a clear standard regarding the circumstances where provocation was reasonable, proving that they acted in response to adequate provocation remains a problem for domestic abuse survivors.[105] In previous work, I have also argued that survivors of domestic abuse sometimes cannot successfully prevail on provocation grounds because they killed mostly out of fear, whereas provocation is largely an anger-based defense.[106]

99 *See generally* Menendez v. Terhune, 422 F.3d 1012 (9th Cir. 2005).

100 *Id.* at 1028–30.

101 *Id.* at 1028–29.

102 *See supra* Introduction.

103 DRESSLER, *supra* note 44, at 518.

104 *See* Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1427 (2020).

105 *See id.* at 1427 & n.100 (noting that "legal scholars have struggled . . . to articulate principled standards to assess the reasonableness or adequacy of the provocation" and discussing a standard where "courts would ask whether the defendant's reason for becoming extremely angry is itself blameworthy" (citing Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409, 422–37, 461 (2018))).

106 *See* Buchhandler-Raphael, *supra* note 94, at 1725. I further argued that the provocation defense should be expanded to be available to survivors of domestic abuse who killed out of fear and survival. *Id.* at 1726.

While some courts recognize survivors' provocation claims to reduce their convictions from murder to manslaughter, others hold that provocation is an anger-based defense, which does not apply when domestic abuse survivors kill abusive intimate partners out of fear.[107]

Yet, even when prosecutors agree to reduce the charges to manslaughter, or provocation or imperfect self-defense claims are successful, and domestic abuse survivors are convicted of manslaughter instead of murder, their legal treatment remains unjust for at least two reasons. First, while manslaughter convictions result in lower terms of imprisonment compared with murder convictions, punishments remain unduly harsh.[108] Second, felony convictions carry a host of collateral consequences, which prove especially devastating for survival homicide defendants.

The prosecution of Amreya Rahmeto Shefa under Minnesota law poignantly demonstrates what is wrong with convicting a domestic abuse survivor of manslaughter.[109] The defendant was charged with one count of second-degree murder under Minnesota law after she stabbed her husband to death.[110] She filed a notice of self-defense and requested that the court consider the lesser included charge of manslaughter in the first degree, and a bench trial ensued after she waived her right to a jury trial.[111]

The trial court's summary of facts reveals a tragic story of domestic abuse that the defendant suffered at the hands of the deceased. The defendant met the deceased in 2006 in Addis Abba, Ethiopia, and they married one month later. At the time, the deceased was living in the United States while the defendant, who owned and operated her own business in Ethiopia, remained there for six years, during which the deceased returned to visit periodically. In 2012, the deceased brought the defendant and their two children to live with him in Minnesota. In an interview with police, the defendant said that on the day of the killing, she and the deceased engaged in vaginal intercourse, and he made her

107 *See, e.g.*, State v. Goff, No. 11CA20, 2013 WL 139545, at *9–10 (Ohio Ct. App. Jan. 7, 2013); Cook v. State, 784 S.E.2d 665, 668 (S.C. 2015). A few states, like New York, replaced the provocation doctrine with the extreme mental and emotional disturbance (EMED) defense, which provides a potential basis for reducing murder to manslaughter. *See* N.Y. PENAL LAW § 125.20(2) (McKinney 2023). *See generally* Michal Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815, 1826 (2020) ("[U]nlike the heat-of-passion defense, which is mostly perceived as an anger-based defense, EMED recognizes that additional emotions, including fear, may trigger the defendant's extreme emotional disturbance.").

108 *See, e.g.*, N.J. STAT. ANN. § 2C:43-6(a)(2) (West 2023) ("[A] person who has been convicted of . . . a crime of the second degree[may be sentenced to imprisonment] for a specific term of years which shall be fixed by the court and shall be between five years and 10 years . . . .").

109 *See* State v. Shefa, No. 27-CR-13-39734, 2015 WL 1279762 (Minn. Dist. Ct. Jan. 30, 2015), *aff'd*, 2016 WL 3042908 (Minn. Ct. App. May 31, 2016).

110 *Shefa*, 2015 WL 1279762 at *1, *3; *see* MINN. STAT. § 609.19(1)(1) (2023).

111 *Shefa*, 2015 WL 1279762, at *1.

perform oral sex. Following that, the deceased raped the defendant by penetrating her anus with a dildo without her consent.[112] In response, the defendant picked up two knives and stabbed the deceased thirty times, which ultimately resulted in his death. Evidence showed that the deceased was intoxicated at the time of his death, and the defendant told police that the deceased often drank and hurt her.[113] She described living in constant fear of him: "'*I am not even afraid of Allah (god) as I am afraid of [the deceased]*' and '*I am afraid of [the deceased] all of the time*.'"[114]

The defendant established a history of abuse at trial, testifying that a month after her arrival in the United States, the deceased began verbally and sexually abusing her, and that he and another man simultaneously sexually assaulted her. She had earlier told investigators that she did not leave or report the abuse because she was completely dependent on the deceased.[115] The power imbalances in the marital relationship of the defendant and deceased were especially notable because the defendant did not speak any English and was not financially self-sufficient.[116]

The trial court found that although the defendant credibly testified that the deceased had engaged in extensive sexual abuse, the force she used "greatly exceed[ed] the degree of force required to defend herself."[117] Ultimately, the court concluded that when the defendant intentionally killed the deceased, she was acting in the heat of passion because the sexual assault, when coupled with the proven history of extensive abuse, would have provoked a person of ordinary self-control under like circumstances.[118] The trial court acquitted the defendant of the murder charge but convicted her of manslaughter in the first degree and sentenced her to eighty-six months in prison.[119] The conviction and punishment were upheld on appeal, and the defendant's petition for review was denied.[120]

Yet, the defendant's conviction and punishment were merely the beginning of her ordeal because of the immigration-related collateral

112 *See id.* at *1–3, *6–7.

113 *Id.* at *3, *6.

114 *Id.* at *2 (emphasis added).

115 *Id.* at *1–3, *9.

116 *Id.* at *9. For further discussion of the unique problems stemming from domestic abuse in immigrant communities, see STARK, *supra* note 85, at 238–41.

117 *Shefa*, 2015 WL 1279762, at *9 & n.7.

118 *Id.* at *9.

119 *Id.* at *9–10; State v. Shefa, No. A15-0974, 2016 WL 3042908, at *2 (Minn. Ct. App. May 31, 2016). The offense of first-degree manslaughter under Minnesota law carries a sentence of up to fifteen years of imprisonment. MINN. STAT. § 609.20 (2023).

120 *Shefa*, 2016 WL 3042908, at *1; Shefa v. Ellison, 968 N.W.2d 818, 822 (Minn. 2022).

consequences of her conviction.[121] Pursuant to the defendant's conviction of manslaughter, the U.S. Department of Homeland Security initiated a deportation process to remove her back to Ethiopia.[122] The defendant filed an application for asylum and withholding of removal, as well as applications for visas, but the immigration judge denied them all.[123]

The defendant applied to the Board of Pardons for an absolute pardon, arguing that her conviction was unjust because when abuse victims "are prosecuted for their resistance, questions of reasonableness and intent become murky," and that "returning to Ethiopia [would] likely be life-threatening because [the deceased]'s family [swore] an oath to kill her if she return[ed]."[124] While the Minnesota governor and attorney general voted to grant her application, the Minnesota Supreme Court Chief Justice voted to deny it. Lacking the unanimous support necessary under Minnesota law, the defendant's application was denied, and the Supreme Court of Minnesota upheld the lower court's decision to deny a pardon.[125] The decision resulted in sending the defendant to Ethiopia, where she faced the grave danger of becoming the victim of a revenge killing.

The case demonstrates the extent to which merely mitigating survivors' criminal responsibility to manslaughter fails to appropriately address the distinct problem of survival homicide. It exemplifies why a specialized statute that is grounded on mitigated criminal responsibility

121 For a discussion of the collateral consequences of criminal convictions on immigrant defendants, see generally Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1441 (2011) ("Defense counsel needs to know not only whether his client is a noncitizen, but also the details of his client's status and what is likely to happen if his client is convicted of a particular offense.").

122 *Shefa*, 968 N.W.2d at 822.

123 *Id.* at 822–23 ("[T]he immigration judge found that, although the concept of retaliatory killings might be culturally accepted in some Ethiopian communities, Shefa's expert testified that there is no acceptance of the practice in the formal legal system and that retaliatory killings would be unlikely in highly populated areas with a strong police presence such as Addis Ababa, the capitol of Ethiopia. The immigration judge also found that two of Shefa's siblings have moved from rural Ethiopia to Addis Ababa and they have not been harmed. She found that nothing would prevent Shefa from living in Addis Ababa. Based on these findings, the immigration judge denied Shefa's asylum application and directed that she be removed from the United States to Ethiopia.").

124 *Id.* at 823.

125 *Id.* at 821. *See generally* MINN. STAT. § 638.02(1) (2023). The Minnesota Supreme Court found that the defendant

> ha[d] not satisfied [her] heavy burden of proving that the unanimity requirement violates the separation-of-powers provision. [The defendant's] efforts to characterize the unanimity requirement as a unilateral veto . . . fail[ed] to overcome . . . the pardon provision[, which] explicitly sets forth the chief justice's participation in the pardon process. Consequently, the district court correctly concluded that the unanimity requirement does not violate . . . the Minnesota Constitution.

Shefa, 968 N.W.2d at 835.

and excludes collateral consequences upon conviction, which this Article will develop in Part III, is needed to fix the law's inequitable treatment of domestic abuse survivors. Below, I turn to explain why sentencing mitigation models are also only partially helpful to survival homicide defendants.

C. *Sentencing Mitigation*

The American criminal legal system consists of two stages: the guilt phase where the defendant's criminal responsibility is determined, and the penalty phase where the defendant's sentence is imposed. Mitigating factors underlying the commission of the crime or the defendant's situation are relegated to the penalty phase. When defendants are not acquitted on self-defense grounds and are convicted of either murder or manslaughter, sentencing judges may exercise their discretion to mitigate their punishment if defendants introduce evidence of past abuse by the deceased.[126]

Judicial discretion, however, is often limited because, in many jurisdictions, murder convictions trigger statutorily defined mandatory minimum sentences, which are often life sentences.[127] When survivors are convicted of manslaughter rather than murder, sentencing judges exercise considerable discretion in deciding the appropriate penalty, either at the initial sentencing phase of the trial or, in a couple of jurisdictions, as a post-conviction remedy, as described below.

1. Initial Sentencing

Mitigation has traditionally played only a limited role in sentencing, as sentencing judges were more likely to implement aggravating rather than mitigating factors, especially without legislative direction.[128] In recent years, however, many jurisdictions have relaxed the severity of their sentencing schemes and restored more discretion to sentencing judges.[129] States' sentencing systems largely adopt discretionary

126 See *infra* notes 132–34 for examples of states' mitigating sentencing schemes.

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

128 *See* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 162–63 (2016).

129 *Id.* at 163 (observing that while structured sentencing schemes, including federal and state sentencing guidelines, limited the role for judicial discretion and incorporated mostly aggravating factors in sentencing, sentencing judges in recent years have exercised more discretion in considering mitigating circumstances).

sentencing models, which leave the identification of relevant mitigating factors and their relative weights to the discretion of sentencing judges.[130] Recent studies find that modern sentencing practices place a heavier role on mitigation.[131]

In a few states, legislatures adopted specific provisions that guide judges' discretion in sentencing defendants who killed abusive intimate partners. Some provisions consist of mitigating circumstances related to the offense itself, like imperfect self-defense or provocation.[132] Others include circumstances that direct sentencing judges to treat the defendant's past abuse as a mitigating factor.[133] These provisions typically

130 Sentencing is divided into mandatory and discretionary systems. In contrast with discretionary systems, mandatory systems identify relevant sentencing factors ex ante, and they sometimes specify the weight a particular factor ought to receive. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 198–202 (2014) (elaborating on the difference between discretionary and mandatory sentencing systems and the ways in which both incorporate aggravating and mitigating factors in sentencing decisions).

131 *See* John B. Meixner, Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1453–57 (2022) (finding that sentencing judges individualize sentences by considering the personal characteristics of defendants, and that science-based arguments about mental and physical health appear especially persuasive).

132 *See, e.g.*, CAL. R. CT. 4.423(a)(2)–(4) ("Circumstances in mitigation include factors relating to the crime . . . . includ[ing] that . . . [t]he victim was an initiator of, willing participant in, or aggressor or provoker of the incident; . . . [t]he crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur; . . . [and] [t]he defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense . . . ."); ARK. CODE ANN. § 16-90-804(c)(1) (2023) ("The following . . . mitigating factors . . . may be considered as a reason or reasons for departure from the voluntary presumptive sentence range under § 16-90-803: (1) While falling short of a defense, the victim played an aggressive role in the incident or provoked or willingly participated in the incident . . . ."); IND. CODE § 35-38-1-7.1(b)(4)–(5) (2023) ("The court may consider the following factors as mitigating circumstances: . . . (4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense. (5) The person acted under strong provocation.").

133 *See, e.g.*, CAL. R. CT. 4.423(a)(9) ("Circumstances in mitigation include factors relating to the crime. . . . includ[ing] that . . . [t]he defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime, and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the abuse does not amount to a defense."); WASH. REV. CODE § 9.94A.535(1)(h), (j) (2023) ("Mitigating Circumstances—Court to Consider . . . . (h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse. . . . (j) The current offense involved domestic violence, . . . and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse."); KAN. STAT. ANN. § 21-6815(c)(1)(D) (2023) ("[T]he following . . . mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist: . . . . The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse."); ARK. CODE ANN. § 16-90-804(c)(5) (2023) ("The following . . . mitigating factors . . . may be considered as a reason or reasons for

require that the defendant suffered from a continuing pattern of physical, sexual, or psychological abuse by the deceased and a causal connection element under which the offense was a response to that abuse.[134] Yet, only a minority of states adopted provisions that explicitly incorporate defendants' past abuse, as most state legislatures have not included past abuse by the deceased as a distinct mitigating factor, leaving individual judges with sole discretion over whether and to what extent past abuse is relevant in determining sentences.[135]

Relying on sentencing mitigation frameworks to mitigate survivors' punishments is problematic because it hinges on unstructured judicial discretion in deciding whether and how much weight to give to mitigating factors like past abuse.[136] Sentencing schemes do not provide judges with statutory guidelines on how to balance mitigating and aggravating circumstances. Thus, leaving sentencing judges with the discretion to decide how much punishment an abuse survivor deserves remains an unsatisfactory solution to the problem of survival homicide. Since mitigation largely depends on the viewpoints of the sentencing judge, some judges would take past abuse into consideration, while others would not fully consider the effect of past abuse on the survivors' acts.[137] This discretionary discrepancy results not only in inconsistent sentencing of survivors who killed abusive partners but also in unduly harsh sentencing. As one New York State Assembly Speaker summarized:

departure from the voluntary presumptive sentence range: . . . The offender or the offender's children suffered a continuing pattern of physical or sexual abuse by the victim of the current offense, and the current offense is a response to the physical or sexual abuse . . . ."); ALASKA STAT. § 12.55.155(d)(16) (2022) ("The following factors . . . may allow imposition of a sentence below the presumptive range: . . . in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior . . . .").

134 *See, e.g.*, IND. CODE § 35-38-1-7.1(b)(11) (2023) ("The court may consider the following factors as mitigating circumstances or as favoring suspending the sentence and imposing probation: . . . . The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.").

135 *See* Hessick & Berman, *supra* note 128, at 162.

136 *Cf.* Michal Buchhandler-Raphael, *Compassionate Homicide*, 98 WASH. U. L. REV. 189, 211–12 (2020). Despite the problematic nature of judicial discretion, some level of judicial discretion is inevitable. I will revisit the role of exercising judicial discretion and explain why it remains an integral part of the proposed survival homicide offense in Section III.D.

137 *See* People v. Addimando, 120 N.Y.S.3d 596, 613–17 (Cnty. Ct. 2020).

> All too often, when a survivor defends herself and her children, our criminal justice system responds with harsh punishment instead of with compassion and assistance. Much of this punishment is a result of our state's current sentencing structure which does not allow judges discretion to fully consider the impact of domestic violence when determining sentence lengths. This leads to long, unfair prison sentences for many survivors.[138]

2. Resentencing

Three jurisdictions have adopted legislation that provides for post-conviction sentencing mitigation for domestic violence survivors. In 2001, California passed a statute that allows domestic violence survivors convicted of killing their abusive partners to submit a petition for a writ of habeas corpus, which could potentially lead to their release from prison.[139] Additionally, in 2015, Illinois amended a statute to allow survivors of domestic violence whose felony convictions were related to that violence to seek resentencing if evidence of the violence was not introduced at sentencing, they were unaware that such evidence might be relevant to their sentencing, and the new evidence is likely to change the sentence imposed by the trial court.[140] Most recently, in 2019, New York passed the DVSJA, which provides a comprehensive framework for resentencing survivors of domestic violence who have been convicted of any crime.[141]

Concededly, the DVSJA offers significant progress for survivors of domestic violence for several reasons.[142] First, the law applies not only to survivors who killed abusive family members but also to those convicted

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138 Memorandum in Support of Legislation A3110 from Carl E. Heastie, Speaker, N.Y. State Assemb. (Jan. 26, 2017), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03110&term=2017&Memo=Y [https://perma.cc/S9U4-L28A].

139 CAL. PENAL CODE § 1473.5 (West 2023). The law only applied to convictions prior to 1996 because, before then, survivors of domestic violence who killed their abusive partners were not permitted to introduce expert testimony about intimate partner violence and its effects. *See id.* § 1473.5(b).

140 735 ILL. COMP. STAT. 5/2-1401(b-5) (2022).

141 *See* N.Y. PENAL LAW § 60.12(1) (McKinney 2023).

142 *Id.* ("[T]he court, upon a determination following a hearing that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment . . . would be unduly harsh may instead impose a sentence in accordance with this section."). *But see* SURVIVED & PUNISHED N.Y., *supra* note 15, at 12 ("Overall, however, the DVSJA legitimizes the criminal punishment system, in that it only provides a challenge to the criminalization of survival in limited individual circumstances.").

of a host of other crimes, including crimes against third parties.[143] Second, the law disentangles sentencing mitigation from the rigid elements of self-defense laws. In sharp departure from familiar defenses that require defendants to produce evidence that they acted in self-defense, the DVSJA's elements are different from those of self-defense. Self-defense requires an objectively reasonable imminent threat to kill or cause serious bodily injury, a proportional response, and a necessity to kill.[144] Contrarily, the DVSJA consists of three distinct elements: the defendant was a victim of domestic violence at the time the criminal act was committed, domestic violence significantly contributed to the criminal act, and the sentence that was imposed is unduly harsh given the circumstances underlying its commission.[145]

Without minimizing this statute's groundbreaking impact by providing a doctrinal basis for sentencing mitigation for domestic abuse survivors, significant limitations constrain its scope. First, a review of the case law reveals that courts interpret the DVSJA to require a temporal nexus between the domestic abuse experienced and the offense committed by the survivor. For example, in *People v. Williams*, the defendant's motion for resentencing under DVSJA was denied after the court found that it was not enough that the defendant was subjected to substantial abuse in the past because she failed to demonstrate that she was the victim of substantial abuse "'*at the time of the offense*," as required by the DVSJA.[146] The court clarified that although the statute does not require that the abuse occur simultaneously with the offense, it creates a "*temporal nexus* between the abuse and the offense" because the temporal requirement is included in the statutory language.[147] Consequently, the court accepted the prosecution's argument that because of the temporal limitation, the abuse must be ongoing when the survivor committed the crime.[148]

Second, the statute's requirement that domestic abuse be a significant contributing factor to the defendant's criminal behavior is another substantial hurdle to meet. Even if the defendant was indeed a

143 *See, e.g.*, People v. S.M., 150 N.Y.S.3d 562 (Cnty. Ct. 2021) (applying the law to a defendant who was convicted of robbery of an innocent party because past abuse significantly contributed to the act); People v. Williams, 152 N.Y.S.3d 575 (App. Div. 2021) (clarifying that the DVSJA applies not only when "the abuser [is] the target of the offense, . . . [but also] in the context of nonviolent and drug offenses").

144 DRESSLER, *supra* note 44, at 226–28.

145 PENAL LAW § 60.12(1).

146 *Williams*, 152 N.Y.S.3d at 576 (emphasis added) (quoting PENAL LAW § 60.12(1)). The court further found that the evidence was insufficient to support a finding that the deceased's behavior toward the defendant rose to the level of substantial psychological abuse. *Id.*

147 *Id.* (emphasis added).

148 *Id.*

victim of domestic violence, the burden rests with the defendant to establish precisely how her history of prior abuse had any impact on her participation in the underlying offense.[149]

Third, the statute's requirement that the imposed sentence be "unduly harsh" is a significant obstacle to its application. Even if a court finds that the defendant was a domestic abuse survivor and that the abuse significantly contributed to the criminal act, it must also determine that the imposed sentence was unduly harsh. The term "unduly harsh" is notably vague, leaving much room for judicial discretion in interpreting how many years of incarceration satisfy this requirement.[150] Fourth, the statute excludes defendants convicted of certain violent crimes, such as sex offenses, from eligibility for sentencing mitigation.[151]

Additionally, the statute contains several procedural limitations that constrain its application. A defendant could only submit an application for resentencing if the original sentence exceeded eight years of imprisonment.[152] For example, the statute will be inapplicable if a defendant was sentenced to seven and a half years imprisonment for killing an abusive intimate partner or another abusive family member, although it remains a considerably hefty sentence.

Another procedural limit that constrains the applicability of the DVSJA concerns the corroboration requirement that the statute imposes on survivors. To prove that the defendant was a victim of domestic violence at the time of the crime for which she was convicted, the defendant must introduce at least two pieces of corroborating evidence, one of them being "either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection."[153] This is particularly onerous for survivors who

149 *See, e.g.*, People v. Crispell, 163 N.Y.S.3d 708, 711 (App. Div. 2022) (rejecting the defendant's application for resentencing because, "[a]lthough [she] alluded to her domestic violence history in her statement to the court at sentencing, she failed to indicate whether or how such history had any impact upon her participation in the instant offense").

150 *See* GOODMARK, *supra* note 16, at 180–81.

151 PENAL LAW § 60.12(1) (providing a list of crimes that are not eligible for resentencing, including first-degree murder, offenses that would require a person to register as a sex offender, and attempts or conspiracies to commit any such offense).

152 N.Y. CRIM. PROC. LAW § 440.47(1)(a) (McKinney 2023) ("[A]ny person confined in an institution operated by the department of correction and community supervision serving a sentence with a minimum or determinate term of eight years or more for an offense . . . eligible for an alternative sentence . . . may . . . submit to the judge or justice who imposed the original sentence upon such person a request to apply for resentencing . . . ." (footnote omitted)).

153 N.Y. CRIM. PROC. LAW § 440.47(2)(c) (McKinney 2023) ("An application for resentencing pursuant to this section must include at least two pieces of evidence corroborating the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence subjected to

were mostly subjected to psychological rather than physical abuse, as proving coercive controlling behavior—including threats to inflict future harm that place survivors in constant fear—is often challenging in the absence of any physical injuries, police records of domestic violence report, or protective orders.[154]

Finally, the DVSJA leaves considerable discretion in the hands of sentencing judges, as different judges interpret its elements differently. The application of the statute in the case of Nicole Addimando is illustrative of the host of difficulties embedded in the exercise of such judicial discretion.[155] The trial court refused to apply the DVSJA to Addimando's case, enumerating four reasons to justify its decision:

> First, . . . the [c]ourt [found] that the abuse history presented by the defendant [was] undetermined and inconsistent regarding the extent of the abuse, as well as the identity of her abuser(s).
>
> Second, the nature of the alleged abusive relationship between the defendant and [the deceased was] undetermined, based on the demeanor and behavior of [the deceased] on the day of his death, as well as during the weeks prior . . . .
>
> Third, . . . the defendant had a tremendous amount of advice, assistance, support, and opportunities to escape her alleged abusive situation, and thereby avoid the decision to take the life of [the deceased, yet she chose to ignore these and instead resorted to killing the deceased]. . . .
>
> Finally, . . . the specific facts of the [killing] . . . reveal[ed] a situation where [the deceased] was supine, with his eyes closed, on a couch. The defendant admitted she had a path to escape . . . her apartment, ... [but i]nstead, the defendant lunged forward and shot [the deceased] point blank in his temple.[156]

The appellate court found that the trial court abused its discretion in refusing to apply the DVSJA. It observed that ample evidence established that the defendant was a victim of "repeated sexual, physical, and psychological abuse" inflicted by the deceased, and that this extensive "abuse was a significant contributing factor to the defendant's criminal behavior."[157] It further rebuked the trial court's decision as resting on "an arcane belief/suggestion that the defendant could have avoided the

substantial physical, sexual or psychological abuse inflicted by a member of the same family or household . . . .").

154 *See* STARK, *supra* note 85, at 250 (observing that although "[c]redible threats are criminal offenses[, only] few are reported to police and almost none result in an arrest").

155 *See supra* Introduction.

156 People v. Addimando, 120 N.Y.S.3d 596, 618–19 (Cnty. Ct. 2020).

157 People v. Addimando, 152 N.Y.S.3d 33, 41 (App. Div. 2021).

murder by withdrawing from her apartment, which are antiquated impressions of how domestic violence survivors should behave."[158] It also found that the trial court "failed to fully take into account the impact of physical, sexual, and/or psychological abuse on the defendant as a domestic violence survivor" and "all but discounted the defendant's evidence and proof, repeatedly referring to the abuse the defendant and others testified to as 'undetermined.'"[159]

While the statute was ultimately properly applied, significant concerns remain regarding its applicability in other cases. The trial court's interpretation of the statute is disconcerting because, despite the fact that the statute's elements are distinct from self-defense, courts might continue to impose the restrictive elements of self-defense. The risk is that self-defense laws' requirement that the defendant committed the criminal act in response to the deceased's imminent threat to kill them will carry over to the DVSJA even though the statute itself is nowhere limited in that respect.[160] In sum, both existing self-defense statutes and sentencing mitigation models are inadequate for offering equitable treatment for survival homicide defendants.

II. RECONCEPTUALIZING BATTERING AND ITS EFFECTS

The problems stemming from the restrictive elements of self-defense laws call for considering an alternative framework to decouple survival homicide from general self-defense statutes. Rather than tethering the legal treatment of survival homicide to inherently constrained defensive claims, the competing account I offer below seeks to highlight the broader social context underlying survivors' reactions to domestic abuse over and above framing these responses within limited self-defense constructs.

A. *Disentangling from Self-Defense Frameworks*

Reformers' efforts to expand the scope of existing defenses to accommodate the unique circumstances underlying survival homicide have yielded only limited success as many survivors fail to establish

158 *Id.* at 42.

159 *Id.*

160 *See Addimando*, 120 N.Y.S.3d at 618; N.Y. PENAL LAW § 60.12(1) (McKinney 2023) (requiring that "such abuse was a significant contributing factor to the defendant's criminal behavior").

defensive claims and are convicted of serious homicide offenses.[161] Commentators have long debated whether survivors who used excessive force, deemed unnecessary because the deceased's conduct at the moment of the lethal act did not pose imminent threat to their lives, should be able to prevail on some *partial* defense grounds.[162]

Survival homicide, however, does not fit neatly into either partial excuse or partial justification frameworks. To understand why both the justificatory and excusatory claims are conceptually inadequate in offering domestic abuse survivors proper legal recourse, it is helpful to revisit the fundamental differences between excuses and justifications.[163]

Justified conduct consists of acts that are typically criminal under normal circumstances but are not considered criminal given the unique background circumstances encompassed by the justification, as the law does not condemn them as wrong.[164] Commentators disagree, however, about whether justification implies a strong, positive judgment about the conduct being morally right and affirmatively desirable, or instead connotes only a weaker value judgment under which the conduct is merely tolerable by the law.[165]

In contrast, the underlying theories underpinning excuse defenses assume that while actors committed wrongful acts that cannot be justified, they nonetheless "should not be blamed or punished for causing [social] harm."[166] Another way of succinctly capturing the difference between justification and excuses rests with highlighting the fundamental distinction between the act itself and the actor who engages in it; justifications focus on the nature and circumstances of the act underlying the criminal prosecution, whereas excuses focus on the personal traits,

161 *See supra* Section I.B.

162 *See supra* Section I.A; *see also* DRESSLER, *supra* note 44, at 246–48 & nn.190–99.

163 While many courts' decisions muddle the distinction between excuses and justifications, commentators aim to clarify the differences between the two concepts by highlighting the theories that undergird them. *See, e.g.*, Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89 (1986); Heidi M. Hurd, *Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551 (1999); Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003); Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387 (2005).

164 *See* DRESSLER, *supra* note 44, at 204.

165 *Id.* at 204 n.7 (citing support for both positions). Moreover, no single theory provides a uniform principle of justification, but commentators have offered several theories to explain the reasoning underlying justifications, including the moral forfeiture and moral rights theories. *Id.* at 205–07 (listing the various justification theories, including "public benefit," "moral forfeiture," "moral rights," and "superior interest" (or "lesser harm")).

166 *Id.* at 207 (quoting Joshua Dressler, *Foreword: Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163 (1987)). Similar to justifications, there is no agreement on a single theory underpinning all excuses and various principles that have been offered, including deterrence, causation, and character theories. *Id.* at 207–11.

characteristics, and attributes of the individual actor charged with that crime.[167]

The difference between excuses and justifications proves especially critical for the conceptual underpinning that underlies the legal treatment of survival homicide defendants. In cases where juries reject the theory that domestic abuse survivors' lethal acts were justified on self-defense grounds, they may fall back on imperfect self-defense or provocation laws to mitigate survivors' crimes from murder to manslaughter. Under both imperfect self-defense and provocation doctrines, a survivor's act of killing is not justified per se, but instead, the law recognizes that at least they ought to be partially excused.[168] Therefore, regardless of the doctrinal underpinning for the manslaughter conviction, the theoretical basis for mitigating survivors' criminal responsibility draws on the notion of partial excuse rather than partial justification.

Reliance on excusatory claims in survival homicide cases, however, has proven deeply problematic given the inevitable tradeoffs embedded in a model that partially excuses survivors based on their purported mental impairments and alleged character trait deficiencies. While establishing a partial defense might be beneficial to the individual murder defendant whose conviction is reduced to manslaughter, categorically excusing domestic abuse survivors based on their status carries a heavy toll of pathologizing the entire group of survivors on the theory that the cumulative impact of the abuse rendered them incapable of making autonomous rational choices.[169] The medicalized portrayal of domestic abuse survivors as suffering from psychological impairments ultimately harms all abuse survivors as a group by suggesting that they are diminished moral agents whose capacity for acting rationally is reduced.[170] Grounding mitigation for domestic abuse survivors on the idea that they lacked the capacity to make rational choices or that such capacity was significantly impaired is inherently detrimental to these defendants because it perpetuates problematic misconceptions of abuse survivors as not merely irrational actors but mentally disturbed individuals, whose purported mental impairments warrant excusing them.

167 *Id.* at 204–11.

168 *See* Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 84 (2010).

169 *See* Coughlin, *supra* note 49, at 71, 76 (noting that excusing battered women suggests that "women in battering relationships lose their mental capacity to make rational choices," and expert testimony "marks the woman as a collection of mental symptoms and behavioral abnormalities").

170 *Cf.* Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1746 (2010) (conceding that even if prostitution is not always harmful to all prostituted people, its benefits do not outweigh the harms to most prostituted people).

The infamous case of Lorena Bobbitt demonstrates the risks of reliance on excusatory frameworks to address the problem of domestic abuse survivors who push back against their abusive partners by using violence of their own. Lorena Bobbitt was prosecuted in 1993 in Virginia for maiming her husband John Bobbitt after she had cut off his penis with a kitchen knife while he was sleeping.[171] To excuse her act, Bobbitt's key defensive claim was that her husband had been sexually abusing her and had raped her prior to her act of mutilation.[172] The jury accepted Bobbitt's account and acquitted her of the crime, arguably on the theory of "temporary insanity," which resulted in her brief involuntary hospitalization in a mental hospital.[173] While Lorena herself benefited from juries' reliance on temporary insanity, domestically abused defendants as a class are, in fact, harmed by being perceived by society as mentally abnormal, irrational women. The Bobbitt case exemplifies the high cost that abuse survivors pay for being excused for their criminal acts based on dubious theories of mental impairments.

Conceding that the excusatory basis for treating survival homicide offers an improper legal recourse to survivors, and should therefore be abandoned, leaves us with the alternative of casting survivors' defensive claims within a partial justification theory. Yet, a wholesale framing of survivors' acts in self-defense claims fails for several reasons.

First, as sociologist Michael Johnson posits, "the term 'violent resistance rather than 'self-defense' [is more apt] because self-defense is a legal term carrying very specific meanings . . . and because there are varieties of violent resistance that may have little to do with these legal meanings of self-defense."[174] Survival homicide cases are not all cut from the same cloth, and therefore a single framework which is based on a justificatory theory cannot offer a uniform solution for addressing the varied circumstances underlying them.

Second, as Professor Mary Anne Franks argues, self-defense is essentially a male-oriented and male-friendly defense that is raised successfully in typical male-on-male encounters, where the parties are

171 Marylou Tousignant & Carlos Sanchez, *Lorena Bobbitt Released from Mental Hospital*, WASH. POST (Mar. 1, 1994), https://www.washingtonpost.com/archive/local/1994/03/01/lorena-bobbitt-released-from-mental-hospital/a3017782-19a4-47ae-a6c2-316f0d0f776d/?utm_term=.2dea20911498 [https://perma.cc/N4NY-ZK3L].

172 ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 57–58, 322–23 (1994) (addressing Lorena Bobbitt's claim that her husband had raped her as her excuse as to why she cut off his penis).

173 *See* Tousignant & Sanchez, *supra* note 171; DERSHOWITZ, *supra* note 172, at 60.

174 *See* JOHNSON, *supra* note 10, at 52.

typically strangers.[175] Self-defense's elements are not fit to address the underlying circumstances characterizing survival homicide, where survivors endure cumulative, ongoing domestic abuse by someone they live with rather than by a stranger in a street encounter.[176]

Relatedly, another reason for decoupling survival homicide from general self-defense statutes lies in the inevitable connection between self-defense claims raised by domestic abuse survivors, who are mostly (albeit not always) women, and similar claims raised by men like George Zimmerman and Kyle Rittenhouse, who killed people after arming themselves with guns, provoking volatile encounters, then claimed that the deceased was the initial aggressor.[177] The perverse outcome is that existing laws let men like Zimmerman and Rittenhouse walk free because of successful applications of self-defense statutes, which largely accommodate the reactions of aggressive males, while domestic abuse survivors, who are often women, are unable to prevail under the same statutes whose elements fail to accommodate their unique experiences.

In recent years, self-defense statutes have come under fierce attack after defendants like Zimmerman and Rittenhouse were acquitted of all charges.[178] Public outrage over such controversial acquittals will likely lead to calls to amend self-defense laws to make it harder for defendants like these to prevail on self-defense grounds. Contracting the scope of general self-defense statutes, however, would also have unintended consequences for survival homicide defendants, making it even harder for them to establish self-defense claims.[179] If self-defense statutes placed the burden of proof on survivors to establish that they acted in self-defense instead of on the state to disprove one of self-defense's elements beyond a reasonable doubt, such change would result in increasing the number of cases where courts and juries reject survival homicide defendants' self-defense claims.[180] As Professor John Pfaff observes, the

175 *See* Mary Anne 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, 1103, 1115–16 (2014).

176 *See supra* Section I.A.

177 *See* Franks, *supra* note 175, at 1107, 1116–21; *see also* Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 284 (2022) (noting that Rittenhouse claimed that he armed himself with an assault rifle and traveled to Kenosha "to help protect businesses that had been previously damaged in a violent protest, which local police and prosecutors had failed to prevent," and further claimed that he "shot and killed two people after they tried to wrestle the rifle out of his hands").

178 *See* Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1, 36–44 (2022) (explaining what is wrong with existing self-defense laws by using the Zimmerman and Rittenhouse examples).

179 *See* Pfaff, *supra* note 44 (observing that calls to limit self-defense claims will ultimately harm survival homicide defendants).

180 *Id.*

"tricky public policy issue" is that the same rules that make it easier for defendants like Rittenhouse to be acquitted might also protect survival homicide defendants.[181] To avoid controversial acquittals of men like Rittenhouse on self-defense grounds without harming survival homicide defendants, the law must disentangle the treatment of survival homicide from general self-defense claims.

Third, none of the general theories that typically underlie justification defenses proves fit when applied in the context of survival homicide that occurred in circumstances where the deceased did not pose any imminent physical threat to the survivor's life at the time of the killing. Under the "moral rights" theory, survivors might be partially justified because they arguably had a right to protect their natural right to autonomy and their moral interest to survive by acting preemptively to enforce these rights that the deceased's conduct threatened to violate.[182] Yet, the amorphous idea of a moral right raises concerns of over-inclusiveness and lack of proportionality.[183] A key premise underlying the justification theory is that the killing was indeed necessary under the circumstances.[184] Even if self-defense's restrictive imminency element was relaxed, the absence of necessity trumps a justificatory claim because an unnecessary killing cannot be justified.[185] When domestic abuse survivors kill at a moment in which the deceased did not threaten deadly physical violence, juries are unlikely to be persuaded that the killing was necessary and, thus, partially justified.[186]

Fourth, a key reason why existing self-defense claims are poorly fitted to address the unique circumstances underlying survival homicide is that all self-defense statutes are crafted to capture actors' reactions to the deceased's actual *physical* violence, or their threats to engage in it, at the time of the actor's response.[187] Self-defense's elements are not designed to account for circumstances where abusive family members

181 *Id.*

182 *See* DRESSLER, *supra* note 44, at 206.

183 *See id.* (observing that critics of the "moral rights" theory rationale express proportionality concerns).

184 *See* Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 476 & nn.126–29 (2008); Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 262 (2004).

185 *See* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993) ("[I]f there is a conflict between imminence and necessity, necessity must prevail."). *But cf.* Moriarty, *supra* note 98, at 31 (advocating the enlargement of self-defense claims to also cover anticipatory self-defense, that is preemptive strikes where imminence cannot be established).

186 *See, e.g.*, People v. Addimando, 120 N.Y.S.3d 596, 619 (Cnty. Ct. 2020).

187 *See* GOODMARK, *supra* note 16, at 83; Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 323–24 (2022).

engage in a pattern of repeated threats to harm survivors at some unspecified time in the future, which places survivors in constant fear of physical harm to themselves or their children.[188]

In the last three decades, social science research has made enormous progress in understanding battering and its cumulative effects on domestic abuse survivors. There is a broad consensus these days that domestic abuse includes not only physical violence but also various forms of psychological and emotional abuse.[189] Sociologist Evan Stark's work describes the various ways in which domestic abusers engage in coercive controlling behaviors as a way to intimidate, dominate, and control their intimate partners.[190] Stark argues that the legal system's emphasis on individual incidents of physical violence obscures other abuse patterns consisting mostly of coercive controlling behaviors.[191] Indeed, domestic abuse survivors are also subjected to additional forms of domination, including threats of harm to them as well as their children, surveillance, stalking, social isolation, and restrictions on their finances.[192]

While these non-physically violent behaviors are prevalent manifestations of domestic abuse, they are not criminalized under existing laws, and thus, self-defense statutes are not designed to address them. Yet, survivors sometimes kill intimate partners in circumstances where coercive controlling behaviors, particularly unspecified threats and more implicit forms of intimidation, rather than physical or sexual violence, significantly contributed to the killing. Take, for example, the Ohio decision in *State v. Goff*.[193] In this case, the defendant was convicted of murdering her estranged, abusive husband, who had previously made repeated threats to kill her and their children. At the time of the killing, however, not only had he not made any imminent physical threats against her or their children, who were not present at the scene, but also, the defendant was the one who initiated the encounter between them by going to his home armed with a gun.[194] Self-defense laws do not cover circumstances like these and would not even partially excuse domestic

188 *Cf.* GOODMARK, *supra* note 16, at 189 ("Proponents of coercive control laws argue that the criminal law does not presently reach many forms of coercively controlling behavior . . . .").

189 *See* Schuller & Erentzen, *supra* note 56, at 419.

190 *See* STARK, *supra* note 85, at 5, 11.

191 *Id.* at 5–6, 13–14, 206, 241, 245 (noting that the patriarchal nature of coercive control is established through the "microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize," etc.).

192 *Id.* at 250–75. Studies have also documented coercive controlling behaviors in same-sex relationships. *See* Christine E. Murray & A. Keith Mobley, *Empirical Research About Same-Sex Intimate Partner Violence: A Methodological Review*, 56 J. HOMOSEXUALITY 361, 363 (2009).

193 State v. Goff, No. 11CA20, 2013 WL 139545 (Ohio Ct. App. Jan. 7, 2013).

194 *See id.* at *1–2. For further discussion of this case, see Buchhandler-Raphael, *supra* note 94, at 1745–48.

abuse survivors who responded to coercive controlling behaviors. Yet, when domestic batterers engage in repeated patterns of intimidation, threats, and surveillance, survivors are constantly placed in fear of future bodily injury, which sometimes prompts them to act preemptively in a way that self-defense laws do not recognize. In order for the law to take into account the effects of such repeated intimidation on survivors' reactions, it is necessary to disentangle survival homicide from self-defense laws. The designated offense I propose in Part III does precisely that. But before turning to develop this specialized offense, the following section lays out an alternative conceptual model for understanding survival homicide.

B. *A Social-Ecological Model for Survival Homicide*

As previously discussed, existing legal frameworks conceptualize survivors who kill abusive family members as having certain psychological "profiles," which cause them to suffer from mental impairments that affected their capacity for making rational choices.[195] The main drawback in this theory is that it perceives abused defendants' survival acts solely as a personal problem of individual criminal responsibility. Framing survival homicide merely as an individual behavioral problem results in neglecting to fully contextualize survivors' acts by situating them within the broader social context that underlies domestic abuse survivors' lives. Existing defensive claims obfuscate the underlying social and cultural conditions, as well as the host of structural gender, racial, and class inequities that contribute to the phenomenon of survival homicide.

Instead, this Article advocates for a more nuanced position that considers the inevitable interplay between law and society by recognizing the inherent limits embedded in existing criminal models, which exclusively focus on the personal culpability of individual actors. Under this proposed alternative law and society perspective, to fully understand the problem of domestic abuse survivors committing homicide, it is essential to also consider the background circumstances, social constraints, and the cultural, gender, and racial barriers underlying survivors' resorts to violent reactions.[196] This Article proposes shifting the

195 *See supra* Section I.A.

196 For a broader discussion of a law and society perspective, see Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 109–10 (2014). For a discussion of survivors' broad underlying social conditions, see Regina A. Schuller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167, 170–71 (1996).

focus away from viewing survival homicide merely as a problem of individual wrongdoing and toward a social-ecological framework that emphasizes the full social and cultural context that dominates survivors' lived experiences and emotional traumas, within which some survivors may resort to lethal force.[197]

Scholars in a variety of areas broadly employ what has come to be referred to as social-ecological models.[198] Social-ecological models generally include four levels: (1) the individual within the context of relationship, (2) relationships within the context of community, (3) community within the context of society, and (4) the broader societal environmental factors.[199]

Likewise, domestic violence researchers have proposed applying a social-ecological model for understanding survivors' varied responses to abuse.[200] The model stresses the interplay between individual survivors and their relationship, community, and societal factors. It rejects the prevalent behavioral model, which centers exclusively on individual survivors' behaviors.[201] Instead, the social-ecological model situates individual survivors' behaviors within the larger social and cultural context by studying the impact of a broader set of factors going beyond the individual characteristics of both batterers and survivors.[202] For example, psychologist Mary Ann Dutton and her colleagues suggest that multiple factors might influence the relationship between victimization and outcomes.[203] The social-ecological model's goal is to identify

197 *See* Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 947 (2012).

198 Social-ecological models are broadly applied by public health scholars to better understand and offer effective prevention of various social problems, including human trafficking, college sexual assault, and more. *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 23–26 (3d ed. 2016); Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 482, 487 (2011).

199 *See generally* Lori L. Heise, *Violence Against Women: An Integrated, Ecological Framework*, 4 VIOLENCE AGAINST WOMEN 262 (1998). For a definition of a social-ecological model in the context of public health, see Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47, 79–80 (2014). For an example of a social-ecological model to better understand violence in general and violence prevention in particular, see *The Social-Ecological Model: A Framework for Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2022), https://www.cdc.gov/violenceprevention/about/social-ecologicalmodel.html [https://perma.cc/2DX9-FF4H].

200 *See, e.g.*, Heise, *supra* note 199.

201 *See* MARY ANN DUTTON, LISA GOODMAN, DOROTHY LENNIG, JANE MURPHY & STACEY KALTMAN, NAT'L INST. OF JUST., ECOLOGICAL MODEL OF BATTERED WOMEN'S EXPERIENCE OVER TIME 4 (2005), https://www.ojp.gov/pdffiles1/nij/grants/213713.pdf [https://perma.cc/9J5X-TD6B].

202 *Id.*

203 *See generally id.*

contributors to patterns of domestic battering that are rooted in the larger community and the survivor's social support system.[204]

One possible application of the social-ecological model to survival homicide concerns introducing social framework evidence in survivors' criminal trials. Social framework evidence refers to general social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case.[205] Commentators have proposed a more prominent role for social framework evidence in trials in a variety of legal areas. For example, advocating for incorporating social framework evidence in employment discrimination cases, Professor Tanya Katerí Hernández argues that social framework evidence "more accurately situate[s] a specific case of discrimination against a backdrop understanding of how discrimination actually operates, which can better assist a fact finder in identifying the manifestations of discrimination."[206]

Likewise, commentators have long suggested that the case of domestic abuse defendants offers one example where social framework evidence would be particularly helpful to juries.[207] A social-ecological model in the domestic violence context integrates social framework evidence into understanding survivors' reactions to domestic battering within the context of their social and cultural conditions.[208] Psychologist Regina Schuller advocates for incorporating social agency testimony as an alternative to conventional psychological evidence about survivors' profiles.[209] Schuller argues that a social agency model better explains battering's effects on survivors in light of their overall social context.[210] Viewed through this lens, the evidence introduced in survivors' criminal

204 *See id.* at 4.

205 The concept of "social framework evidence" was first coined as early as the 1980s. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987) ("We therefore propose a new category, which we term social framework, to refer to the use of general conclusions from social science research in determining factual issues in a specific case." (emphasis omitted) (footnote omitted)).

206 *See* Tanya Katerí Hernández, *One Path for "Post-Racial" Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQ. 309, 310 (2014).

207 *See* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1726, 1732 (2008); *see also* Walker & Monahan, *supra* note 205, at 563.

208 *See* Heise, *supra* note 199, at 262–63.

209 The term "social agency testimony" was coined by Regina Schuller and Patricia Hastings. *See* Schuller & Hastings, *supra* note 196, at 183. Schuller also uses the term "social framework testimony." *See* Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 176 (1989).

210 *See* Regina A. Schuller, *Expert Evidence and Its Impact on Jurors' Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J. GENDER L. & POL'Y 225, 244–45 (2003).

trials should de-emphasize experts' testimonies on survivors' psychological symptoms and emphasize instead the overall social context that is necessary for understanding survivors' responses to domestic abuse.[211]

Currently, the role of social framework evidence in trials in general, and particularly in criminal trials, is contested. That is because criminal law generally focuses on the specific incidents underlying the criminal charges against the individual defendant rather than on social and cultural patterns.[212] Arguably, introducing social framework evidence might raise a number of concerns from an evidentiary perspective.[213] The rules of evidence are mostly aimed at directing jurors' attention to relevant information that would be helpful to the jury in making their decisions, including the introduction of expert opinions.[214] Additionally, under the "mercy rule," criminal defendants are allowed to introduce character evidence about their own character traits or the victims' character traits as long as these are deemed "pertinent" to the specific charges.[215] Within this evidentiary framework, allowing expert witnesses to testify about social framework evidence, including information regarding broad social and cultural circumstances underlying defendants' acts, might be perceived not only as unhelpful to decision-makers but also as potentially confusing the jury by diverting their focus from the specific facts of the case. There is also a risk that jurors would assign too much weight to expert testimonies consisting of background circumstances.

Yet, human behavior in general, and domestic abuse survivors' behaviors in particular, are deeply influenced by social patterns and cultural attitudes. Relaxing existing evidentiary barriers to include social framework evidence in survival homicide prosecutions would allow survivors to introduce testimonies about batterers' coercive control of them, lack of effective community support, inadequacy of the legal

211 *See* Schuller & Erentzen, *supra* note 56, at 468.

212 *See generally* Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 584–85 (2010) (discussing "a newfound focus on identifying social patterns"); Natalie R. Davidson, *The Feminist Expansion of the Prohibition of Torture: Towards A Post-Liberal International Human Rights Law?*, 52 CORNELL INT'L L.J. 109, 134 (2019) (noting that international criminal law shifts attention from the individual perpetrator to broader social patterns and structures).

213 *See* Walker & Monahan, *supra* note 205, at 572–82.

214 *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading . . . . Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." (quoting Jack B. Weinstein, U.S. Dist. Judge, Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended, Speech at the Eighth Circuit Judicial Conference (July 10, 1991), *in* 138 FED. RULES DECISIONS 631, 632 (1991))).

215 FED. R. EVID. 404(a)(2). Federal Rule of Evidence 404(a)(2) and the comparable state rules of evidence refer to this as the "mercy rule."

system's responses to domestic abuse, survivors' risks of leaving abusive relationships, dearth of economic support, employment opportunities, housing for survivors, and insufficient child care.[216] Additionally, social framework evidence should also include testimonies regarding larger structural inequality and societal barriers underlying many domestic abuse survivors' lives, such as systemic racism, classism, heteropatriarchy, and ableism.[217]

Likewise, the risks associated with separation violence and survivors' limited financial resources and employment opportunities are two factors that prove especially pertinent under the social-ecological model. Separation violence means that survivors' acts of resistance in response to their abuse may result not only in increased attempts to control their behavior but also in escalation of the violence against them.[218] Survivors' attempts to leave abusive relationships often increase the risks to their lives as batterers may resort to lethal violence in response to survivors' attempts to end the relationship.[219] Domestic violence researchers have identified estrangement as a risk factor for intimate partner homicide, with most women who have been murdered by their intimate partners being killed within a year of leaving.[220] Courts, however, routinely refuse to admit into evidence expert testimonies about the risks of separation violence, reasoning that these testimonies are impermissible character evidence.[221]

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216 *See* Terrance, Plumm & Rhyner, *supra* note 197, at 947–48.

217 *See generally* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 21–22 (2011) (defining heteropatriarchy as a set of connected beliefs that include five linked assumptions about hegemonic masculinity); Seema Mohapatra, *Politically Correct Eugenics*, 12 FIU L. REV. 51, 74 (2016) (discussing the meaning of ableism as discrimination in favor of the able-bodied, which "contributes to the beliefs that people with disabilities need to somehow be fixed, cannot function as full members of society, and that having a disability is a defect rather than a dimension of difference").

218 *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991) (describing the phenomenon of separation violence as "a specific type of attack that occurs at or after the moment she decides on a separation or begins to prepare for one").

219 *See* Jacquelyn C. Campbell, Nancy Glass, Phyllis W. Sharps, Kathryn Laughon & Tina Bloom, *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA VIOLENCE & ABUSE 246, 254 (2007).

220 *Id.*; Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

221 For example, in *State v. Ketchner*, the state introduced expert testimony from a sociologist who specializes in domestic violence in order "to educate the jury about domestic violence patterns and general characteristics exhibited by domestic violence victims and abusers." State v. Ketchner, 339 P.3d 645, 647 (Ariz. 2014). The expert testified about "separation assault," defining it as:

> When someone decides to leave a violent relationship is a very dangerous time, because then the abuser feels their control has—they've lost their control and they'll use violence.

Furthermore, survivors' lack of financial independence is yet another social factor that underpins survivors' responses to domestic abuse. Poverty and battering are inextricably intertwined as poverty increases the chances of women's vulnerability to domestic abuse, and abuse, in turn, significantly contributes to survivors' poverty.[222] Researchers have studied the effects of domestic battering on survivors' work status, income levels, and access to financial resources.[223] They found that the experience of domestic battering drives the negative impact on survivors' occupational functioning.[224] Domestic battering "was associated with unemployment and income under the poverty level," and the "[l]evel of violence also predicted being unemployed, change in employment, and less access to resources."[225] Studies also recognize that controlling survivors' finances is part of batterers' coercive controlling behaviors, explaining the ways in which many survivors remain in abusive relationships because their financial resources are limited.[226] In contrast with the behavioral model, which ignores the role of economic disempowerment, the social-ecological model emphasizes the close correlation between domestic abuse and survivors' economic dependence on their partners, including limited employment opportunities. Survivors' inability to leave abusive relationships may be perceived as a rational choice within a social-ecological framework, given the numerous societal obstacles that they face.

To date, the social-ecological model has been applied to the general phenomenon of domestic abuse, but it has yet to be applied in the specific

> It's a very high risk period for homicide when a person does leave the relationship. And it's another aspect of why people go back again, because they're not safe just because they leave the relationship.

Id. The sociologist expert "then described risk factors for 'lethality' in an abusive relationship: presence of a gun in the house, stepchildren in the home, prior threats to kill, drug and alcohol use, forced sex, and strangulation." *Id.* The Supreme Court of Arizona defined "profile evidence as evidence that 'tends to show that a defendant possesses one or more of an "informal compilation of characteristics" or an "abstract of characteristics" typically displayed by persons' engaged in a particular kind of activity." *Id.* (quoting State v. Lee, 959 P.2d 799, 801 (Ariz. 1998)). It ultimately held that the sociologist's expert testimony about separation violence, lethality factors, and characteristics common to domestic abusers was "inadmissible profile evidence." *Id.* at 648; *see also* Brunson v. State, 79 S.W.3d 304, 313 (Ark. 2002) (holding that "the profiling of batterers likely to become killers and then placing [the defendant] within that category was unduly prejudicial"); Parrish v. State, 514 S.E.2d 458, 463 (Ga. Ct. App. 1999) (excluding "testimony regarding the typical characteristics of an *abuser*" as improper character evidence).

222 *See* LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 105–09 (2008).

223 *See* DUTTON, GOODMAN, LENNIG, MURPHY & KALTMAN, *supra* note 201, at 24–25.

224 *Id.*

225 *Id.* at 24.

226 *See* GOODMARK, *supra* note 25, at 38–41.

context of survival homicide.[227] The model accounts for the underlying social context that may lead some survivors to use lethal force against abusive intimate partners by drawing attention to survivors' social structural basis and the ample inequities underlying their lived experiences.[228] Framed through this lens, survival homicide may plausibly be perceived as a rational strategy that some survivors choose when confronted with threats to their survival.

Implementing a social-ecological model for survival homicide offers a more holistic framework for understanding survivors' desperate acts. While one application of this model consists of introducing expert testimonies in individual defendants' criminal trials, as discussed above, another application that has yet to be suggested draws on the model to propose a separate offense designed specifically for prosecuting survival homicide defendants, which I now turn to develop.

III. A SUI GENERIS FRAMEWORK: SURVIVAL HOMICIDE OFFENSE

Insights gained from the social-ecological model provide policymakers with new tools through which to evaluate survivors' lethal acts. The time is ripe for considering an innovative solution to this old problem by adopting a sui generis framework under which state legislatures would craft a designated offense, titled "survival homicide," whose elements, as well as punishment, are distinct from both murder and manslaughter.

The survival homicide offense departs from existing frameworks for addressing domestic abuse survivors who committed homicide in two respects. First, it shifts away from familiar self-defense constructs toward a separate offense specifically designed for survival homicide. Second, it reconceptualizes survival homicide under a specialized mitigated criminal responsibility model instead of the familiar sentencing mitigation model that currently applies when defendants' self-defense claims are rejected.[229]

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227 *See generally* Alesha Durfee, *The Use of Structural Intersectionality as a Method to Analyze How the Domestic Violence Civil Protective Order Process Replicates Inequality*, 27 VIOLENCE AGAINST WOMEN 639, 647–48 (2021) (identifying the mechanisms by which institutions reproduce broader social inequalities, and then tracing back to constellations of marginalized social identities and applying structural intersectionality analysis in the context of civil protection orders).

228 *See* Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801, 840, 844 (2021).

229 *See* Nicola Lacey, *General Principles of Criminal Law? A Feminist View*, *in* FEMINIST PERSPECTIVES ON CRIMINAL LAW 87, 99 (Donald Nicolson & Lois Bibbings eds., 2000) ("[I]t might be argued that one of the most urgent items on a feminist criminal law reform agenda would be the

Proposing to carve out a specialized statutory provision for survivors who killed abusive family members begs the question of whether and why domestic abuse exceptionalism is warranted. Below, I offer two alternative accounts of exceptionalism to justify a specialized framework for survival homicide.

A. *Why Domestic Abuse Exceptionalism?*

As this Article acknowledged at the outset, domestic abuse survivors are not the only type of abuse-victims-turned-criminal-defendants, as other groups have also been subjected to various forms of victimization outside the familial and household settings.[230] For example, individuals who have been subjected to coercive indoctrination, that is, growing up under impoverished socioeconomic conditions and having endured a host of pressures in their streets and neighborhoods to commit crimes, could arguably be viewed as abuse survivors too and raise similar claims for recognizing a specialized legal framework to account for their prior victimization.[231]

Professor Richard Delgado has long proposed crafting a separate excuse of "rotten social background" to mitigate the criminal responsibility of offenders whose life circumstances contributed to their offending.[232] Proponents of mitigated criminal responsibility due to severe environmental deprivation suggest that individuals who have suffered from racial discrimination, dysfunctional family dynamics, and lack of adequate housing, employment, and education might also be partially excused based on their socially disadvantaged backgrounds.[233] While these proposals have ignited lively scholarly debate, they have never gained traction in practice in the form of any legislative

reception of factors, currently regarded only as relevant at the sentencing stage, into the framework for determining liability.").

230 *See supra* Introduction.

231 *See generally* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

232 *Id.*

233 *See id.*; Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23, 24 (2011) (noting that proponents of mitigated criminal responsibility for these defendants suggest that "socio-economic deprivation might produce an abnormal mental condition that so impairs behavioral control that an offender cannot be held (fully) liable for the resulting conduct"); Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background,"* 2 ALA. C.R. & C.L. L. REV. 53, 53 (2011).

amendments that recognize such an excuse.[234] Socioeconomic deprivations have yet to be recognized as a basis for mitigating individual blame.[235] Conceding that the scope of the problem of abuse-survivors-turned-criminal-defendants indeed extends over and above the domestic realm calls for articulating some justifications for drawing the line between different groups of abuse survivors based on the familial setting.

Advocating for a specialized survival homicide offense rests on two separate lines of reasoning: one I refer to as "hard" exceptionalism, and the other I refer to as not strictly pure exceptionalism per se but rather an alignment with analogous areas where criminal law in general, and homicide law in particular, embrace exceptionalism by recognizing circumstances for both mitigating and aggravating defendants' criminal responsibility.

Beginning with "hard" exceptionalism, a specialized legal framework for domestic abuse is justified for at least four reasons. First, survival homicide is a form of relational crime, meaning that the survivor and the abuser are either related by blood or live in the same household.[236] This relational dimension places domestic abuse survivors in a unique predicament compared to other crime victims. It is the disparate nature of relational crime and its resulting distinct harms that makes abuse within close personal relationships more blameworthy than stranger violence.[237] Because survivors live under the same roof as abusers, enduring constant fear for their safety, their position is qualitatively different compared to those who struggle with difficult life circumstances in the outside world. The home has always had a special meaning in American lives as one's sanctuary from outside harm.[238] What makes

234 *E.g.*, Stephen J. Morse, *Severe Environmental Deprivation (AKA RSB): A Tragedy, Not a Defense*, 2 ALA. C.R. & C.L. L. REV. 147 (2011); Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L. L. REV. 131 (2011).

235 *See* Luna, *supra* note 233, at 24 (noting that Professor Delgado acknowledges that the rotten social background concept "has not been incorporated into American criminal law doctrine and it is unlikely that the defense will be accepted at any point in the near future").

236 *See generally* Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169 (2017) (noting that relational crime also often involves harm to children growing up with the batterer).

237 Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 348, 391–95, 401 (2007) (stressing the "unique harms associated with non-stranger violence, such as increased victim injuries and breach of trust").

238 *Cf.* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 657, 670–71 (2003) (observing that the castle doctrine has not proved helpful to domestic violence survivors).

domestic abuse categorically different is that this private place, which is supposed to be a safe haven, is where harm is inflicted from within.[239]

The second reason that justifies exceptionalism lies with the difference between active abuse and passive neglect as contributors to survivors' dire predicaments. While there are some analogies between defendants with rotten social backgrounds and domestic abuse survivors, there are also important differences between these groups that explain why domestic abuse survivors should be viewed as genuine victims of others' wrongdoing. It is the difference between an identified domestic abuser, on the one hand, and general societal omissions to adopt laws and policies that improve the lives of individuals on the other. This difference may be analogized to law's disparate legal treatment of criminal liability based on an act as opposed to an omission, that is, a failure to act.[240] Domestic abuse survivors have endured physical, sexual, and psychological abuse by abusers whose behaviors not only caused the survivors' predicaments but are also morally blameworthy for this wrongdoing. By contrast, individuals living in impoverished conditions endure mostly passive societal neglect but are not subject to intentional abuse.

Third, exceptionalism for survivors of domestic abuse should be viewed as a corrective measure for the long history of profoundly inadequate societal responses to domestic abuse. Until the mid-1980s, this phenomenon had been perceived as a private matter between married couples, one that society refrained from interfering with in order to protect the value of family privacy.[241] Feminist commentators have long lamented that states' failures to intervene not only facilitated gendered hierarchy in marital relationships but also obscured serious harms to domestic violence survivors.[242] As a result of feminist advocacy, states developed vigorous responses to domestic abuse that heavily relied on the criminal legal system to hold domestic batterers criminally

239 A comparative lens further supports the idea of exceptionalism in the domestic abuse context. For a discussion of a mitigated criminal responsibility framework under Israeli law, see Hava Dayan, *To Kill or Not to Kill: (When) That Is the Question? A Legislative Treatise on Battered Israeli Women Facing a Dead End Road*, 23 WM. & MARY J. WOMEN & L. 219, 231–32 (2017).

240 *See generally* Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1220 (2009) (discussing crimes of omission in comparison to acts).

241 *See* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976, 984–85 (1991).

242 *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (noting that historic spousal immunity from assault that was arguably justified for family privacy reasons entrenched male dominance and left intimate partner violence permitted, acceptable, and part of the American family).

accountable.[243] These days, however, many commentators fiercely critique the turn to the criminal legal system because of, among other reasons, its detrimental impact on survivors, failure to focus on their needs, and disregard of their autonomous choices.[244] For example, one of the unintended consequences of states' mandatory arrests of domestic violence offenders and prosecutors' "no-drop policies" was penalizing domestic abuse survivors who refused to cooperate with states to address domestic violence.[245]

Crafting a specialized statute to prosecute survivors of domestic abuse who killed abusive partners or other abusive family members acknowledges that they have been continuously subjected to multiple levels of inequitable legal treatment by the state. The unfair treatment of domestic violence survivors initially started with states' failure to intervene to protect them from abuse but eventually culminated in prioritizing tough prosecutorial policies against batterers while neglecting to support survivors' needs. Relatedly, conceptualizing domestic abuse exceptionalism as a corrective measure is also warranted to compensate for the legal system's practice of disbelieving survivors' experiences and doubting their credibility.[246] Credibility discount, defined as "unwarranted failure to credit an assertion where this failure stems from prejudice," remains a significant barrier not only for domestic abuse survivors who become involved in the criminal legal system, but also for those who turn to the civil legal system to secure civil protection orders.[247]

Fourth, a key justification underlying exceptionalism for domestic abuse survivors lies with political feasibility concerns. To date, state

243 *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802–03 (2001). For a critique of the criminal legal system's treatment of domestic violence, see AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 45–65 (2020); GOODMARK, *supra* note 25, at 16–23.

244 *See, e.g.*, Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 148 (2015); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1867 (2002).

245 *See* Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 868–71 (2017).

246 *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 425–438 (2019).

247 *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3, 55–56, 56 n.327 (2017); DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 2–3 (2021) (observing how the credibility complex, driven by cultural assumptions and misconceptions about victims and accusers, as well as legal interpretation and procedures that embed the discounting of credibility, results in distorted decision making and disbelieving accusers).

legislatures have shown cautious willingness to adopt reforms for low-level crimes—affecting criminal responsibility only in limited contexts—such as the decriminalization of marijuana possession and the reforming of some misdemeanors.[248] But these modest reforms have yet to expand to also affect core crimes like homicide.

Some state legislatures, however, have recently expressed aptitude for carving out specialized legal treatment for survivors of domestic abuse. As previously discussed, the New York State Legislature recently adopted the DVSJA, which authorizes courts to mitigate sentences of survivors of domestic abuse when such abuse significantly contributed to crimes they committed.[249] State legislatures' willingness to acknowledge that domestic abuse survivors deserve reduced sentences might open the door toward their taking the next step by carving out specialized provisions to mitigate survivors' criminal responsibility itself.

Moreover, survival homicide exceptionalism affects only a small number of homicide cases. The number of domestic abuse survivors who resort to killing abusers is relatively small today.[250] Carving out an exception for the prosecution of these survivors is thus only modest in scope. Survival homicide statutes are a far cry from a comprehensive overhaul in the definition of homicide offenses and are thus more likely to gain political support.

While some readers might be persuaded that full-fledged exceptionalism for domestic abuse survivors is warranted, others might cast doubt on a proposal to craft a specialized treatment for this group of defendants. Responding to the latter concerns, I propose another theoretical basis for framing the specialized survival homicide statute without resorting to hard exceptionalism.[251]

An alternative framework suggests that the proposal to mitigate domestic abuse survivors' criminal responsibility for homicide may be plausibly viewed as entirely consistent with existing legal frameworks. In fact, within the criminal law realm, the notion of exceptionalism is neither novel nor unique but quite prevalent.[252] Other notable areas where criminal law already openly and categorically embraces

248 *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1069–70 (2015).

249 *See supra* Section I.C.2.

250 *See* JOHNSON, *supra* note 10, at 59.

251 I thank Justin Murray for pointing me in this direction.

252 However, such criminal law exceptionalism has been subject to commentators' criticism. *See, e.g.*, Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1390–91 (2022); Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1689–90 (2020).

exceptionalism concern sex crimes,[253] violent crimes,[254] drug crimes,[255] and hate crimes.[256] Moreover, commentators continue to propose carving out additional frameworks that draw on exceptionalism to recognize the distinct harms inflicted on certain groups of defendants, such as the unique implications of invasive bodily searches on incarcerated girls.[257]

Furthermore, within the specific area of homicide law, existing statutes already provide distinct legal treatment to defendants who acted out of certain emotions.[258] Drawing an analogy to the law's treatment of defendants' anger offers a powerful reason why survivors' fear and survival should similarly mitigate their criminal responsibility.[259] Provocation doctrines already explicitly recognize that actors' anger may serve as a basis for mitigating their criminal responsibility from murder to voluntary manslaughter.[260] Under the prevailing account of provocation, which centers on defendants' loss of self-control, anger is not understood as a motive for killing.[261] But some commentators suggest that anger is such a motive, observing that provoked actors kill from motives that criminal law regards as less blameworthy, thus justifying mitigating their criminal responsibility.[262] Framing anger as a motive that makes homicide defendants less culpable begs the question: if anger is an understandable reaction that mitigates actors' criminal responsibility, why shouldn't defendants' fear for their lives similarly mitigate their criminal responsibility?

253 *But see* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. (forthcoming 2023) (rejecting sex exceptionalism).

254 *See generally* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011) (discussing what makes a crime violent, scrutinizing the concept, and arguing that the attention to categories of violent crimes has not resulted in critical analysis of what is classified as violence).

255 *See generally* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002).

256 *Compare* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1 (defending hate crime legislation), *with* Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004) (critiquing hate and bias crime legislation).

257 *See, e.g.*, Thusi, *supra* note 34, at 921–22 (focusing on the unique harms that the state inflicts on incarcerated girls in doing invasive bodily searches, even though all incarcerated people are subject to similar bodily searches).

258 *See, e.g.*, N.Y. PENAL LAW § 125.20(2) (McKinney 2023) (recognizing EMED as a basis for mitigating a crime from murder to manslaughter); OR. REV. STAT. § 163.135 (2022) (same).

259 For further discussion of motive's role in mitigating criminal responsibility, see *infra* Section III.C.1.

260 *Cf.* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 54 (2002) (suggesting that criminal law should be more sensitive to actors' motives).

261 *See* Buchhandler-Raphael, *supra* note 107, at 1822–23, 1829.

262 *See* Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 472, 476 (2012); Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 100 (2006).

There is even a stronger case for recognizing fear as a basis for mitigating survivors' criminal responsibility below the level of manslaughter. Lower gradation of survival homicide is warranted because fear is a more justified emotion compared to anger in circumstances of domestic abuse, not only because it is a response to abusers' wrongful acts, but also due to the danger that survivors will be killed by abusive family members.[263] Femicide, the gendered killing of women by men, remains a disconcerting problem that does not receive sufficient attention and is rarely referred to by name.[264] Data shows that the likelihood of women being killed by an intimate partner is much higher than the likelihood of men being killed by an intimate partner.[265] Moreover, statistics show that "[i]n 2013, fifteen . . . times as many females were murdered by a male they knew than were killed by male strangers," and that "[f]or victims who knew their offenders, 62% were wives, common-law wives, ex-wives, or girlfriends of the offenders."[266]

The analogous treatment of defendants' anger within provocation doctrines suggests that rather than a form of genuine exceptionalism, survival homicide statutes would conceptually conform to existing excusatory defenses by expanding the same rationales that undergird them. This would help to also mitigate the criminal responsibility of defendants whose acts were motivated by survival and fear. Framed this way, survival homicide statutes offer a corrective strategy that reduces the criminal responsibility of domestic abuse survivors in a manner that is consistent with existing legal frameworks that already mitigate angry actors' criminal responsibility.[267]

Intersectional analysis further buttresses this position. As previously discussed, existing criminal law doctrines embed inherently male perspectives in crafting the elements of provocation and self-defense statutes.[268] While these arguably male-friendly doctrines accommodate

263 For further discussion of provocation, the notion of justified emotion, and warranted excuse, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1393–95 (1997).

264 Caroline Davidson, *Speaking Femicide*, 71 AM. U. L. REV. 377, 384–85 (2021); Commonwealth v. Paige, 177 N.E.3d 149, 159–60 (Mass. 2021) (Cypher, J., concurring).

265 *See* Linn v. State, 929 N.W.2d 717, 734 (Iowa 2019); *see also Domestic Violence*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (2020), https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457 [https://perma.cc/6VKD-LNAN] ("1 in 2 female murder victims and 1 in 13 male murder victims are killed by intimate partners.").

266 *The Scope of the Problem: Intimate Partner Homicide Statistics*, VAWNET, https://vawnet.org/sc/scope-problem-intimate-partner-homicide-statistics [https://perma.cc/2KV2-JK9S].

267 *See* Nourse, *supra* note 263, at 1332–33 (discussing existing laws for giving a jury instruction on voluntary manslaughter to angry men who killed their departing wives in an emotional outburst of jealous rage self-described as a "heat of passion" response).

268 *See supra* Sections I.A–I.B, II.A.

the typical experiences of *white* male defendants, they often fail to accommodate the typical experiences of women, racial minorities, and other marginalized communities.[269] A survival homicide statute may, thus, be perceived as yet another corrective measure that is responsive to intersectional concerns by highlighting the gender, racial, and class inequities that characterize existing doctrines. Framed this way, rather than grounding survival homicide in genuine exceptionalism, the specialized offense simply levels the playing field by offering evenhanded gender-neutral legal treatment to all defendants whose level of blameworthiness is lower due to the impact of emotions like fear, anger, and frustration coupled with their survival motive.[270]

Having explained why exceptionalism for survival homicide is warranted, the analysis now turns to the two key theoretical justifications that underlie the proposed statute. But before doing so, a brief explanatory note is in order to clarify the relationship between these justifications. Admittedly, some readers might not be persuaded by the argument that adopting a separate statute for survival homicide is justified based on the states' shared responsibility rationale. Readers might characterize this rationale as grounded solely in a feminist position, and reject the proposal that survival homicide be treated under a separate statute. Yet, even those who might not be persuaded by the feminist justification might still be persuaded by the additional, entirely independent basis for a separate survival homicide offense, which rests on survivors' lower culpability. The second justification for the proposed statute draws on general criminal law principles and specifically on broad notions of retributive justice and proportionality. This argument adopts the general retributive idea that defendants whose behaviors are less morally blameworthy should be treated more leniently by the law because the level of their culpability is lower. This justification is sufficiently powerful to stand on its own feet, even without subscribing to the suggestion that states are partially responsible for survivors' predicaments. Framed this way, the two types of justifications discussed below should be construed as *alternative* and independent rationales underlying the proposed survival homicide statute.

269 *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–45 (1991). *See generally* BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN (1996) (studying African American battered women awaiting trial at Riker's Island, New York).

270 *See* Buchhandler-Raphael, *supra* note 94, at 1724–26; GOODMARK, *supra* note 16, at 15.

B. *States' Shared Responsibility*

As previously mentioned, to date, no jurisdiction has adopted a separate legal framework that might partially excuse defendants whose background circumstances significantly contributed to their offending. Legislatures' refusal to recognize such framework lies with criminal law's fundamental assumptions that criminal culpability rests with individual blameworthiness and cannot be shared between offenders and society, and that states, as institutions, cannot be criminally responsible.[271] The following analysis challenges this conventional wisdom by suggesting that states should share at least part of the responsibility for survivors' predicaments.

The first theoretical justification that explains why domestic abuse survivors' criminal responsibility should be mitigated focuses on reframing states' responsibility for failing to prevent domestic abuse. Domestic abuse is far from being merely a problem of individuals' culpability that criminal law is suitable to address; instead, it is a multifaceted problem, implicating broad social, economic, and public health concerns.[272] Holistically understanding the full scope of domestic abuse's effects requires focusing not only on survivors' personal blameworthiness and abuse-related traumas, but also on states' dual failure to both prevent domestic abuse and provide survivors with adequate support necessary to end abusive relationships.

Drawing on understandings gained from the social-ecological model for domestic abuse, I argue that states share part of the responsibility for survivors' acts and thus should revise their criminal codes to reflect the idea that survivors' responsibility is relative to that of states. I coin the term "comparative/relative criminal responsibility" to refer to this model, which draws on the idea that survivors' criminal responsibility is comparative to states' shared responsibility.

A key argument that justifies the adoption of a designated homicide offense for survival homicide rests with recognizing that states share partial responsibility for survivors' lethal acts because of their own failings.[273] A host of societal failures contribute to survivors' reactive violence and should thus result in a legislative reform that mitigates survivors' criminal responsibility for homicide, as "forcing society to reckon with its own failings is one of criminal law's most important

271 *See* Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 82 (2011).

272 *See* GOODMARK, *supra* note 25, at 9–10.

273 *See generally* TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 215 (2016) (observing that the United States is so deeply unjust that the social order "cannot reasonably expect allegiance from [an] oppressed group").

purposes."[274] Because states prosecute survivors for killing abusive family members, survivors' criminal responsibility ought to be comparative and evaluated vis-à-vis states' shared responsibility for neglecting to provide survivors with conditions necessary for living safely and thus contributing to their becoming crime victims and, consequently, perpetrators.

1. States' Duties

A main function of the state is to provide people with personal safety and security, including the duty to protect them from harms perpetrated by private actors.[275] Governments adopt laws that are premised on the assumption that states have an obligation to promote their citizens' fundamental rights to life and bodily integrity.[276] This assumption rests on political theories that have long recognized states' obligations toward their citizens under what is commonly referred to as "social contract" theory.[277]

Philosopher Martha Nussbaum offers a useful way for understanding states' duties toward their citizens. Nussbaum has developed the capabilities approach, which consists of ten fundamental capabilities that each individual ought to have to be fully human.[278] These include, among others, the capability for bodily integrity, which encompasses the right to be free from domestic violence.[279] To flourish as

274 *See* Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 35.

275 *See* Robin L. West, *Toward a Jurisprudence of the Civil Rights Acts*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 70, 73 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015); Robin L. West, *Law's Nobility*, 17 YALE J.L. & FEMINISM 385, 404 (2005) ("[I]f it is not only private violence to which the state must respond but also other forms and consequences of egregious private subordination, then the states' obligations to act are extensive . . . .").

276 *See, e.g.*, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C., 24 U.S.C.) (making it a federal crime to cross state lines in order to commit domestic violence or violate a protection order, requiring states to give full faith and credit to protection orders issued by other states, authorizing federal grants to increase the effectiveness of police, prosecutors, judges, and victim services agencies, and providing federal funding supporting battered women's shelters).

277 *See* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 30–33 (1999) (noting that under social contract theory, "a principal function of the state is to protect the physical integrity of individuals").

278 MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78–80 (2000) (providing the full list of capabilities).

279 *Id.* at 78.

functioning citizens in society, continues Nussbaum, individuals must be capable of bodily integrity.[280]

The main practical implication of the capabilities approach is that it imposes positive, affirmative obligations on states. It dictates that states have an absolute constitutional duty to protect, actively promote, or create whatever conditions are necessary for citizens to possess these fundamental capabilities and protect their minimal attainment.[281] This obligation is part of states' duty to treat their citizens with dignity and justice.[282] The capabilities approach further establishes a political interest in providing a host of fundamental rights to citizens, including, among others, expanding remedies for domestic violence survivors.[283]

States' penal laws, particularly assault and homicide offenses, are premised on states' duty to promote public safety.[284] The public institutions of police and prosecution have replaced traditional reliance on individuals' exercise of private justice.[285] Also, one of the premises underlying the adoption of the Violence Against Women Act was that states contribute to the continuance of domestic violence through nonfeasance and misfeasance.[286]

Yet, despite four decades of vigorous criminal enforcement of domestic violence laws, survivors still do not receive adequate state protection and necessary support.[287] The theoretical recognition of states' obligation to promote survivors' safety has never resulted in court decisions that frame states' duty as a matter of a constitutional right to be

280 *See id.* at 5–6; *see also* Robin West, *Human Capabilities and Human Authorities: A Comment on Martha Nussbaum's Women and Human Development*, 15 ST. THOMAS L. REV. 757, 757–59 (2003) (discussing Nussbaum's capabilities approach).

281 NUSSBAUM, *supra* note 278, at 5–6.

282 *Id.* at 101–06.

283 *See* West, *supra* note 280, at 775–76.

284 *See, e.g.*, N.Y. PENAL LAW § 1.05(6) (McKinney 2023) ("The general purposes of the [penal code's] provisions are . . . [t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized . . . and the[] confinement [of those convicted] when required in the interests of public protection.").

285 *See* Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 718–19 (2016).

286 *See* G. Kristian Miccio, *Notes from the Underground: Battered Women, the State, and Conceptions of Accountability*, 23 HARV. WOMEN'S L.J. 133, 157–59 (2000). *See generally* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 U.S.C., 24 U.S.C.).

287 *See* GOODMARK, *supra* note 25, at 13–15 (observing that states' responses in addressing the prevalence of domestic violence have largely relied on criminal law with mandatory arrest and no-drop prosecution policies).

protected against private violence.[288] The United States Supreme Court's decision in *Town of Castle Rock v. Gonzales* illustrates a state's failure to protect domestic abuse survivors.[289] In *Castle Rock*, a lower court issued a protective order to protect Ms. Gonzales and her three daughters from her abusive estranged husband. When he kidnapped the girls, she repeatedly called the police, yet no efforts were made to find him. After he killed the girls, Ms. Gonzales sued the state under 42 U.S.C. § 1983, claiming that the state violated the Due Process Clause because the police department arbitrarily deprived her, without due process of law, of her right to enforcement of the protective order.[290] Rejecting her claim, the Court found that Ms. Gonzales and her daughters had no due process right to police protection.[291] The Court held that states are not constitutionally required to enforce their own protective orders, and even if state law had imposed a mandatory duty on the police, the state had not given a private party any entitlement to the enforcement of the order.[292] The Court's failure to recognize survivors' constitutional right to state protection against private violence has been extensively criticized,[293] and further elaborating on this critique exceeds the scope of this Article. For the purposes of my argument here, it suffices to stress that the Court has yet to hold that states' neglect in enforcing its own protection orders violates domestic abuse survivors' constitutional rights.[294]

288 *Cf.* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191–97 (1989) ("[N]othing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."); Town of Castle Rock v. Gonzales, 545 U.S. 748, 757, 760–61 (2005).

289 *See generally Castle Rock*, 545 U.S. 748.

290 *Id.* at 751–54.

291 *Id.* at 768 ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations.").

292 *Id.* at 768–69.

293 *See, e.g.*, Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47 (2017); G. Kristian Miccio, *The Death of the Fourteenth Amendment:* Castle Rock *and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277 (2011).

294 *See, e.g.*, Patricia A. Broussard & Maria Isabel Medina, Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 504, 508–26 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) (criticizing the Court's opinion in *Castle Rock* and arguing that the Court should have held that the benefit created by the state in the form of legislation designed to protect people from domestic violence was a property interest creating a due process right).

2. States' Failures

In the past four decades, states have made important progress in combatting domestic abuse, yet adequate legal responses, including sufficient interventions, are still significantly lacking in two respects: prevention of future abuse and support of survivors.[295] While states have adopted mandatory arrest and "no-drop" policies for prosecuting domestic violence, criminal enforcement of domestic violence statutes yielded only limited success, partly because the criminal legal system is mostly reactive—prosecuting batterers for harm once it has already been inflicted but proving deficient in preventing future harm to survivors.[296]

Moreover, many survivors of domestic abuse are reluctant to turn to the criminal legal system for protection. Instead of locking up batterers, they wish to ensure their own safety and remain free from future abuse.[297] The unwillingness to rely on criminal law is especially prevalent among minority and particularly Black survivors who distrust the criminal legal system, which they perceive as racist, violent, and disproportionately harmful to their communities.[298] Many survivors thus opt to pursue a civil remedy by receiving *civil* protection orders, which are the most commonly used tool available for survivors, and have largely proven effective in preventing future battering.[299] Several shortcomings, however, characterize these orders.[300]

Survivors often face difficulties obtaining civil protection orders given courts' hesitancy to issue them, which often stems from them discrediting survivors' accounts of abuse.[301] Additionally, states significantly differ on how they define domestic abuse that warrants issuing a civil protection order, and only a minority of jurisdictions provide this remedy for psychological and emotional abuse that falls short

295 *See generally* Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 591 (1996) ("[S]ociety might change so that access for women to alternative paths of relief were more available than it now is. If the cost to society of no-access scenarios were women killing men without criminal liability, the state might be more motivated to provide alternative avenues of relief.").

296 GOODMARK, *supra* note 25, at 52–53.

297 *See* ROBELO, *supra* note 13, at 9.

298 BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 163 (2012) (critiquing the criminal legal system's responses to domestic violence).

299 Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1019, 1021 (2014); Epstein & Goodman, *supra* note 246, at 403.

300 *See* Epstein & Goodman, *supra* note 246, at 404–05, 416–18; Stoever, *supra* note 299, at 1021–22.

301 Epstein & Goodman, *supra* note 246, at 404–05.

of threats to place survivors in fear of future physical violence.[302] Moreover, even if courts do issue protection orders, batterers often violate them.[303] Thus, these orders are practically meaningless in practice unless batterers' compliance is backed up by effective enforcement.[304] Existing enforcement mechanisms of civil protection orders, however, not only rely on criminal enforcement, but are also significantly lacking.[305] States have yet to adopt adequate enforcement tools to ensure compliance with these orders.[306] Finally, even when protection orders are issued, the Court's decision in *Castle Rock* demonstrates that domestic abuse survivors do not have a constitutional right to their effective enforcement.[307]

Another area where states fail to provide domestic abuse survivors with sufficient protection against future abuse concerns refusal to prohibit firearms possession by domestic abuse offenders.[308] Ample studies document the ways in which access to firearms poses significant risks to abuse survivors.[309] These demonstrate the close correlation between batterers' possession of firearms and survivors' increased chances of being shot to death by their intimate partners.[310] In sum, states' inadequate measures are demonstrated in survivors' difficulties in obtaining civil protection orders and the insufficient mechanisms to

302 *See* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1133–38 (2009).

303 *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005). *See generally* Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 836–37 (2004).

304 *See generally* Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 GEO. J. GENDER & L. 43 (2013).

305 *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1509, 1515–18 (2008).

306 *See id.* at 1516–17; Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 376 (2011) (noting that effective enforcement of protection orders requires a commitment by various actors, including legislatures).

307 *See generally Castle Rock*, 545 U.S. 748; *see also supra* notes 287–94 and accompanying text.

308 *See* Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 575 (2020) ("Although some states have enacted statutes that restrict firearm possession by domestic violence offenders, many others do not have laws that prevent perpetrators of intimate partner violence from owning or possessing firearms."). States' failures to protect people from private violence are nowhere unique to the context of domestic violence, as the recent increase in mass shootings in the United States demonstrates. *See* Glenn Thrush, *An F.B.I. Report Shows a Steep Rise in 'Active' Shooters*, N.Y. TIMES (May 24, 2022, 10:34 PM), https://www.nytimes.com/2022/05/24/us/shootings-fbi-data.html (last visited Jan. 15, 2023).

309 *See, e.g.*, April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers' Access to Guns*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 53, 53 (Daniel W. Webster & Jon S. Vernick eds., 2013).

310 *Id. See generally* Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017).

enforce their compliance, as well as neglecting to adopt laws that restrict batterers' access to firearms.

Another major area where states fall short in their duty to facilitate survivors' right to life and bodily integrity concerns their failure to provide survivors who wish to end abusive relationships with adequate financial support.[311] The criminal legal system's emphasis on punishing batterers obfuscates a corollary state obligation to financially support abuse survivors.[312] In a powerful memoir titled *Maid: Hard Work, Low Pay, and a Mother's Will to Survive*, Stephanie Land provides a compelling account of domestic abuse survivors living in poverty and describes states' failures, including lack of support for working single mothers and their economic struggle to survive, be self-sufficient, and have reasonable housing and decent living conditions.[313]

The literature extensively addresses the many financial obstacles that survivors face when contemplating leaving abusive relationships.[314] While fully discussing states' neglect to economically support survivors exceeds the scope of this Article, here, I paint in broad strokes the multiple deficiencies in states' policies that contribute to survivors' resorting to use of lethal force.

The correlation between poverty and domestic abuse is well documented.[315] While access to dignified employment is critical for survivors' economic security and is a necessary condition for leaving abusive partners, the labor market's structural inequalities often keep survivors in unstable jobs that do not allow them to become self-sufficient. Financial dependence on abusive partners and lack of sufficient economic opportunities are the main barriers for survivors seeking economic independence and financial security.[316]

States' economic policies miserably fail survivors, and often result in their decision to remain in abusive relationships.[317] These policies

311 *See* Johnson, *supra* note 244, at 187–96 (discussing economic barriers to employment and lack of housing options).

312 *See* GOODMARK, *supra* note 25, at 32–33, 154 ("We should shift funding away from courts, police, and prosecutors and put money and programmatic control into communities, nongovernmental organizations, and the hands of people subjected to abuse.").

313 *See generally* STEPHANIE LAND, MAID: HARD WORK, LOW PAY, AND A MOTHER'S WILL TO SURVIVE (2019).

314 *See id.*; *e.g.*, Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty*, 16 J. GENDER RACE & JUST. 1, 15–16 (2013); Andrea B. Carroll, *Family Law and Female Empowerment*, 24 UCLA WOMEN'S L.J. 1, 25 (2017); *see also supra* text accompanying notes 222–26.

315 *See, e.g.*, GOODMARK, *supra* note 25, at 123.

316 *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 19–21 (discussing survivors' financial despair); *see also supra* text accompanying notes 222–26.

317 *See* GOODMARK, *supra* note 25, at 34–41, 123.

disproportionately affect women in low-paying jobs, particularly minority and Black women.[318] Welfare payments are low and limited in duration.[319] Lack of affordable housing is yet another area where states fail to support domestic abuse survivors. While fair housing shortage is a general problem in the United States, it proves especially detrimental for survivors, who often find themselves homeless after escaping abusive relationships.[320]

States' neglect to adopt adequate measures to prevent domestic abuse and support survivors is intimately connected to their criminal responses against survivors who resorted to lethal violence. The shared responsibility model suggests that states' failures should have a direct bearing on the structure of their criminal laws. Survivors' level of culpability for killing abusive partners ought to be relative to states' shared responsibility and must be measured against states' insufficient intervention. Acknowledging states' failures to facilitate necessary support for survivors thus ought to result in mitigating survivors' criminal responsibility for survival homicide.

3. Mercy's Role Redux

Mercy's role in criminal law is deeply contested. Criminal law theorists have long debated the reasons for meting out mercy and its role in the criminal legal system. Some argue that defendants' suffering as a result of their criminal acts warrants mercy.[321] Others suggest that defendants' history of past abuse, including a "rotten social background," justifies the exercise of mercy.[322] But most commentators posit that exercising mercy belies justice and adhere to the view that mercy has no room in determining criminal responsibility itself at the guilt phase of trial and may only be considered at the sentencing phase.[323]

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318 *See id.* at 37.

319 *See* Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 4 (2008) (discussing the Temporary Assistance for Needy Families restrictions and shortcomings).

320 *See* GOODMARK, *supra* note 25, at 128–29.

321 *See, e.g.*, R. A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361, 367 n.16, 376–77 (2007) (supporting the exercise of mercy at least when the defendant's loss is not the result of their own wrongdoing).

322 *See* Delgado, *supra* note 231, at 9–11. Other scholars reject this proposed generic defense. *See, e.g.*, Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114 (William C. Heffernan & John Kleinig eds., 2000).

323 *See generally* Stephen P. Garvey, *Questions of Mercy*, 4 OHIO ST. J. CRIM. L. 321 (2007) (summarizing different approaches to exercising mercy). For a recent work advocating for a legal

Courts today routinely recognize the role for mercy at sentencing in general, and sentencing of domestic abuse survivors in particular.[324] Moreover, the notion of mercy provides one of the key justifications underlying the previously discussed New York statute DVSJA that allows for sentencing mitigation for domestic abuse survivors.[325] For example, in applying the DVSJA in *People v. Smith*, the court explicitly acknowledged mercy's role, stating that the statute "recognizes the severity of an offense while also affording some measure of mercy for the offender."[326] The court continued to stress that "*our system also allows for mercy—mercy where [the] defendant herself is a victim, and where her victimization fueled the crime for which she was convicted*."[327]

Yet, existing legal treatment of survival homicide casts doubt on whether current laws that relegate the role for mercy only to the penalty phase are warranted as a matter of sound policy. Mercy could and should play a more prominent role in determining criminal responsibility itself. The dual status of survivors as both crime victims and offenders[328] supports the position that mercy and justice are not contradictory but complementary notions and thus could be simultaneously meted out to domestic abuse survivors. Survivors' dire predicaments consisting of trauma and abuse warrant a more humane societal response to their plight. Treating survivors more compassionately means that states ought to directly exercise a modicum of mercy toward survivors by amending their penal codes and crafting a designated survival homicide offense that is grounded in mercy. Instead of partially excusing survivors based on their purported mental impairments as existing frameworks currently do, a preferable approach compatible with the shared responsibility model would mandate states to administer to survivors straightforward mercy.

C. *Survivors' Lower Culpability*

The second theoretical reasoning for the specialized survival homicide offense centers on survivors' lower culpability. Survivors'

right to redemption for all humans, see generally Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 349, 360 (2021) (discussing clemency and pardons as acts of mercy by the executive branch).

324 *See* Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 753–54 (1994); *e.g.*, People v. Smith, 132 N.Y.S.3d 251 (Cnty. Ct. 2020).

325 *See supra* Section I.C. *See generally* N.Y. PENAL LAW § 60.12 (McKinney 2023).

326 *Smith*, 132 N.Y.S.3d at 259.

327 *Id.* at 260 (emphasis added).

328 *See generally* Weissman, *supra* note 228, at 851 (describing New York's DVSJA as "recognizing the duality of survivor/offender experiences and characteristics").

reduced blameworthiness should mitigate their criminal responsibility where the deceased's abuse significantly contributed to the killing. This reasoning emphasizes the impact of survivors' motives on their criminal responsibility and further explains why the proposed offense is compatible with the two prevalent justifications for punishment, namely retributivism and utilitarianism.

Suggesting that survivors' criminal responsibility should be mitigated might wrongly imply that the survival homicide offense draws on the notion of diminished responsibility.[329] Commentators use the term "diminished responsibility" to refer to circumstances where actors' capacity for making rational choices is diminished due to mental impairments that fall short of satisfying the elements of the insanity defense.[330] The position this Article advances, however, must be clearly distinguished from the medicalized diminished responsibility model. Grounding survivors' lower criminal liability in the notion of "diminished responsibility" is inherently problematic because it suggests that their responsibility should be diminished due to mental impairment, resulting in irrational choices. The proposed survival homicide offense would recognize that survivors' criminal responsibility should be mitigated without relying on concepts that suggest they are somehow diminished or reduced to anything lesser than autonomous agents with full capacity for rationality. Using the term "diminished" is inconsistent with the rationales underlying the survival homicide offense, which rejects the idea that survivors ought to be excused based on their purported deficient personal traits.[331]

In contrast with existing frameworks that excuse survivors because of their supposed mental impairments, the model I advance here rejects the notion that survivors' capacity for making autonomous rational choices is impaired. Instead, this model is grounded on the idea that survivors' actions are *understandable* responses to repeated domestic battering, even if they cannot be fully justified. The survival and fear

329 *Cf.* Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 3 (2009) (observing that a reduced responsibility or "diminished-retribution" model posits that certain categories of criminal defendants, such as juveniles and abused defendants, should be subject to diminished criminal responsibility).

330 *See generally* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003) (proposing that criminal law adopt a generic partial excuse of partial responsibility which is based on actors' diminished capacity for making rational choices).

331 *See supra* Section I.A (criticizing courts' reliance on a medicalized view of survivors, which pathologizes their behaviors). I thank Professor Michelle Madden Dempsey for directing my attention to this point.

motives make actors' desperate reactions not only rational responses to cumulative domestic abuse, but also understandable ones.[332]

Viewed this way, survival homicide should be treated under a sui generis framework that sets a lower gradation for the offense and is distinct from other forms of homicide. Survivors' acts are qualitatively different from those committed by other defendants in typical murder or manslaughter cases. That is because the abuse that the batterer inflicted on them significantly contributed to their acts, thereby lowering the degree of their moral blameworthiness. The discussion below provides two reasons why survivors' culpability level is lower.

1. Motive's Relevance

Motive's role in determining offenders' criminal responsibility is contested. Conventional wisdom in criminal law is that motives largely do not matter for the purpose of determining actors' criminal responsibility.[333] This position rests on the assumption that while motives are mostly irrelevant for the guilt phase of trial, they could be taken into account at the sentencing phase.[334]

Disregarding defendants' motives or reasons for the lethal act, homicide statutes center instead on whether the defendant acted with a culpable mental state, making intent to kill the key factor in determining the level of their criminal responsibility.[335] These statutes fail to recognize the role for motive as a basis for distinguishing between different actors' culpability.[336] For example, actors who purposely kill a terminally ill loved family member out of mercy and compassion are similarly treated, for the purpose of determining criminal responsibility, as actors who kill out of hatred or jealousy.[337] Likewise, defendants who kill out of fear and

332 See Buchhandler-Raphael, *supra* note 136, at 234, for further discussion of the notion of defendants' understandable reactions.

333 *See id.* at 201.

334 *See* Husak, *supra* note 262, at 472.

335 *See* Hessick, *supra* note 262, at 94–95, 99–100, 114 (observing that homicide statutes largely focus on mens rea, inquiring whether the defendant acted intentionally or with another mental state, but that there are several recognized exceptions to this rule where motives do play a limited role in shaping the scope of criminal defenses, such as self-defense and mitigating liability from murder to manslaughter under the provocation defense); *see also* Vera Bergelson, *The Depths of Malice*, 53 ARIZ. ST. L.J. 399, 400, 406 (2021) (noting that homicide law's previous focus on actors' motives was replaced by focus on intent rather than the reasons for the homicide).

336 *See* Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 460 (1990).

337 *See* Bergelson, *supra* note 335, at 421.

survival motives are similarly treated as those who kill out of nefarious motives, such as pecuniary gain.[338]

Yet, the dominant assumption that motives are irrelevant at the guilt phase of the trial is not only oversimplified but also descriptively inaccurate. In fact, many laws, including homicide statutes, do incorporate actors' motives in determining their criminal responsibility.[339] One notable example is hate crime laws, where defendants' motives play an aggravating role at the guilt phase of the trial rather than being relegated to the sentencing phase.[340] Other examples include homicide laws where the defendant's motive aggravates a second-degree to first-degree murder. For example, some states' penal codes provide that first-degree murder occurs when the killing is driven by the defendant's motive to prevent a witness from testifying at trial or retaliating against a witness who has testified.[341] Similarly, motives may also serve as aggravating circumstances in cases where defendants killed police officers or judges.[342]

The unifying thread characterizing these statutes is that actors' motives exclusively serve to aggravate their criminal responsibility. No criminal statute, however, explicitly incorporates actors' motives as a basis for mitigating their criminal responsibility. If motives are, in fact, relevant for determining actors' criminal responsibility, a position that the abovementioned statutes clearly embrace, then no principled reason could explain why motives may only increase the level of criminal responsibility but not reduce it. Thus, if motives do play a role as aggravating factors for determining the scope of actors' criminal responsibility, they could similarly play a role as mitigating factors that reduce criminal responsibility.

Moreover, motives not only affect the scope of actors' criminal responsibility as a descriptive matter, but they also *should* shape actors' criminal responsibility from a normative policy perspective.[343] As

338 *See supra* Sections I.A–I.B.

339 *See* Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1863 (1999) ("[N]umerous criminal law doctrines . . . treat a defendant's reasons for acting as partially or wholly exculpatory.").

340 *See* Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, ANN. SURV. AM. L., Nov. 1993, at 605 (observing that motive is commonly an element in determining liability or grade of offense).

341 *See* Hessick, *supra* note 262, at 99–100; *e.g.*, N.Y. PENAL LAW § 125.27(1)(a)(v) (McKinney 2023).

342 *See, e.g.*, PENAL LAW § 125.26(1)(a)(i) (aggravated murder); N.J. STAT. ANN. § 2C:11-3(b)(2) (West 2023).

343 Binder, *supra* note 260, at 5–7, 45, 54 (suggesting that criminal law should be more sensitive to actors' motives); *cf.* Hessick, *supra* note 262, at 90 (positing that the conventional wisdom that motives are irrelevant is wrong descriptively and normatively).

commentators observe, motives should play a role in evaluating defendants' blameworthiness, including their specific reasons for committing a homicide.[344] Actors' reasons for killing matter normatively because different reasons affect the degree of moral blameworthiness and thus should also impact the level of their criminal responsibility by mitigating it.[345] When degrees of moral wrongdoing are different, criminal law should reflect that difference, and, in fact, it already does precisely that, as the moral significance of lower culpability is currently recognized at the sentencing phase of trial.[346]

Acknowledging that motives should play a role in determining actors' criminal responsibility leads to suggesting that domestic abuse survivors' motives *should* impact their criminal responsibility for killing abusive partners because the reasons motivating different types of killings are morally distinguishable. Survivors' moral culpability is lower when the killing was motivated by fear of the deceased and a desire to survive.[347] This motive is distinct from common motivations that underlie typical intentional killings, which often stem from involvement in criminal activities like drug trafficking, competition and rivalry between those involved in these activities, as well as jealousy and revenge. In contrast, survivors who kill abusive intimate partners repeatedly report fear and desperation resulting from the ongoing abuse.[348] They also report that

344 *See, e.g.*, Husak, *supra* note 262, at 472–77 (explaining how motive affects assessment of blameworthiness); Binder, *supra* note 260, at 45 (discussing "normative arguments that criminal liability should be conditioned on motive because it is relevant to moral blame"); Hessick, *supra* note 262, at 113–15.

345 Binder, *supra* note 260, at 45; Husak, *supra* note 262, at 477 (suggesting that motives are and ought to be relevant to determining criminal responsibility and offenders' blameworthiness).

346 *See* Morse, *supra* note 330, at 289–90.

347 Abused survivors' motives may include the overlap between emotions of fear, anger, and frustration. *See* Buchhandler-Raphael, *supra* note 94, at 1785 (emphasizing that fear and anger are not mutually exclusive and abuse survivors may act out of an indistinguishable combination of the overlapping emotions of both fear and anger).

348 *See, e.g.*, People v. Addimando, 152 N.Y.S.3d 33, 41–42 (App. Div. 2021) ("[T]he defendant testified that she was 'pretty sure [Grover] was going to kill' her. On the night of the subject shooting, Grover told the defendant that 'he could kill [her] in [her] sleep,' asking whether 'someone would wake up first or just die right away.' . . . Grover then showed her diagrams of a human brain on his telephone, stating 'I could shoot you in this part and you would die right away. But if I killed you in this part, you wouldn't be able to talk or remember things.' When the defendant retreated to the bathroom, Grover followed her and threatened that he 'could shoot [her] in the shower, but it would echo.' Thereafter, . . . Grover . . . [forcefully] raped her . . . . Further, just prior to the subject shooting, Grover menaced, 'I'm going to kill you, I'm going to kill myself, and then your kids have no one.'" (second, third, fourth, and fifth alterations in original)). *See generally* Jordan, Clark, Pritchard & Charnigo, *supra* note 64.

they felt that they had exhausted all resources and attempts to get help and support to no avail.[349]

Relatedly, the motive that triggers the killing is critical for distinguishing between different actors based on the distinct level of disregard they manifested for the value of human life. Criminal law places unique emphasis on the value of human life.[350] The division between different forms of homicide based on different mental states captures the extent to which the killer disregarded the fundamental value of preserving human life.[351] Random killings, motivated by revenge, greed, or rivalry between criminal gangs, arguably manifest the highest form of disregard for the value of human life. For example, actors who are motivated to kill by financial incentives choose to prioritize their personal gains over the victim's life.[352] When balancing the competing values in cases like these, it is clear that the value of the sanctity of human life trumps values such as external personal benefits like greed or revenge.

In contrast, domestic abuse survivors do not manifest such deliberate disregard for the batterer's life. Both competing interests in survival homicide implicate the value of human life. An actor's survival act represents a rational choice to prioritize their own life over their batterer's life precisely because it was the batterer who threatened them with bodily harm. Killing in circumstances of domestic abuse is therefore distinct from killing in any other context because what motivated the act was the survivor's fear of being killed by the abuser. Recognizing survivors' desires to live as an understandable response to threats to their own lives is thus consistent, rather than contradictory, with the law's prioritizing the value of life. Further, incorporating survivors' motives into the survival homicide offense does not result in complete acquittal of

349 *See* GOODMARK, *supra* note 16, at 13–15 (observing that for survivors who believe that the legal system will not protect them, particularly Black people, using violence in response to their victimization seems to be the only way to protect themselves); H. Gertie Pretorius & Shirley-Ann Botha, *The Cycle of Violence and Abuse in Women Who Kill an Intimate Male Partner: A Biographical Profile*, 39 S. AFRICAN J. PSYCH. 242, 242 (2009).

350 *See* Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 272 (2008).

351 *See* Pillsbury, *supra* note 336, at 438.

352 While most women kill in circumstances of domestic battering, some may kill for reasons unrelated to abuse, such as financial motivation. For example, in the recent prosecution of Nancy Crampton Brophy, who was charged and convicted of murdering her husband, Daniel Brophy, the prosecution's theory was that "Crampton Brophy was motivated by greed and a $1.4 million insurance policy." Zane Sparling, *Oregon Romance Novelist Who Wrote 'How to Murder Your Husband' Goes on Trial in Fatal Shooting of Longtime Spouse in Portland*, OREGONIAN (Apr. 29, 2022, 12:24 PM), https://www.oregonlive.com/crime/2022/04/oregon-romance-novelist-who-wrote-how-to-murder-your-husband-goes-on-trial-in-fatal-shooting-of-longtime-spouse-in-portland.html [https://perma.cc/XE95-YGR5]; Mike Baker, *'How to Murder Your Husband' Writer Convicted of Murdering Husband*, N.Y. TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/us/novelist-nancy-brophy-murder-husband.html (last visited Mar. 3, 2023).

any crime. Instead, the fear and survival motives merely reduce the gradation of the homicide by finding survivors criminally responsible for an offense that is graded lower than manslaughter.

2. Theories of Punishment

States impose criminal liability for wrongdoing to express societal condemnation of the defendant's act, and since the state intentionally inflicts suffering on the offender, punishment must be justified on some theoretical grounds.[353] Voluminous scholarship has been devoted to the theoretical justifications for punishment, aiming to answer criminal law's key question of why wrongdoers should be punished.[354] While it is beyond the scope of this Article to delve deeply into these justifications, suffice it to say that adopting a designated offense for survival homicide is warranted based on the prevailing justifications for punishment.

Traditional justifications for punishment have drawn on retributivism, utilitarianism, or some combination of both.[355] Retributivism does not have an agreed-upon meaning, and retributivist theories come in many flavors.[356] Broadly speaking, retributivist theories adhere to the principle of "just desert," under which punishment should be scaled to the individual offender's level of culpability and the resulting harms of their conduct by taking into account both the seriousness of the offense itself and the personal culpability of the specific actor.[357] Additionally, the principle of proportionality places limits on what counts as "just desert" by mandating that an offender's penalty will be proportional to their individual blameworthiness.[358]

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353 *See* Douglas Husak, *Why Criminal Law: A Question of Content?*, 2 CRIM. L. & PHIL. 99, 100, 108 (2008).

354 *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992); Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 150 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

355 Frase, *supra* note 354, at 69, 73. Commentators recently offered an additional strand, that is reconstructivism. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1492–93 (2016).

356 *See generally* Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145 (2008) (distinguishing between vengeful, deontological, and empirical desert, each of which are types of principles of retributivism).

357 *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 & n.22, 279, 282–83 (2005). Another principle of retributivism is *lex talionis*, that is, "the law as retaliation." *Id.* at 280–81.

358 *Id.* at 279 (suggesting that the proportionality principle requires "correspondence between desert and sanction").

Current treatment of survival homicide, however, does not align with the retributive notion of just desert because it refuses to distinguish between defendants' different levels of culpability and distinct motivations. Retributivism's emphasis on actors' personal culpability supports the argument that survival homicide defendants' culpability is lower than that of other homicide defendants.[359] The notion of "just desert" dictates that actors' fears and survival motives carry moral significance that should affect the normative evaluation of their culpability level.[360] This notion also buttresses the abovementioned argument that abuse survivors deserve more merciful treatment at the hands of the state, given the trauma they have endured.[361]

One version of retributivism is expressivism, which posits that punishment signifies an expression of societal disapproval of a criminal act by morally condemning the offender.[362] Expressivist theories justify imposing punishment for homicide because the actor has demonstrated that they do not respect the deceased's moral worth and because their own values regarding the sanctity of human life are wrong.[363] Expressivism is the theory that is best suited for recognizing that defendants' motives should affect their criminal responsibility.[364] As Professor Carissa Byrne Hessick succinctly points out, hiring a contract killer warrants greater societal disapproval than killing out of mercy.[365] Expressivism justifies differentiating between levels of societal disapproval expressed not only in the reaction to different crimes but also to similar crimes that are triggered by different motives, including

359 The notion of "blameworthiness" and its role within retributive theories is contested. Some legal theorists hold a narrow view of blameworthiness, focusing mostly on the actor's mens rea. Others, however, hold a broader view of blameworthiness that incorporates the actor's motives and assesses how these motives affect assessments of blameworthiness. *See generally* Hessick & Berman, *supra* note 128, at 180–81 (discussing narrow and broad understandings of the notion of blameworthiness).

360 *See supra* text accompanying notes 357–68.

361 *See supra* Section III.B.3.

362 The notion of expressivism was initially developed by Dan M. Kahan. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592–94 (1996).

363 *See* Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 310 (2005).

364 Hessick, *supra* note 262, at 112–15.

365 *Id.* at 114. Professor Hessick also suggests that motives should play a prominent role at sentencing rather than the guilt phase of the trial. *See id.* at 92. The drawback in relegating motives to sentencing, however, is that sentencing entails an enormous amount of judicial discretion as judges considerably differ in the way they view survivors' motives. I have argued elsewhere that mercy is a motive that ought to lower defendants' criminal responsibility, and not merely their punishment, because of the concern that mitigation at sentencing is entirely discretionary and unpredictable. *See* Buchhandler-Raphael, *supra* note 136, at 211–12.

homicide offenses.[366] Applied in the specific context of survival homicide, expressivism is consistent with the position that homicides that are motivated by fear and survival warrant less societal condemnation than other types of homicide triggered by nefarious motives. Because survival acts are less culpable, expressivist theories would likely justify mitigating domestic abuse survivors' criminal responsibility.

Furthermore, under expressivist theories, gradations of homicide should be differentiated to conform with the public's normative intuitions and community justice judgments.[367] A survival homicide offense recognizes that survivors who killed domestic abusers should not be labeled and stigmatized as murderers because the societal perceptions about their moral wrongdoing are different than other forms of homicide.[368] On the flip side, disentangling survival homicide from the offense of murder also recognizes that murder convictions ought to be reserved for the most morally heinous crimes. Existing frameworks allowing for mitigating sentences of abuse survivors who are convicted of murder arguably undermine the seriousness of a murder conviction because they impose light and disproportional prison terms on actors who are convicted of murder.

Moreover, expressivism would arguably support the adoption of a specialized statute for survival homicide because this offense corresponds to a potential concern that avoiding altogether bringing *any* criminal charges against abuse survivors who killed domestic abusers might encourage others in abusive relationships to take similar action.[369] Yet, far from condoning the killing of domestic abusers as a legitimate course of action, the survival homicide offense retains the strong societal message that resorting to killing remains an act that criminal law explicitly condemns. The expressive message that a conviction of survival homicide will send to the public is that the value of the sanctity of human life is left intact, given the strong message sent by the homicide conviction itself. Merely mitigating survivors' level of criminal responsibility by adopting a different gradation of the homicide nowhere detracts from this expressive message.

366 *See* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1076 (2009).

367 *See generally* Paul H. Robinson & Jonathan C. Wilt, *Undemocratic Crimes*, 2022 U. ILL. L. REV. 485, 499, 505 (observing that criminal law doctrines are in tension with the views of the communities to which they apply, and that "empirical evidence suggests that lay intuitions of justice do not support either the aggravation of culpability or the complicity aspects of the felony murder rule").

368 *See* Simon, *supra* note 127, at 1303.

369 See *infra* Section III.E.1 for responses to counterarguments that propose an abolitionist framework for addressing all abuse survivors whose prior victimization contributed to their committing crimes.

Likewise, a survival homicide offense is also justified based on utilitarian rationales. "[M]odern criminal law represents an explicit legislative decision to prioritize crime control over doing justice."[370] Utilitarianism prioritizes specific and general deterrence and incapacitation of offenders as mechanisms for crime control, namely prevention of future harm and reducing recidivism.[371]

Regarding specific deterrence, survival homicide defendants are more capable of being deterred than other homicide offenders. From a crime control perspective, survivors who specifically target domestic abusers are not dangerous to society at large, and their risk level and likelihood of recidivism are low. Further, a crime prevention model may rely on probability estimates and evidence-based risk assessment instruments to determine individual offenders' level of risk and likelihood of recidivism.[372] Risk assessment tools are capable of determining whether an individual survivor poses any specific risk to the community that justifies their incapacitation. Absent such risk, however, incapacitating survivors is deemed unjustified under utilitarian theories.

Regarding general deterrence, utilitarians might posit that even if specific deterrence is unwarranted in individual survival homicide cases, it is still necessary to send a deterring message to the community at large that killing domestic abusers ought to remain criminalized similarly to other types of intentional killings. Conceding this argument, however, should not necessarily lead to rejection of the proposed offense. From a utilitarian perspective, to justify punishment, its overall benefits must outweigh the enormous costs that punishment inflicts on defendants.[373] While engaging in such cost-benefit calculus, utilitarians would weigh the extensive harm that murder or manslaughter convictions entail not only on the individual abuse survivor but also on their families and entire communities. Since survival homicide defendants are often mothers to young children, sentencing them to long periods of imprisonment pursuant to murder or manslaughter convictions in itself imposes a significant cost both to the individual and to society at large and therefore must be factored into the societal policy decision about the scope of their criminal responsibility.[374]

370 *See* Robinson & Wilt, *supra* note 367, at 524.

371 *Id.* at 487, 492; Slobogin & Fondacaro, *supra* note 329, at 7, 41, 57.

372 *See* Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 313 (2018).

373 *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Batoche Books 2000) (1781).

374 Arguably, in terms of the justifications of punishment, there are no societal benefits in incarcerating survival homicide defendants. *See* GOODMARK, *supra* note 16, at 94 (noting that

D. *Doctrinal Implications*

Having identified the theoretical basis underlying the proposed survival homicide statute, the discussion below considers its doctrinal implications by laying out its elements, scope, and limits.

1. A Screening Procedure

The proposed model aims to direct prosecutors away from bringing murder charges against abuse survivors by guiding them toward prosecuting survivors under the designated statute. It is plausible to surmise that a survival homicide law, in itself, would naturally incentivize some prosecutors to opt for the specialized statute, which provides a much-needed doctrinal basis for charging survivors with a crime other than murder or manslaughter. Progressive and reformist prosecutors, who believe in the need for reforming the overly harsh criminal legal system,[375] would likely take seriously this legislative direction, which is clearly expressed in the legislature's intent, by voluntarily bringing survival homicide charges when evidence in police investigation files suggests that domestic abuse significantly contributed to the defendant's act.

But of course, while some prosecutors would voluntarily adhere to this legislative direction, others would not. Prosecutors harboring more "tough on crime" agendas would likely refuse to prosecute survivors under the specialized survival homicide statute and instead continue to bring murder charges against them. These prosecutors would have to be further nudged into revising their existing practices concerning the prosecution of abuse survivors. A procedural screening mechanism in the form of a motion to dismiss the murder charge offers such prodding.

To prevent prosecutors from circumventing the legislature's intent, the survival homicide statute must incorporate a screening procedure that would allow an abused defendant who was charged with murder, notwithstanding substantial evidence of prior domestic abuse established by police investigation, to file a motion to dismiss the charge for insufficient evidence. Such a motion would require the court to schedule a preliminary hearing where the judge would make factual determinations about whether the defendant had been subjected to

incapacitation of domestic abuse survivors who were convicted of crimes "deprive[s] society of the many other functions performed by these people," including as parents and caregivers); Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 291–95 (2007).

375 For scholarship on progressive prosecutors, see *supra* note 42.

substantial abuse by the deceased and whether this abuse significantly contributed to the homicide. Once the defendant meets their initial burden to produce evidence to establish these facts, the burden would shift to the state to establish, by *clear and convincing evidence*, that there is sufficient evidence to support the murder charge and that the case does not satisfy the elements of the specialized survival homicide statute.[376]

Considering a preliminary motion where judges would determine the nature and severity of the criminal charges against abuse survivors requires grappling with the discretionary nature of such procedure and the difficulties stemming from reliance on, and having faith in, individual judges to properly exercise their discretion. After all, there is a broad consensus that judicial decision-making is shaped, at least to some extent, not only by judges' backgrounds and personal experiences, but also by their own biases, prejudices, and stereotypes, as well as their moral beliefs and personal sets of values.[377] To be clear, relying on judicial discretion to determine the nature of survivors' criminal charges arguably raises some tension with the previously discussed critique concerning sentencing judges' enormous discretion to determine appropriate punishments.[378] Yet, the proposed survival homicide statute significantly alleviates this tension.

To begin with, at least some measure of judicial discretion is an inevitable feature of a well-functioning judiciary.[379] It can hardly be contested that a mechanical and bureaucratic vision of judicial decision-making, which leaves no room for tailoring decisions to individual cases' specific circumstances, is unwarranted. Moreover, judicial decision-

376 For motions to dismiss the indictment for insufficient evidence, see, for example, 2 ROBERT G. BOGLE, CRIMINAL PROCEDURE IN NEW YORK §§ 26:5, 27:2 (2022). Additionally, even if judges would deny the motion to dismiss the murder indictment and the prosecution would proceed with the murder prosecution, defendants should be able to request a jury instruction that provides jurors with the option to convict the defendant of the proposed "survival homicide" offense, instead of murder or manslaughter. For the proposition that defendants should be able to request jury instructions that rest on alternative theories for mitigation, see Buchhandler-Raphael, *supra* note 94, at 1790–91 (arguing that a jury instruction on provocation should be additive and supplemental to self-defense or imperfect self-defense claims).

377 *Cf.* Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 501–02 (2009) (discussing antiquated notions of judicial independence and advocating for alternative understandings of judicial independence to promote judicial quality). *See generally* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 141 n.252 (1997) ("[T]here is almost universal agreement that judicial decision making is affected, in some measure, by a judge's background, experience and moral values.").

378 *See supra* Section I.C. For critique of state actors' discretion in addressing criminalized survivors, see GOODMARK, *supra* note 16, at 179–80. I thank Leigh Goodmark for highlighting this tension.

379 *See generally* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 408–17 (2007) (discussing the role for judicial discretion).

making involves resolving conflicting interests that are in tension with one another.[380] The exercise of judicial discretion is therefore a built-in feature of the judiciary role.[381]

Furthermore, reliance on judicial discretion to dismiss murder charges adds a necessary layer of protection against the exercise of improper prosecutorial discretion regarding what charges to bring in survival homicide cases. The problems associated with prosecutors' exercise of unlimited, unstructured, and unreviewable discretion in deciding whether and what charges to bring are well documented in the literature.[382] A motion to dismiss murder charges provides a much-needed independent judicial review mechanism to ameliorate the largely inconspicuous and unreviewable nature of prosecutorial discretion.[383] The goal of the judicial screening procedure is to prevent prosecutors from eviscerating the legislature's intent that abuse survivors would be prosecuted with a specialized crime rather than with murder or manslaughter.

Conceding that some degree of judicial discretion remains necessary under the survival homicide statute is consistent with the proposed model. But judicial discretion must be clearly structured by providing judges with guidance on how to exercise their discretion. The potential advantages of judicial discretion are a matter of degree: the more judicial discretion is guided by explicit legislative direction, the less risk that judicial decision-making would be excessively affected by judges' personal experiences, including from their own prejudices, biases, and stereotypes.[384]

380 *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 808–09 (2020) (elaborating on the importance of exercising prosecutorial discretion to resolve conflicting interests).

381 *See generally* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 409–10 (2005) (discussing the difficulties embedded in mandatory sentencing guidelines that deprived sentencing judges their judicial discretion, and the advantages of voluntary sentencing guidelines).

382 *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (noting that prosecutors' charging decisions "are totally discretionary and virtually unreviewable").

383 *See id.*; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (noting the problems associated with unreviewable prosecutorial discretion); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (observing the lack of checks on prosecutorial power); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 506–08 (2016) (same).

384 *Cf.* Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 203 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (discussing the inevitable role of judicial discretion in divorce cases, and noting that legislative initiatives can contain and structure judicial discretion).

What distinguishes potentially problematic exercises of judicial discretion from the proposed model is that in the latter case, explicit legislative direction structures judges' exercises of discretion in their decisions to dismiss murder charges and replace them with survival homicide charges.

Incorporating statutory guidelines into the survival homicide offense would effectively structure judicial discretion. To guide courts' discretion at the preliminary hearing, a survival homicide offense would include a non-exhaustive list of factors judges would have to consider when deciding whether the defendant should be charged with survival homicide instead of murder.[385] Judges will be required to make a preliminary finding that the prior abuse significantly contributed to the defendant's criminal act. Such statutorily defined factors will guide judicial discretion in a way that is currently missing from existing sentencing mitigation schemes. Additionally, trusting judges to exercise their judicial discretion in a way that aligns with the legislature's intent is preferable to expecting juries to adhere to the statutorily defined factors, given a host of biases, prejudices, and stereotypes that often affect jurors' decision-making.[386] Relevant statutorily defined factors will include social framework evidence, as previously discussed, to help the judge contextualize the defendant's act.[387] For example, such factors would include survivor-oriented circumstances, such as survivors' cultural norms and social backgrounds, and the availability, or lack thereof, of sufficient financial resources to enable leaving the abusive relationships, as well as deceased-related factors, such as their ownership of a firearm.

2. The Offense's Elements

The survival homicide offense would have distinct elements that differ from existing elements of both self-defense and manslaughter statutes. Instead, its elements draw on New York's DVSJA, discussed earlier in this Article.[388] Yet, it would modify some of this statute's requirements to address its shortcomings.[389] Here, I outline survival homicide's main features, leaving for the Appendix the more elaborate model statute that legislatures could readily consider adopting.

385 *See infra* Appendix.

386 For an example of jurors' prejudices and biases in the context of sexual assault prosecutions, see Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. 409, 446–49 (2022).

387 *See supra* Section II.B.

388 *See supra* Section I.C.2.

389 *See generally supra* Section I.C.2 (discussing the DVSJA's shortcomings).

The survival homicide offense would consist of two key elements: First, the defendant or their children were subjected to *substantial* physical, sexual, or *cumulative psychological* abuse. For the purpose of the survival homicide statute, cumulative psychological abuse largely consists of batterers' engagement in intimidation tactics by threatening to inflict future bodily harm on defendants or their children. The second element would require proof that such abuse *significantly contributed* to the homicide (significant contributing factor).

The first element responds to the concern that emphasizing the threat of inflicting *immediate* lethal harm, as existing self-defense laws require, misses the important dimensions of domestic abusers' ongoing intimidation and threats toward survivors.[390] As previously discussed, Evan Stark's work on coercive control highlights the full range of tactics that batterers use to control their intimate partners. This includes various forms of intimidation, which instill fear in survivors' lives through explicit and implicit threats to inflict physical harm, surveillance, and degradation.[391]

Concededly, not all forms of coercive control will satisfy the proposed element of "substantial cumulative psychological abuse." For example, coercive control also includes economic control, where abusers restrict survivors' access to necessities of daily living and deprive their financial resources.[392] But economic control, standing alone, unaccompanied with additional forms of intimidation and threats to inflict physical harm in the future, will be deemed insufficient to meet the "substantial cumulative psychological abuse" element.

Yet, the proposed survival homicide offense explicitly recognizes that substantial cumulative non-physical domestic abuse may also lead to survival homicide when it includes various forms of intimidation. When domestic abusers engage in patterns of behaviors that continuously threaten survivors by placing them or their children in fear of physical harm at some unspecified time in the future, these may amount to "substantial cumulative psychological abuse" even when they are not accompanied by physical violence.[393] The proposed offense recognizes that abusers' engagement in patterns of intimidation and cumulative threats to survivors' lives may affect survivors in a way that is equally traumatic to physical and sexual abuse. Further, the "substantial abuse" element puts a premium on the cumulative effects of domestic abuse in a

390 *See* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1004–06 (1995).

391 STARK, *supra* note 85, at 249.

392 *Id.* at 271–73.

393 *Id.* at 249–55 (describing the various forms of intimidation, including explicit and implicit threats to inflict physical harm in the future).

way that both expands and contracts the scope of the statute. It recognizes the combined effects of physical, sexual, and psychological abuse without unduly emphasizing the first two. At the same time, to ensure that the offense is not over-inclusive, this element also limits the applicability of the statute by requiring a *repeated pattern* of behavior, which would exclude from its scope isolated, single incidents of abuse.

Next, the "significant contributing factor" element recognizes that the cumulative abuse that survivors endure is not separate from, but instead "inextricably interlinked" with, their criminal acts.[394] This does not mean, however, that a causal connection between the abuse and the lethal act is required. The offense's elements eliminate the causal nexus between the two, which is required by self-defense's elements, by replacing it with the "significant contributing factor," under which the abuse only needs to be a *significant contributing* factor, rather than a causal one, to the defendant's criminal behavior.[395]

It is important to clarify what the survival homicide offense does not require to ensure that its applicability is not unjustifiably limited. The "significant contributing factor" requirement acknowledges that the defendant's criminal act could be motivated by any number of factors and that mixed motives may suffice for applying the statute. This means that the defendant does not need to establish that the abuse they "suffered was the exclusive, or even the overriding factor" that motivated their criminal conduct.[396] Likewise, the "significant contributing factor" element recognizes that survivors may suffer abuse not only from the deceased but also from prior intimate partners, as well as other family members.[397] The term "significant contribution" is sufficiently broad to acknowledge the trauma endured by survivors from more than just one abuser, as long as it was largely the *deceased's abusive conduct* that significantly contributed to the homicide.

Further, prevalent patterns of domestic abuse typically include evidence of severe, multiple, variable, repetitive, and prolonged abuse.[398] But since the survival homicide offense departs from self-defense statutes, it does not require that a survivor be in the throes of an attack or that one be imminent. Instead, the survivor's conduct would be evaluated in light

394 *See generally* People v. Smith, 132 N.Y.S.3d 251, 258 (Cnty. Ct. 2020).

395 *Cf.* People v. D.M., 150 N.Y.S.3d 553, 558 (Sup. Ct. 2021) (clarifying that application of the DVSJA does not require a causal link between the abuse and the criminal act, but only that the abuse be a significant contributing factor to the defendant's criminal behavior).

396 *Smith*, 132 N.Y.S.3d at 257.

397 *See, e.g.*, People v. Addimando, 120 N.Y.S.3d 596, 603 (Cnty. Ct. 2020) (noting that the defendant's testimony revealed that she was subjected to "numerous instances of abuse by other individuals throughout her life"); *see also* GOODMARK, *supra* note 16, at 12–13 (noting the co-occurrence of multiple forms of abuse inflicted on criminalized survivors).

398 Linn v. State, 929 N.W.2d 717, 737–39 (Iowa 2019).

of the cumulative effect of the abuse.[399] "[R]elationship duration or battering frequency" are largely not considered "good yardsticks to determine whether" the abuse significantly contributed to the homicide.[400] Therefore, the "significant contributing factor" does not require that the abuse be long-lasting in terms of duration, as it is difficult to speculate based solely on the duration of the relationship what effect such abuse had on survivors.[401] Finally, the offense dispenses of a physical proximity requirement between the defendant and the abuser. It acknowledges that in circumstances where the parties have children together, repeated threats to physically harm survivors and their children may continue post-separation.[402]

3. Non-Carceral Penalty Presumption

One of the main goals of a designated statute for survival homicide is avoiding the unduly harsh sentences that accompany manslaughter convictions by imposing alternative types of punishment on defendants who are convicted of survival homicide. As previously discussed, courts and legislatures disagree about what type of sentence qualifies as "unduly harsh" for domestic abuse survivors convicted of any crimes.[403]

Non-carceral penalty is an integral component of the survival homicide offense as it is the only sentence that would not be unduly harsh for these traumatized defendants. Ample studies establish that the majority of incarcerated women are survivors of physical, sexual, and psychological abuse, which produce multiple forms of trauma, including,

399 *Cf. Smith*, 132 N.Y.S.3d at 257 (observing that application of the DVSJA does not require imminent threat).

400 *Linn*, 929 N.W.2d at 737. For example, in *People v. Brown*, 94 P.3d 574, 575 (Cal. 2004), a woman suffered only one incident of abuse.

401 *Linn*, 929 N.W.2d at 737.

402 *See, e.g.*, State v. Goff, No. 11CA20, 2013 WL 139545 (Ohio Ct. App. Jan. 7, 2013) (discussing the case of a defendant who was separated from her estranged husband, armed herself with a firearm, went to his house, and shot him in response to his repeated threats to kill her and their children).

403 *See supra* Section I.C.2. *Compare* People v. Rangel, 145 N.Y.S.3d 803 (App. Div. 2021), *leave to appeal denied*, 178 N.E.3d 448 (N.Y. 2021) (concluding that defendant's sentence of eight years imprisonment was not unduly harsh), *with* People v. Addimando, 152 N.Y.S.3d 33, 46 (App. Div. 2021) (concluding that an indeterminate term of imprisonment of nineteen years to life was unduly harsh, and on resentencing, sentencing the defendant to seven and a half years imprisonment), *and Smith*, 132 N.Y.S.3d at 260 (concluding that a sentence of twenty-five years to life imprisonment was unduly harsh, and on resentencing, sentencing the defendant to a determinate sentence of twelve years imprisonment together with a five-year period of post-release supervision); People v. D.M., 150 N.Y.S.3d 553, 562 (Sup. Ct. 2021) (concluding that a sentence of a fifteen-year prison term was too harsh and resentencing the defendant to five years of incarceration with four years of post-release supervision).

among other types, depression, anxiety, and post-traumatic stress disorder.[404] These studies further establish that incarceration in itself is a traumatizing experience, thus exacerbating survivors' already existing traumas.[405]

Criminal statutes should conform with these studies by implementing trauma-informed approaches.[406] Adopting trauma-informed approaches for survival homicide defendants means incorporating a statutory presumption in the designated survival homicide statute under which *any* term of imprisonment would be *presumed* "unduly harsh." This presumption of a non-carceral penalty aligns with the premises underlying the shared responsibility model for survival homicide, which recognizes states' partial responsibility for survivors' acts. A non-carceral punishment presumption is a necessary component of alternative sentencing schemes, which draw on the notion of alternatives to incarceration (ATIs) and are aimed at abolishing states' carceral practices that retraumatize already traumatized survivors.[407]

Embracing ATIs as the presumed punishment for survival homicide defendants is premised on the idea that the link between a homicide conviction and lengthy imprisonment is not an inevitable one.[408] One of the problems characterizing the existing criminal legal system is unnecessarily conflating incarceration with punishment.[409] This consolidation fails to recognize that criminalization of survival homicide and sentencing survivors implicate two separate questions, the first being whether domestic abuse survivors who killed abusers ought to be convicted of any crime, and if so, what should be the appropriate level of their criminal responsibility. An entirely separate question, however, concerns what sentence is appropriate once these survivors have already been convicted.

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404 *See* Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019).

405 *See* Belt, *supra* note 34, at 800–01.

406 For discussions of trauma-informed approaches to domestic violence, see BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA 23–24, 148–49, 192, 220 (2015).

407 *See generally* Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235 (2009). For a recent discussion of ATI, see Levin, *supra* note 252, at 1404–08. For an argument that ATIs could also be problematic, see Michal Buchhandler-Raphael, *Overmedicalization of Domestic Violence in the Noncarceral State*, 94 TEMP. L. REV. 589, 593–95 (2022).

408 *See* Diamantis, *supra* note 274, at 25–38 (observing that criminal "trial[s] [are] not just a prelude to punishment" as trials have unique independent values separate from the question of punishment).

409 *See* Ernest van den Haag, *Punishment: Desert and Crime Control*, 85 MICH. L. REV. 1250, 1253 (1987) (reviewing ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985)).

Existing sentencing schemes fail to clearly distinguish between punitive and carceral sanctions, and commentators mostly lump them together as "carceral and punitive responses."[410] Yet, as I have argued elsewhere, the law could and should separate punitive sanctions from carceral ones.[411] A meaningful path toward reversing the effects of mass incarceration consists of adopting policies that decouple criminalization decisions and their punitive implications from incarceration policies.[412] Society may reaffirm the message that survival homicide is a blameworthy act without imposing harsh terms of imprisonment. Domestic abuse survivors could be convicted of the crime of survival homicide yet still receive non-carceral penalties. ATIs accomplish criminal law's expressive message that taking lives absent a right to self-defense is wrong, while simultaneously acknowledging that the same societal message may effectively be conveyed without imprisonment.

Perspectives from international law buttress this position as the Nordic model of punishment offers insight on using community sanctions in lieu of imprisonment.[413] Under this model, community sanctions consist largely of five types of ATIs: conditional or suspended sentence, probation or supervision, community service, treatment orders, and electronic monitoring.[414]

American courts and legislatures are gradually beginning to recognize that ATIs might be more appropriate for survival homicide defendants. Take, for example, the New York court decision in *People v. D.M.* concerning resentencing an abuse survivor who was originally sentenced to fifteen years of imprisonment for manslaughter.[415] The court found that the original sentence was "unduly harsh."[416] Applying the DVSJA, it held that a period of post-release supervision was appropriate and necessary for the defendant's successful re-entry into society.[417] This decision takes an innovative approach to sentencing, which de-emphasizes carceral responses and prioritizes rehabilitation. It recognizes

410 *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 579 (2022) ("Abolitionist organizers working to reimagine a society that does not rely on carceral and punitive responses to interpersonal harms are also working to end reliance on police and forms of policing.").

411 *See* Buchhandler-Raphael, *supra* note 386, at 482–85.

412 *See* Diamantis, *supra* note 274, at 36 (observing that theories of punishment that focus on reconstruction overemphasize punishment and overlook the essential role of criminal trial itself).

413 *See generally* Tapio Lappi-Seppälä, *Community Sanctions as Substitutes to Imprisonment in the Nordic Countries*, 82 LAW & CONTEMP. PROBS. 17 (2019).

414 *Id.* at 19–20. For a critique of electronic monitoring, see Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022).

415 *See generally* People v. D.M., 150 N.Y.S.3d 553 (Sup. Ct. 2021).

416 *Id.* at 559.

417 *Id.* at 561.

the court's duty to "take a more compassionate, problem-solving approach rather than one driven by retribution, and highlights the goals of rehabilitation and 'successful and productive reentry and reintegration into society.'"[418] It further clarifies that "[t]he goals of public safety, deterrence and rehabilitation are not achieved by a lengthy sentence of incarceration for an individual whose criminal conduct was borne out of trauma from severe domestic violence."[419] For survivors who continue to suffer the traumatic effects of the abuse, it continues, since even supervised release could be perceived as mimicking incarceration.[420]

4. Excluding Collateral Consequences

For many domestic abuse survivors, the collateral consequences that routinely attach to felony criminal convictions could be even more devastating than conviction itself. Even if survivors are not convicted of murder but of manslaughter instead, such convictions pose serious obstacles for reentry upon release.[421] Sentencing mitigation statutes, such as New York's DVSJA, do not resolve these hurdles because a host of collateral consequences, including deportation, flow from manslaughter convictions.[422]

To begin with, immigration laws provide an extensive list of deportable offenses which allow removing noncitizens from the United States upon conviction.[423] Deportable offenses include, among others, any conviction of aggravated felony, as well as conviction of crimes of moral turpitude, defined as conviction of any crime for which a sentence of one year or longer may be imposed.[424] The Minnesota Supreme Court's

418 *Id.* at 559 (quoting N.Y. PENAL LAW § 1.05(6) (McKinney 2023)).

419 *Id.* (citation omitted).

420 *Id.* at 561.

421 *See supra* Section I.B.

422 *See* Sara Herschander, *This Law Is Supposed to Reunite Imprisoned Survivors with Their Families. Did It Lead to One Woman's Deportation?*, DOCUMENTED (Apr. 18, 2022), https://documentedny.com/2022/04/18/this-law-is-supposed-to-reunite-imprisoned-survivors-with-their-families-did-it-lead-to-one-womans-deportation [https://perma.cc/6Z9H-JMDH].

423 *See* 8 U.S.C. § 1227(a)(2).

424 *See id.* § 1227(a)(2)(A)(i), (iii) ("Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable. . . . [Also,] [a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."). The United States Supreme Court recognized in its decision in *Padilla v. Kentucky* that for many noncitizens, deportation becomes "nearly an automatic result" of a conviction. Padilla v. Kentucky, 559 U.S. 356, 366 (2010). Justice Stevens's majority opinion found that "[d]eportation as a

decision in *Shefa v. Ellison* discussed earlier poignantly illustrates the ways in which collateral consequences that accompany manslaughter convictions result in uniquely dangerous implications for survival homicide defendants.[425]

The collateral consequences of punishment, however, include not only the risk of deportation but also other wide-ranging consequences applicable to all survival homicide defendants, not just noncitizens. These include, among others, "temporary or permanent ineligibility for public benefits, public or government-assisted housing, [as well as for] federal student aid[,] various employment-related restrictions[, and] . . . civic disqualifications such as felon disenfranchisement and ineligibility for jury service."[426]

The problem of collateral consequences that stem from a homicide conviction cannot simply be resolved by adopting an explicit provision in the survival homicide statute, which provides that conviction of this offense will not trigger any collateral consequences because of the Constitution's Supremacy Clause.[427] Amending state laws to exclude the application of any federal collateral consequences will result in preemption.[428] For that reason, adopting a survival homicide offense is insufficient, standing alone, for ensuring equitable treatment for survival homicide defendants.

Yet, two alternative legislative solutions could be adopted to avoid the collateral consequences that directly flow from felony convictions. First, automatic expungement of survival homicide convictions would effectively resolve this problem.[429] Acknowledging the far-reaching implications of a host of collateral consequences for previously convicted people, many states in recent years have amended their laws to include

consequence of a criminal conviction . . . [carries a] close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." *Id.*

425 *See supra* notes 109–25 and accompanying text. *See generally* Shefa v. Ellison, 968 N.W.2d 818 (Minn. 2022).

426 *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635–36 (2006) (footnotes omitted).

427 *See generally* U.S. CONST. art. VI, cl. 2 (providing that the Constitution, federal laws, and treaties enacted pursuant to it "shall be the supreme Law of the Land").

428 *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234–35 (2000) (discussing the ways in which state law is preempted under the Constitution).

429 *See* Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for A Clean Slate*, 52 ARIZ. ST. L.J. 1059, 1065–67 (2020) (observing that "[t]he latest wave of expungement legislation, referred to by the label 'Clean Slate,' makes expungement automatic in some cases," but that expungement laws vary by state and have strict eligibility requirements, like applicability only after waiting periods, and the exclusion of violent crimes).

expungement provisions.[430] Expungement is an umbrella term that is used to refer to various measures that allow for record clearing, sealing, or setting aside criminal convictions so the collateral consequences of a conviction would not apply.[431]

Given the far-reaching implications that collateral consequences carry for convicted survivors, adopting a designated survival homicide offense ought to be supplemented with specific language that authorizes the expungement of a survival homicide defendant's criminal record. Such expungement is necessary for ensuring that the conviction of a survival homicide offense will not trigger any of the collateral consequences that normally attach to felony convictions.

Second, the survival homicide offense could incorporate the notion of clemency to avoid the inevitable collateral consequences stemming from a homicide conviction. States' clemency power embodies "amnesty, pardon, commutation, and reprieve."[432] A few states have already adopted statutory provisions that are specifically targeted toward abuse survivors.[433] Survival homicide statutes could include an additional provision that *requires* state governors to grant automatic pardons or commutations to those convicted of survival homicide.[434] Without these additional measures, the legislative intent underlying the designated offense will be eviscerated because the applicability of collateral consequences circumvents its goal.

430 *See* Margaret Colgate Love, *Forgiving, Forgetting, and Forgoing: Legislative Experiments in Restoring Rights and Status*, 30 FED. SENT'G REP. 231, 234 (2018); Margaret Colgate Love, *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION RTS. PROJECT (Oct. 2021), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside [https://perma.cc/KD23-XM8D]; GOODMARK, *supra* note 16, at 192.

431 *See* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 524 & n.19 (2020) (discussing reforms in state laws that authorize for expungement and sealing of criminal convictions, including of some felony convictions, which result in convicted felons clearing their criminal records and avoiding any collateral consequences).

432 For a discussion of clemency for abused survivors who killed abusive family members, see Carol Jacobsen, Kammy Mizga & Lynn D'Orio, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN'S L.J. 31, 53 (2007).

433 GOODMARK, *supra* note 16, at 162.

434 For a proposal to commute sentences for battered women who killed abusive intimate partners, which was suggested by Professor Krause as early as 1994, see generally Krause, *supra* note 324, at 749–54 (discussing the clemency power and its application to survival homicide). For a recent discussion of the role of clemency for criminalized survivors, see GOODMARK, *supra* note 16, at 157–65. For the proposition that "[c]lemency can alleviate the collateral consequences of conviction," see *id.* at 161, 192. For the problems that flow from the discretionary nature of clemency, see *id.* at 162–163, 192. To overcome the discretionary nature of clemency, statutes should require, not merely allow, governors to grant clemency to people convicted of survival homicide.

E. *Responses to Critiques*

Proposing that state legislatures craft a new offense to prosecute survival homicide cases will likely face staunch pushback. Opponents will raise a host of objections from multiple directions. I have already addressed earlier one line of critique concerning exceptionalism for domestic abuse survivors as opposed to other victims of non-domestic abuse.[435] Below, I address additional arguments that criticize my choice to focus solely on survivors who killed abusive family members and exclude domestic abuse survivors who committed other crimes beyond intentional killing.

1. Underinclusiveness

Critics who agree that exceptionalism for domestic abuse survivors is justified will likely argue that the survival homicide statute is underinclusive and reject the idea of carving out a criminal statute applicable only to survivors who killed abusive family members. To them, such a statute is unwarranted because it undermines domestic abuse advocates' broader abolitionist agenda that rejects altogether the criminalization of all domestic abuse survivors who become involved with the criminal legal system after committing a host of crimes, often at the direction of abusive family members.[436] These include felony murders that result in killing third parties, as well as committing other crimes beyond homicide, such as drug crimes and crimes against property.[437] Narrowly focusing on survivors who kill domestic abusers arguably detracts from efforts to provide a more equitable treatment to all domestic abuse survivors by decriminalizing additional acts they committed as a result of the abuse, including crimes against third parties.

While I am cognizant of this concern, strong arguments support carving out a separate statute for survival homicide. I have already addressed some of these arguments, including political feasibility, while

435 *See supra* Section III.A.

436 For a full-fledged abolitionist agenda of all abuse survivors, see GOODMARK, *supra* note 16, at 186–95. For arguments that reform measures are inadequate in solving the problems of criminalized survivors, see *id.* at 178–84, and SURVIVED & PUNISHED N.Y., *supra* note 15, at 12–16 ("The DVSJA legitimizes the carceral system we're trying to dismantle, and in some instances may expand it.").

437 *See, e.g.*, People v. D.L., 147 N.Y.S.3d 335, 336 (Cnty. Ct. 2021) (discussing that the defendant, who was sexually abused by his uncle, pled guilty to burglary); People v. D.M., 150 N.Y.S.3d 553, 555 (Sup. Ct. 2021) (discussing how the defendant and another co-defendant were convicted of manslaughter after kidnapping and killing a third party).

discussing whether domestic abuse exceptionalism was justified.[438] Here, I add additional arguments to explain my choice to focus solely on domestic abuse survivors who intentionally killed abusive family members.

First, the distinct problem of survival homicide currently presents a more urgent need for legislative reform. That is because, in many jurisdictions, murder convictions result in mandatory minimum sentences, meaning that sentencing judges' discretion to treat defendants more leniently is statutorily constrained.[439] By contrast, conviction of other crimes provides sentencing judges with more discretion to tailor defendants' sentences to the specific circumstances underlying their offense, including prior domestic abuse.

Second, political feasibility concerns once again support carving out a specialized statute specifically targeting the distinct circumstances where domestic abuse survivors kill abusive family members. Some commentators support fully abolitionist approaches to the broader problem of domestic abuse survivors who become involved in the criminal legal system in multiple ways.[440] Yet, a thoroughly abolitionist response to all crimes committed by domestic abuse survivors is not a feasible legislative action these days. Specifically targeting survival homicide as a problem that warrants legislative reform is a preferable strategy because legislatures are unlikely to adopt a wholesale decriminalization or decarceration for all crimes that survivors of any past abuse commit, including against third parties. It is far more likely that legislatures will be responsive to amending just a narrow category of homicide statutes.

Furthermore, incremental, piecemeal legislation often proves a prudent and realistic policy choice. As Professor Tribe has explained: "underinclusive" or "piecemeal legislation is a pragmatic means of effecting needed reforms, where a demand for completeness may lead to total paralysis."[441] Courts further note that legislatures have wide discretion in attacking social ills, and a state may "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses," and also that "[f]ailure to address a certain problem in an otherwise comprehensive legislative scheme is not fatal to the legislative plan."[442]

438 *See supra* Section III.A.

439 *See* Caroline Forell, *Domestic Homicides: The Continuing Search for Justice*, 25 AM. U. J. GENDER SOC. POL'Y & L. 1, 5–7 (2017).

440 *See* GOODMARK, *supra* note 16, at 186–95.

441 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 997 (1978).

442 Hardison v. State, 507 P.3d 36, 45 (Wyo. 2022) (quoting Hughes v. Superior Court, 339 U.S. 460, 468 (1950)).

Additionally, implementing a fully abolitionist approach in practice means prosecutorial immunity, namely, that prosecutors would avoid altogether bringing any criminal charges whenever evidence in the police file suggests a history of abuse. This approach is especially problematic given the fierce criticism mounted against expansive self-defense laws that embrace immunity from investigation and prosecution, such as "stand your ground" provisions, which provide defendants immunity from prosecution and dismissal of all charges.[443] Initial dismissal of all charges against domestic abuse survivors charged with any crimes essentially mimics this troublesome framework and perpetuates its disconcerting implications. Consistency dictates that denouncing laws that provide immunity from prosecution to men claiming self-defense in male-on-male confrontational encounters should, by the same token, reject outright dismissal of any homicide charges against domestic abuse survivors.

Finally, the proposal that legislatures pass survival homicide laws is sympathetic to other legislative reforms that would mitigate survivors' criminal responsibility in additional contexts where past abuse and trauma's effects create criminogenic influence that contributes to criminality.[444] The proposed piecemeal approach to reforming the legal treatment of abuse survivors opts for taking incremental legislative amendments that may open the door for gradually adopting additional statutory revisions to address other circumstances where abuse survivors turn into criminal defendants.[445] Carving out a separate offense for survival homicide is merely a first step toward broader reforms, although further discussing the scope and limits of such additional reforms exceeds the scope of this Article.

2. Overinclusiveness

Other critics will likely reject a survival homicide offense on overinclusiveness grounds. Some might argue that the offense's elements are vague and overbroad, thus failing to differentiate between cases where domestic abuse significantly contributed to the killing and those where defendants killed family members for reasons unrelated to abuse such as pecuniary gain. Concededly, the terms "substantial cumulative abuse" and "significant contributing factor" are somewhat ambiguous because the many forms of domestic abuse do not easily lend themselves to more

443 *See* Franks, *supra* note 175, at 1107.

444 *See* GOODMARK, *supra* note 16, at 13–17 (addressing the broader phenomenon of abuse survivors who commit a host of other crimes as a result of the abuse).

445 *See* Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1521–22 (2017).

precise statutory definitions. But such ambiguity is an inevitable feature of many other statutory terms.[446] Courts routinely engage in statutory interpretation of equally ambiguous language, and have upheld their constitutionality against vagueness challenges.[447] Similar to other statutory interpretation tasks, courts could construe the offense's terms in light of the legislature's intent and prior judicial interpretations in domestic abuse cases, which have considered the relationship between defendants' enduring a pattern of serious cumulative abuse and their crimes.[448]

3. Offense or Defense?

Additional criticism will likely suggest that mitigating survivors' criminal responsibility should draw on expanding the scope of existing defensive claims rather than adding yet another offense to the books. Designating a separate offense for survival homicide might also be perceived as redundant, given the availability of partial defenses that already mitigate the level of survivors' criminal responsibility when their acts are not fully justified on self-defense grounds.[449]

Yet, as previously noted, the main drawback with partial excuses like imperfect self-defense is that their application results in manslaughter convictions, which are accompanied by unduly harsh sentences, even if less draconian than life sentences.[450] Partially excusing survivors thus leaves intact their inequitable legal treatment. The specialized offense offers a superior framework to merely expanding the scope of existing defenses because it not only mitigates survivors' criminal responsibility below the manslaughter level, but also includes a presumption of non-carceral penalty as well as excluding any collateral consequences upon conviction.

Likewise, the main goal of conceptualizing a mitigated criminal responsibility model for domestic abuse survivors within an offense

446 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335 (2023) (criminally prohibiting violation of privacy and the distribution of nonconsensual, private sexually explicit images); OR. REV. STAT. § 163.472 (2022) (same); VT. STAT. ANN. tit. 13, § 2606 (2022) (same).

447 *See, e.g.*, *In re* Banks, 244 S.E.2d 386, 389 (N.C. 1978).

448 *See, e.g.*, Linn v. State, 929 N.W.2d 717 (Iowa 2019).

449 *See* 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, 69–70 (2006) (positing that imperfect self-defense claims already address circumstances where reducing murder charges to manslaughter charges might be warranted); Ramsey, *supra* note 168, at 41–42 (recommending changes to partial defenses to murder, which are inspired by reforms in three Australian jurisdictions that expand imperfect self-defense as partial defense).

450 *See supra* Section I.B.

rather than a defense framework is to craft a lower baseline offense for prosecuting survival homicide. The proposal aims to prevent prosecutors from bringing murder charges as a baseline offense against survival homicide defendants and leaving the question of mitigated criminal responsibility to establishing defensive claims. By contrast, the survival homicide statute would require prosecutors to initially prosecute survivors under the lower-graded baseline offense.

Relatedly, this position also responds to another potential concern that the proposed offense might harm rather than benefit domestic abuse survivors who would be deprived of the opportunity to be fully acquitted of any crime on self-defense grounds.[451] Yet, nothing in the proposed model suggests this is a viable concern because the designated offense will supplement rather than subtract from survivors' potential claims. Its goal is to mitigate the criminal responsibility of defendants whose only other viable recourse would have been partial mitigation rather than complete acquittal. Defendants will remain free to try to prove a right to self-defense and complete acquittal of all crimes.

CONCLUSION

"I had to leave him or kill him, and I wasn't ready to kill him."[452]
—Dollree Mapp, a survivor of both police and domestic abuse

Every student of Criminal Procedure is familiar with *Mapp v. Ohio*, the landmark Supreme Court decision which applied the exclusionary rule to the states.[453] In 1957, Ms. Dollree Mapp, an African American woman in her thirties, stood up against police abuse of power and refused to let police officers into her house to conduct a warrantless search. Far less known, however, is Mapp's personal background story and the additional abuse she endured by her husband—she was previously married to Jimmy Bivins, a renowned boxer at the time, who she had accused of beating her and eventually divorced.[454] Years later, she said that she had chosen to leave her abusive husband because if she had not

451 *See supra* Introduction.

452 Ken Armstrong, *Dollree Mapp, 1923–2014: "The Rosa Parks of the Fourth Amendment,"* MARSHALL PROJECT (Dec. 8, 2014, 3:55 PM), https://www.themarshallproject.org/2014/12/08/dollree-mapp-1923-2014-the-rosa-parks-of-the-fourth-amendment [https://perma.cc/DMJ4-U7FY].

453 *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).

454 Matt Schudel, *Dollree Mapp, Figure in Landmark Supreme Court Decision in 1961, Dies at 91*, WASH. POST (Dec. 13, 2014), https://www.washingtonpost.com/national/dollree-mapp-figure-in-landmark-supreme-court-decision-in-1961-dies-at-91/2014/12/13/e5dec098-82f6-11e4-81fd-8c4814dfa9d7_story.html [https://perma.cc/PVS5-4ZC8].

done so, she would have resorted to killing him.[455] Mapp was a bold, strong-willed survivor, who actively resisted both police abuse and domestic abuse. Her story further illustrates that different survivors have distinct reactions to abuse; some are passive and submissive, others fight back with violent acts of their own, and still others are able to leave abusive relationships. While sixty-five years have passed since Mapp's case, domestic abuse survivors today, and particularly those who fight back in response to their victimization, continue to face legal obstacles when they push back and actively fight back against the abuse.

Survival homicide is far from being a new phenomenon, and voluminous literature has been devoted to proposing potential solutions to this problem.[456] Yet, despite four decades of vigorous efforts by domestic abuse advocates and scholars to reform the criminal legal system's treatment of abuse survivors, the problem is anything but moot. In fact, the more things change, the more they stay the same. Reform efforts have taken hold in many areas of criminal law and enforcement, but they have stopped short of amending homicide offenses, including among others, recognizing the need for a specialized offense to prosecute survival homicide.

This Article has sought to enlist state legislatures in promoting social reform regarding domestic abuse survivors. Reforming the legal treatment of survival homicide requires making public policy choices, which balance competing public policy interests, a role that is naturally within the province of legislatures. Legislatures have the authority to pass laws that meet pressing social problems, and routinely wade into difficult and polarizing social issues, including among others criminal justice reforms.[457] Advocacy and public interest groups seeking reform in the treatment of abuse survivors need to seize the current political moment where there is increasing support for reforming the criminal legal system to effectively engage state legislatures in crafting legislative reforms.[458] Legislatures are superior to the judiciary in the making of public policy and have the exclusive authority to do so.[459] They are better suited to consider the extensive social science research that is pertinent to understanding the broad public policy issues surrounding domestic

455 *Id.* (referencing Mapp's interview with Carolyn N. Long, author of Mapp v. Ohio*: Guarding Against Unreasonable Searches and Seizures*).

456 See *supra* note 49 for representative scholarly works on the topic.

457 *See* Jamie R. Abrams, *Experiential Learning and Assessment in the Era of Donald Trump*, 55 DUQ. L. REV. 75, 77–78 (2017).

458 *See* John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249 (2016).

459 *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 874 (1987) ("Much of public law is premised on the assumption of legislative competence to resolve social conflict.").

abuse that arise in judicial proceedings, yet the judiciary is unable to fully address.[460]

Capitalizing on advocates' and commentators' broad agreement that a host of inequities result in unfair treatment of criminal defendants, this Article has called for reconceptualizing survival homicide as a separate crime that carries non-carceral penalties and does not trigger any collateral consequences upon conviction. In proposing a conceptual shift from existing sentencing mitigation frameworks to a mitigated responsibility model, I hope to ignite debates over additional legislative amendments. Such broader reforms would revise overly harsh criminal prohibitions by recognizing that some offenders' culpability is lower and therefore the law should correspond by mitigating their criminal responsibility.

As this Article concedes, there are additional categories of abused victims who have become involved in the criminal legal system as offenders beyond the context of domestic abuse.[461] While commentators have long proposed to craft an excusatory framework to mitigate the criminal responsibility of abused defendants, to date this idea has failed to take hold, as neither state legislatures nor courts seriously considered it.[462] But embracing a mitigated responsibility model for domestic abuse survivors would open the door toward additional statutory reforms as the time is ripe for considering more merciful treatment of criminal defendants.

To date, the vast majority of proposals to reform the overly harsh criminal legal system focus on police reforms as well as reforming prosecutorial practices and policies.[463] But a thorough commitment to reforming the flawed criminal legal system requires overhauling not only criminal enforcement policies and practices but also extensive revisions in the definition of substantive criminal offenses. Of course, this move requires state legislatures' appetite for reforms that are aimed toward more lenient treatment of offenders, which arguably is currently not politically feasible, as legislatures typically adhere to the public's punitive demands for being "tough on crime." Yet, political feasibility might evolve pursuant to political pressures from constituents who have

460 Dahlin v. Kroening, 796 N.W.2d 503, 508 (Minn. 2011); Caviglia v. Royal Tours of Am., 842 A.2d 125 (N.J. 2004).

461 *See supra* Section III.A.

462 Luna, *supra* note 233, at 24. *See generally* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1, 7 (1998) (observing that testimony regarding urban survival syndrome is not medically recognized, and has been mocked and ridiculed as grounded in "junk science").

463 *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

suffered severe harm by the criminal legal system. Shifting societal perceptions about the desirability of a more merciful legal treatment of domestic abuse survivors would ultimately result in legislatures adhering to demands for leniency for various types of abuse survivors-turned-criminal defendants. Survival homicide is merely the beginning, not the end of such reform.

APPENDIX: A MODEL SURVIVAL HOMICIDE STATUTE

The following chapter will be incorporated into states' homicide statutes and will follow the definitions of the various degrees of homicide.

Homicide Defined. Homicide means conduct which causes the death of a person under circumstances constituting murder, manslaughter, survival homicide, or criminally negligent homicide.

Amending Murder Provisions. A person is guilty of murder when they intentionally cause the death of another human being, *unless that person has been subjected to a substantial pattern of domestic abuse by the deceased, and this domestic abuse significantly contributed to the commission of the homicide.*

General Rule. The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise.

Definitions. The following definitions apply in this section:

"Family or household members" includes spouses, former spouses, intimate partners, former intimate partners, parents, children, stepchildren, and other persons related by blood or by present or prior marriage; persons who share or formerly shared a common dwelling; persons who have or allegedly have a child in common; persons who share or allegedly share a blood relationship through a child; persons who have or have had a dating, sexual, or engagement relationship; persons with disabilities and their personal assistants; and caregivers.

"Domestic abuse" includes a repeated pattern of physical violence, sexual violence, substantial psychological abuse, or their combination, committed by the deceased against the defendant and/or their children. For purposes of the survival homicide offense, substantial psychological abuse consists of a course of conduct that continuously intimidates and threatens the defendant by placing them in fear of future bodily injury.

Survival Homicide. A person is guilty of survival homicide when they intentionally caused the death of another human being in circumstances that do not constitute murder. These circumstances consist of intentionally causing the death of an intimate partner or family or household member where the deceased has subjected the actor (or

their children) to substantial domestic abuse, and this domestic abuse significantly contributed to the commission of the homicide.

Relevant Factors for the Significant Contribution Finding:

In determining whether the abuse significantly contributed to the homicide, the court may take into account the following factors, as well as any additional factors it deems relevant:

a) The deceased's ownership of a firearm.
b) The deceased's alcohol and substance abuse.
c) The deceased's history of mental illnesses.
d) The actor's economic dependency on the deceased.
e) The actor's employment status, income level, and available housing.
f) The actor's cultural norms and underlying social background.
g) Any documentation of the actor's prior abuse by the deceased, former intimate partner, or family members, including physical, sexual, and psychological abuse.
h) The presence of children in the house and whether the deceased made any threats against them.

When making a finding that the domestic abuse significantly contributed to the homicide, the court will engage in a totality of circumstances inquiry. None of the abovementioned factors is dispositive for making such determination.

Presumption of Non-Carceral Penalty. It shall be presumed that a term of imprisonment for conviction of survival homicide is unduly harsh. The presumption may be rebutted if the government establishes by clear and convincing evidence that a non-carceral sentence is inappropriate due to the defendant's dangerousness. The penalty pursuant to a survival homicide conviction will include alternatives to incarceration, including suspended sentences and community supervision.

Expungement of Records to Exclude Collateral Consequences. Records of criminal conviction of survival homicide will be automatically expunged, and no collateral consequences will stem from this conviction.

Alternatively:

Governors' Grant of Clemency. Upon conviction of a defendant with the offense of survival homicide, governors will grant the defendant clemency.