ABUSE VICTIMS WHO KILL AND THE NEW REHABILITATION MODEL

Sara Weskalnies[*]

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INTRODUCTION

In the early hours of the morning on July 28, 2016, in Warren, Ohio, Jonathan Meadows slept on his couch as his fourteen-year-old daughter, Bresha Meadows, hovered over him—with his .45 caliber handgun in her hands.[1] Pulling the trigger, Bresha fired a single bullet to his head.[2] But the murder of her father was not a random act of violence.[3] For years, the Meadows household had been a dangerous place for Bresha's mother and her three children.[4] Brandi

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* J.D. 2018, Michigan State University College of Law; B.S. 2014, Towson University.

1. *See* John Caniglia, *Bresha Meadows Case: The Fight to Keep a Young Girl from Prison in Dad's Death*, CLEVELAND.COM (Aug. 14, 2016), http://www.cleveland.com/metro/index.ssf/2016/08/bresha_meadows_case_the_fight_to_keep.html [https://perma.cc/7Y3R-6J7J].

2. *See* Tobias Salinger, *Ohio Girl Killed Father to Protect Family from Abuse, Mother Says*, N.Y. DAILY NEWS (Aug. 5, 2015), http://www.nydailynews.com/news/crime/ohio-girl-killed-father-protect-family-abuse-mother-article-1.2740064 [https://perma.cc/Z9R7-UEJ8].

3. *See id.*

4. *See* John Caniglia, *Bresha Meadows Case: Cleveland Detective Feared Helping Would Have 'Dug Sister's Grave'*, CLEVELAND.COM, (Aug. 13, 2016),

Meadows, mother of Bresha Meadows, lived in fear of her husband as he had repeatedly beat, kicked, and punched her in front of their children.[5] Martina Latessa, Brandi's sister, described Jonathan Meadows as an overprotective and jealous man who threatened that if Brandi ever left him, he would kill her and their three children.[6] Although it is reported Jonathan Meadows often threatened and ridiculed his children, no evidence exists that the children had suffered any physical abuse by hand of their father.[7]

Prosecutors deliberated whether to try Bresha as an adult on an aggravated murder charge—leaving her staring down the possibility of a life sentence at the age of fourteen,[8] but ultimately chose to resolve the matter in juvenile court.[9] The decision to keep Bresha's case in juvenile court reflects both the media's and her family's opinion that Bresha Meadows is not a cold-blooded killer.[10] Brandi Meadows referred to her daughter as "her hero" and stated Bresha

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http://www.cleveland.com/metro/index.ssf/2016/08/bresha_meadows_case_clevelan d_detective.html [https://perma.cc/QM3U-6EKM]. Brandi's sister, Latessa, works for the Cleveland police's domestic violence unit. *Id.* She has not spoken with her sister in over five years because Jonathan kept them isolated and Brandi was too afraid to contact anyone "for fear Jonathan Meadows would find out." *Id.*

5. *See id.* ("Any mistake or problem would, at the least, bring a form of mental, physical, or emotional abuse."); *see also* Victoria Law, *What Bresha Meadows, Arrested for Shooting Her Father After Reported Abuse, Faces Next*, REWIRE (Aug. 25, 2016), https://rewire.news/article/2016/08/25/bresha-meadows-arrested-shooting-father-reported-abuse-faces-next/ [https://perma.cc/D7BZ-XUYK].

6. *See* Caniglia*, supra* note 4. Brandi told officers that her husband was "capable of extreme violence" and sought to receive a civil protective order. *Id.* However, Jonathan Meadows forced her to drop it, and she agreed, fearing retaliation. *Id.* Jonathan was also very suspicious of Brandi being unfaithful and made sure he controlled her. *Id.*

7. *See* Law, *supra* note 5. Latessa stated that Jonathan did not hit his children, but "they were belittled, ridiculed, and controlled." *Id.*

8. *See* Caniglia, *supra* note 1. Prosecutors are basing their decision to try Bresha in adult court based on how effectively they believe the juvenile system will rehabilitate her back into society. *Id.*

9. *See* Goldie Taylor, *Bresha Meadows Isn't a Murderer. She's a Hero.*, DAILY BEAST (Dec. 3, 2016), http://www.thedailybeast.com/articles/2016/12/03/bresha-meadows-isn-t-a-murderer-she-s-a-hero.html [https://perma.cc/3RM4-AMZC].

10. *See* Peggy Gallek, *14-Year-Old Accused of Killing Father, Family Says Girl Is 'Hero Who Saved Them All'*, FOX 8 CLEVELAND (Aug. 4, 2016), http://fox8.com/2016/08/04/14-year-old-accused-of-killing-father-family-says-girl-is-hero-who-saved-them-all/ [https://perma.cc/4EJB-4SHL]. About 24,000 people have signed a petition to have Bresha released. *See* Taylor, *supra* note 9. Many are finding her arrest a gross injustice. *See id.*

saved the family by doing what she never could—end the abuse.[11] Bresha's attorney further commented this may have been "the only opportunity she had to defend her family and her mother."[12] Bresha witnessed her mother physically beaten every day, and "it reached a point where [her actions were] self-defense and defense of others."[13] Although Bresha will be tried in juvenile court, this victory is not the end of her battle to justify shooting her father in his sleep.[14]

Unfortunately, Bresha Meadows' situation is not unique as there are abuse victims that experience similar realms of terror every day; in fact, an average of twenty people are abused by an intimate partner or family member every minute.[15] Often when the abuse ultimately ends at the hands of the victim, the state pursues criminal charges against the victim acting in self-defense.[16] Although Bresha's situation suggests a more difficult circumstance of defending another, the criminal justice system has consistently failed other victims of direct abuse, as courts have refused or limited evidence of their abuse at trial,[17] and even with legislative amendments to self-defense law, presenting a self-defense claim cannot guarantee an acquittal.[18]

Failures in conviction methods and sentencing procedures result in long-term incarceration that only perpetuates the adversity of those ultimately acting to protect themselves.[19] On average,

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11. *See* Gallek, *supra* note 10.

12. *See* Salinger, *supra* note 2.

13. *See id.*

14. *See* Taylor, *supra* note 9.

15. *See Domestic Violence National Statistics*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, https://www.speakcdn.com/assets/2497/domestic_violence.pdf [https://perma.cc/CQ7N-TWLL] (last visited May 7, 2018).

16. *See* Ashley Brosius, *An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense*, 100 IOWA L. REV. 775, 775-79 (2015). Brosius's comment describes a similar situation, in which a woman kills her husband in a nonconfrontational setting after years of violent abuse. *Id.* at 777. The jury convicted the woman of second-degree murder for failing to present a perfect self-defense claim that demonstrated that the woman was placed in a situation of imminent harm to justify the killing of her abuser. *Id.* at 778-79.

17. *See, e.g.*, Wallace-Bey v. State, 172 A.3d 1006, 1041 (Md. Ct. Spec. App. 2017) (finding that the court erred by limiting certain evidence of past abuse).

18. *See* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 157, 161-62 (2004).

19. *See* Elizabeth L. Turk, *Abuses and Syndromes: Excuses or Justifications?*, 18 WHITTIER L. REV. 901, 901-92 (1997); *see also* Brian J. Ostrom et al., *Assessing Consistency and Fairness in Sentencing: A Comparative Study in*

women who kill their abusive partners receive a fifteen-year sentence.[20] Often women resort to this "last-gasp" effort because they neither have the financial means to leave nor do they have a beneficial relationship with the police that would encourage them to seek help.[21] According to a California statistic, 93% of women who committed homicide had been abused by the victim and 67% of women committed the homicide in self-defense.[22] Although the state has a legitimate interest in incarcerating those who kill, it is critical that courts strike a balance between the interests of the state and the interests of suffering abuse victims.[23]

To remedy these inadequacies, the criminal justice system should reform how it approaches the prosecution and sentencing of victims who kill their abusers.[24] A better and likely more successful approach would be to reform sentencing guidelines to strongly incorporate rehabilitative practices in lieu of strict incarceration to combat inadequate conviction methods and overcome the influence of the more dominant sentencing theories.[25] As scientific developments have emerged over the past several decades, rehabilitation has reformed into a new model influenced by scientific research data from various disciplines such as neuroscience, pharmaceuticals, and behavioral science.[26] These advances in medicine, neuroscience, pharmacology, and behavioral therapies provide the new rehabilitation model with effective tools to treat

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Three States, NAT'L CTR. FOR ST. CTS. 1 (2006) [hereinafter *Comparative Study*], http://www.vcsc.virginia.gov/PEWExecutiveSummaryv10.pdf [https://perma.cc/JZF7-5JU5].

20. *See Mich. Women's Justice & Clemency Project, Clemency for Battered Women in Michigan: A Manual for Attorneys*, LAW STUDENTS & SOC. WORKERS 1 (2008) [hereinafter *Clemency Project*], http://umich.edu/~clemency/clemency_mnl/ch1.html [https://perma.cc/N95A-P6DC] (stating that women who kill their intimate partners receive an average sentence of fifteen years); *see also* Susan C. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U. L. REV. 141, 169 (1992) ("In parricide cases, while sentences range from no punishment at all to life in prison, the average sentence is approximately fifteen to twenty years imprisonment."); Rebecca McCray, *When Battered Women Are Punished with Prison*, TAKEPART (Sept. 24, 2015), http://www.takepart.com/article/2015/09/24/battered-women-prison [https://perma.cc/4A36-UWJG].

21. *See* McCray, *supra* note 20.

22. *See The Sin by Silence Bills*, AB 593 (2012), http://legislation.sinbysilence.com/about-ab-593 [https://perma.cc/K7SZ-HZPB].

23. *See infra* Part III.

24. *See infra* Part III.

25. *See infra* Part III.

26. *See infra* Subsection II.B.1.a.

offending abuse victims and restore them to a more stable state of being.[27] This new model not only brings the necessary help to abuse victims, but also encourages judges to abandon past sentencing guidelines that primarily focus on retributivist efforts and instead consider the individual offender.[28] With the new rehabilitation model at the judiciary's disposal, incarceration becomes not only inappropriate, but cruel.[29]

Part I of this Note discusses the current problems abuse victims who kill their abusers face within the legal system and explains the inadequacies of the trial system, as it often fails to protect abuse victims from incarceration.[30] Part II examines the penal philosophies encompassed within the current federal and state sentencing guidelines and not only analyzes their flaws, but also the movement toward an evidence-based system, further supporting rehabilitation's revival.[31] Finally, Part III argues that the new rehabilitation model is the best alternative for abuse victims who kill their abusers in self-defense and do not receive an acquittal.[32] This section urges the criminal justice system to consider the individual offender and the totality of the circumstances surrounding the crime, including the circumstances influencing the mental state of the offending abuse victim.[33] By considering the individual offender, the system itself can institute a reform more cognizant of and sensitive to the mental, emotional, and physical effects of abuse, therefore shifting the focus of sentencing from punishment to treatment.[34] This section further addresses the benefits and criticisms of using the new rehabilitation model as a solution.[35] This Note ultimately concludes by arguing that the benefits of implementing a rehabilitative focus in sentencing guidelines for abuse victims outweigh any criticism to altering the system.[36]

27. *See infra* Subsection III.C.2.
28. *See infra* Part III.
29. *See infra* Subsection III.C.2.
30. *See infra* Part I.
31. *See infra* Part II.
32. *See infra* Part III.
33. *See infra* Part III.
34. *See infra* Section III.C.
35. *See infra* Subsection III.C.3.
36. *See infra* Subsection III.C.3.

I. AVOIDING THE CONVICTION: EXAMINING THE FAILURES OF THE TRIAL SYSTEM

Historically, abuse victims, namely women, who killed their abusers in nonconfrontational settings have not had an arsenal of legal defenses or excuses at their disposal.[37] In many cases, victims of repeated physical violence have struggled to properly exculpate their actions when claiming self-defense or defense of others.[38] Such obstacles often arise in trying to satisfy the law's requirements in both the prima facie claim of self-defense and the rules of evidence in criminal trials.[39]

A. Evaluating the Inadequacy of Self-Defense for Abuse Victims

Although some jurisdictions have successfully enacted legal reforms to help abuse victims claim self-defense or defense of others, the lack of uniformity among states substantially prejudices offending abuse victims who can claim self-defense in one state but not another.[40] This disparity commonly occurs in cases where the abuse victim subjectively perceives an imminent threat of harm, but the killing occurs as the abuser is sleeping or engaged in a nonconfrontational course of action.[41] Even though the abuse victim

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37. *See* Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 13-17 (1986). Rosen discusses the development of defenses for abuse victims, particularly for battered women. *See id.* Women in abusive situations often resorted to self-help methods, leading to the killing of their abusers, and such methods also led to murder convictions since defenses did not previously exist for these types of nonconfrontational situations. *See id.* at 13-14.

38. *See* Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 192-93 (2000) (discussing how many courts have refused to allow a self-defense jury instruction when the homicide occurred in a nonconfrontational manner).

39. *See id.* at 203-05 (discussing how abuse victims have struggled to both establish the imminence requirement and admit their evidence of abuse to further establish imminence); *see also* Turk, *supra* note 19, at 909-10.

40. *See* Martin E. Veinsreideris, *The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613, 616-17 (2000) (discussing the differences in state statutes that treat the self-defense immediacy requirement as either imminent or immediately necessary and how one over the other can be more outcome determinative).

41. *See* Kit Kinports, *Defending Battered Women's Self-Defense Claim*s, 67 OR. L. REV. 393, 394 (1988); *see also* Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L.

has a belief that bodily harm or death will immediately occur, such belief has been traditionally insufficient to satisfy the minimal requisite of an objective threat of bodily harm or death.[42] Therefore, without the immediate physical threat, the abuse victim fails to present a successful self-defense claim.[43] Although courts have been increasingly willing to admit the mitigating evidence of abuse syndromes, this movement often fails to overcome the deficiency in self-defense to provide for all circumstances of self-preservation.[44]

1. *The Elements of Self-Defense and Disparaging Effects*

Self-defense legally justifies the killing of another human being in limited and exceptional circumstances.[45] To claim self-defense, a person must validate the use of force by satisfying various elements. First, the actor must reasonably believe there is a threat of unlawful harm.[46] Second, the amount of force must be proportional to the threatened force.[47] Third, the actor must believe that use of force is necessary to prevent the unlawful harm.[48] Finally, the threatened harm must be immediate or imminent.[49] Most importantly, aside from having a good-faith belief of harm, the belief must be

555, 558 (2007). Krause states that "in nonconfrontational circumstances, the chief obstacles to proving self-defense are the requirements that she *reasonably* believe the threatened harm be *imminent*, as the killing occurs in the absence of any ongoing physical attack." *Id.*

42. *See* Krause, *supra* note 41, at 557 ("This belief must be both *subjectively* reasonable, in that the actor herself truly believes it, and *objectively* reasonable, in that a reasonable person would similarly so believe.").

43. *See* Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 460-61 (2006) (asserting that no self-defense claim can take place during a nonconfrontational event).

44. *See* Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 218 (2002).

45. *See* Rosen, *supra* note 37, at 25.

46. *See* United States v. Peterson, 483 F.2d 1222, 1229-30 (D.C. Cir. 1973).

47. *See id.* at 1229 (implying that the self-defense must be reasonable under the circumstances, such that if the attacker was to "maim," the appropriate self-defense response would not be to kill).

48. *See id.* at 1230 (discussing that the threat must be actually immediate and that "[t]he defender must have believed that he was in imminent peril of death or serious bodily harm").

49. *See id.* at 1229. Judge Robinson, delivering the opinion of the court, discusses that the killing must have been done out of total necessity. *Id.* Judge Robinson states that successful self-defense claims require that "[t]here must have been a threat, actual or apparent, of the use of deadly force against the defender." *Id.*

"objectively reasonable in light of the circumstances."[50] For abuse victims claiming self-defense based on a nonconfrontational killing, the imminence requirement presents a difficult standard to satisfy because such victims must be presented with an objectively immediate threat of harm.[51] Scholars have developed multiple theories that would allow abuse victims to overcome the imminence requirement; however, not every state accepts such theories as some choose to follow a stringent application of self-defense.[52]

For abuse victims, the cyclical nature of the physical harm creates a perception of constant physical danger; therefore, it may seem reasonable for abuse victims to kill their abusers in nonconfrontational settings.[53] However, self-defense struggles to universally incorporate this reasoning.[54] What bars abuse victims from claiming self-defense or defense of others is the subjective *and* objective reasonableness requirement—in which the person must have had an honest belief of imminent harm and the jury must determine that a reasonable person would perceive that the assailant's action would result in serious harm or death.[55]

Even the minority jurisdictions following the Model Penal Code's (MPC) version of self-protection—which requires only a

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50. *See* People v. Goetz, 497 N.E.2d 41, 50 (N.Y. 1986) ("To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force.").

51. *See* Rosen, *supra* note 37, at 33-34; *see also* Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV 1, 49 (1994) ("Defenders of battered women found that jurors were hostile to the women's self-defense pleas, especially in the nonconfrontational cases.").

52. *See* Kinports, *supra* note 41, at 423; *see also* Robert F. Schopp, Barbara J. Surgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 66 (discussing the nuanced difference between statutes that require immediate harm versus imminence). The Schopp article suggests that developing a temporal distinction between the two words will allow more women to claim that they were in some form of pending danger justifying their actions. *See id.* at 66-67.

53. *See* Kinports, *supra* note 41, at 409 ("Because these cases do not resemble the classic case of self-defense, this lack of success is not surprising.").

54. *See id.*

55. *See id.* at 409-15 ("[T]he two approaches do not constitute diametrically opposed standards[,] . . . they represent different points on a continuum, with the only arguable difference lying in the extent to which they import the defendant's particular characteristics into the definition of the 'reasonable person.'"); *see also* State v. Kelly, 478 A.2d 364, 364, 375 (N.J. 1984) (presenting one of the first cases in which courts considered battered women's syndrome as relevant to "defendant's belief that she was in imminent danger").

showing of actual belief of harm—do not guarantee that an abuse victim who kills her abuser nonconfrontationally will receive a total defense.[56] First, under the MPC, honest belief, which applies to co-dwellers, can be undermined by the retreat requirement.[57] This poses an obstacle for the abuse victim claiming self-defense during a nonconfrontational circumstance because she is obligated to avoid using force.[58] Second, courts within MPC jurisdictions may often instruct the jury to find whether a reasonable person under the same or similar circumstances would also determine that the killing was necessary to prevent harm or death.[59] Therefore, MPC states are not always "purely subjective" because a jury can be instructed to consider objective reasonableness when justifying the actions of the offending victim.[60]

2. *Battered Woman Syndrome: Achieving Perfect or Imperfect Self-Defense*

Battered Woman Syndrome (BWS), also referred to as Battered Person Syndrome (BPS), alone is not a recognized legal defense.[61] It

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56. *See* Kinports, *supra* note 41, at 409; *see also* MODEL PENAL CODE § 3.04(1) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

57. *See* MODEL PENAL CODE § 3.04(2)(b)(ii) ("The use of deadly force is not justifiable . . . if the actor knows that he can avoid the necessity of using such force with complete safety by retreating.").

58. *See* Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. LEGIS. 17, 28-29 (2015) (discussing the obstacles a battered woman faces in claiming self-defense under the Model Penal Code).

59. *See* Kinports, *supra* note 41, at 410-11 ("The jurisdictions that purport to apply an entirely subjective standard of self-defense use a similar instruction [of whether a reasonable person would have felt the need to use self-defense under the same circumstances]: in order to acquit on grounds of self-defense, the trier of fact must find that a reasonable person in the same situation, seeing what the defendant saw and knowing what she knew, would have resorted to self-defense.").

60. *See id.* Kinports describes the MPC standard as "not purely subjective; rather, it also incorporates the objective notion of 'reasonableness.'" *Id.* at 410.

61. *See* GA. CODE ANN. § 16-3-21(d)(1)-(2) (2010) ("In a prosecution for murder or manslaughter, if a defendant raises as a defense . . . the defendant, in order to establish the defendant's reasonable belief that the use of force or deadly force was immediately necessary, may be permitted to offer: (1) Relevant evidence that the defendant had been the victim of acts of family violence or child abuse

functions as a supplement to the imminence requirement by allowing an abuse victim to claim that he or she acted reasonably in response to what he or she perceived to be an immediate threat of harm, even when the threat would not exist otherwise.[62] BWS, therefore, acts as a quasi-defense in murder or manslaughter cases where the defendant has been repeatedly subjected to prolonged abuse.[63] In order to achieve a successful self-defense claim, the abuse victim must present expert testimony establishing that the act was reasonable under the surrounding circumstances—a feat that Battered Woman Syndrome does not guarantee.[64] Abuse victims claiming self-defense may use BWS testimony to achieve imperfect or perfect self-defense.[65] Unlike perfect self-defense, which functions as a total defense and would acquit the defendant of a crime, imperfect self-defense reduces a charge from murder to manslaughter.[66] Imperfect self-defense only requires a showing of an honest but unreasonable belief that imminent peril to life or great bodily injury will occur.[67] This is largely a subjective standard and requires no finding of objective reasonableness.[68] In turn, perfect self-defense requires a showing that the belief is objectively reasonable, in addition to the actual subjective belief that harm will occur.[69] Moreover, issues in offering BWS testimony can arise when courts err in providing a BWS instruction to the jury, resulting in improper application of

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committed by the deceased . . . ; and (2) [r]elevant expert testimony regarding the condition of the mind of the defendant at the time of the offense.").

62. *See* 34 AM. JUR. 2D *Proof of Facts* § 4 (1983).

63. *See* LENORE E. WALKER, THE BATTERED WOMAN 55-79 (1979). Lenore Walker developed the BWS theory in the 1970's. *Id.* at 55-70; *see also* Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1257-59 (1987). The syndrome acts as a quasi-exception to traditional elements of self-defense because it relies on expert testimony on the syndrome and self-defense claims to create a legitimate legal defense. *Id.* at 1259.

64. *See* Burke, *supra* note 44, at 230-31, 243 ("Even if the defendant convinces a jury that she reasonably believed that harm was imminent, the jury may be reluctant to acquit.").

65. *See* Christopher Slobogin, *Psychological Syndromes and Criminal Responsibility*, 6 ANN. REV. L. & SOC. SCI. 109, 112 (2010).

66. *See id.* ("Traditionally, imperfect self-defense might apply when a person honestly but unreasonably believed he or she was about to be seriously harmed or killed by the victim or when the crime is objectively disproportionate to the harm but nonetheless is understandable.").

67. *See* Wallace-Bey v. State, 172 A.3d 1006, 1023-24 (Md. Ct. Spec. App. 2017).

68. *See* McNeil v. Middleton, 402 F.3d 920, 921 (9th Cir. 2005).

69. *See Wallace-Bey*, 234 A.3d at 1023.

BWS to imperfect or perfect self-defense, or when the BWS evidence is limited to the extent it impacts the jury's finding of fact.[70]

Consider the case of *Middleton v. McNeil*, in which the Supreme Court reversed the Ninth Circuit's decision to issue a writ of habeas corpus for a woman convicted of second-degree murder for shooting her husband in both the head and the stomach while he was cooking.[71] The Ninth Circuit acknowledged that the trial judge improperly instructed the jury by prohibiting its application of BWS testimony to perfect self-defense.[72] The Ninth Circuit held this was in error because if the jury *had* followed the literal interpretation of the instruction, it could have established the defendant did not act as a reasonable person and, therefore, rejected the imperfect self-defense argument altogether.[73] However, the Supreme Court disagreed.[74] The Supreme Court stated the jury did not possess the legal sophistication to parse such technicalities; thus, the instruction would have unlikely misled the jury.[75] On remand, a Ninth Circuit dissenting judge suggested that not only did the defendant heavily rely on BWS evidence for her defense, but the trial court erroneously deprived the defendant of due process through the limited instruction, which "precluded [the defendant] from establishing the reasonableness of her belief" and further deprived her of the chance to justify her actions with a complete defense.[76] The judge further wrote that

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70. *See* McNeil v. Middleton, 402 F.3d 920, 922 (9th Cir. 2005); *Wallace-Bey*, 234 A.3d. at 1006.

71. *See* Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curium) (stating that the last four words of the jury instruction—*as a reasonable person*—should not have been included in the jury instruction but were unlikely "to have mislead the jury").

72. *See McNeil*, 402 F.3d at 921 ("The trial judge correctly instructed the jury that BWS could be considered on the issue of McNeil's actual belief, but incorrectly instructed that it could not be considered in testing reasonableness for perfect self-defense purposes.").

73. *See id.* ("Thus, even though BWS evidence could be considered, it did her little good because if, due to BWS, her perceptions were other than that of a reasonable person, she could not demonstrate that her actions resulted in voluntary manslaughter at most.").

74. *See Middleton*, 541 U.S. at 437-38.

75. *See id.* at 438.

76. *McNeil*, 402 F.3d at 923 (Paez, J., dissenting). Judge Paez dissented in the opinion and concluded that the defendant had a due process right to present a complete defense. *Id.* Her defense could not be properly established without presenting evidence of BWS, and mostly importantly, it was her only defense. *Id.* Judge Paez found the jury instruction was not a harmless error because she needed to show her belief of imminent harm was both "actual *and* reasonable." *Id.*

although the jury considered evidence of BWS, it did little to serve the abuse victim when the court erroneously instructed the jury.[77]

The case of *Wallace-Bey v. State* presents a similarly alarming issue with admitting BWS evidence to achieve perfect or imperfect self-defense.[78] In 2009, a jury convicted Tania Wallace-Bey of first-degree premeditated murder and sentenced her to life imprisonment plus twenty years.[79] The defendant shot her boyfriend in the chest after he had reportedly raped her.[80] She told her defense counsel that she had been repeatedly abused months before, but counsel did not pursue this information in her defense.[81] After the appellate court affirmed her conviction, she filed for post-conviction relief on the basis of ineffective assistance of counsel,[82] and during a new trial in 2016, the jury convicted her once more.[83]

During the March 2016 trial, the court sustained the prosecutor's multiple objections to the defense's statements regarding her boyfriend's psychologically abusive remarks during their relationship.[84] Thus, the trial court limited the testimony that the jury could hear regarding the defendant's overall mental state and

77. *See id.* at 924 ("Because the centerpiece of [the defendant's] defense was the BWS evidence, the erroneous instruction effectively precluded the jury from finding that she acted in self-defense when she shot and killed [the victim].").

78. *See* Wallace-Bey v. State, 172 A.3d 1006 (Md. Ct. Spec. App. 2017).

79. *See id.* at 1011.

80. *See id.*

81. *See id.* at 1011-12. The Maryland Special Court of Appeals stated that the defense counsel did not pursue any battered woman syndrome evaluation and merely relied on a "theory of self-defense, without calling any witnesses." *Id.* The court affirmed her convictions on direct appeal. *Id.* The defendant also wrote a note addressing the abuse to her family. *Id.* at 1013. The note stated that "'over the past year,' her relationship with [the victim] 'became very unhealthy.'" *Id.* She made "'numerous attempts to end the relationship,' but that they 'managed to find themselves in each other's arms—only to begin a new cycle of sickness and injury more grotesque than previous.' She said that there 'appeared to be no hope in sight for their condition,' that she 'couldn't see the way out,' and that she 'couldn't take it anymore.'" *Id.*

82. *See id.* at 1012 ("The post-conviction court found that [the defendant's] trial counsel had rendered ineffective assistance by failing to investigate battered spouse syndrome. . . . On March 13, 2014, the court vacated [the defendant's] convictions and granted her a new trial.").

83. *See id.* at 1011.

84. *See id.* at 1012 ("For instance, the court sustained an objection to a comment that [her boyfriend] demeaned [the defendant] by telling her that she was 'sick' and 'destined for stagnation and failure.'").

scaled down the full picture of the defendant's abuse.[85] Although the court allowed an expert to testify that the defendant suffered from BWS, the expert could not adequately discuss any effects of psychological abuse on the defendant that involved her boyfriend's controlling behavior.[86] At the end of the trial, the court instructed the jury on how to apply imperfect or perfect self-defense and declined to give a special instruction regarding battered spouse syndrome.[87] The Maryland Court of Special Appeals found that exclusion of the victim's statements to the defendant severely impaired the defendant's imperfect self-defense claim by limiting the jury's understanding of how the abuse affected her mental state when she killed her boyfriend.[88] The Special Court of Appeals held that she will be entitled to a new trial, yet again.[89]

B. Admissibility of Past Abuse During Criminal Trial

In further contributing to the complications of claiming self-defense, admission of syndrome evidence has also posed a substantial obstacle for abuse victims in the past.[90] Using BWS evidence to claim imperfect self-defense cannot reasonably succeed

85. *See id.* at 1013 ("[A]ccording to defense counsel, the jury would 'not be able to adequately evaluate' whether and how the abuse actually occurred."). At another point during the trial, the prosecutor asked the defendant why she did not leave on an occasion of abuse. *See id.* The defendant replied, "Because I'm barred from saying what he said, I will say that he said things to me that led me to believe that he would harm me if I moved." *Id.* at 1020.

86. *See id.* at 1021 ("The court sustained four more objections while Dr. McGraw attempted to describe psychological abuse in the form of [the victim's] controlling behavior, in which he 'insisted' that she do certain things and 'claimed' that he was 'divinely ordained' or 'the police of God.'"). The trial court determined that these types of statements were inadmissible hearsay. *See id.*

87. *See id.* at 1022.

88. *See id.* at 1032 (stating that "[t]he jury heard a muted version of the defense case instead of the version that [the defendant] had the right to present under Maryland law").

89. *See id.* at 1041.

90. *See* Turk, *supra* note 19, at 904. Historically, courts have battled over whether the appropriate standards for admissibility of scientific evidence should be conducted under the *Frye* test (which requires a general consensus among experts in a field) or the Federal Rules of Civil Procedure § 702. *See id.* But since *Daubert*, the treatment of scientific evidence opened the door for abuse syndromes. *See id.* The Court in *Daubert* rejected the *Frye* test and "opened the door for admissibility of novel scientific evidence, such as expert testimony to prove the existence of many syndromes not scientifically recognized by the entire psychiatric community." *Id.* at 905.

if evidence of the abuse is negated during trial.[91] According to Professor Slobogin, psychological syndromes only make a difference in criminal trials when "they are thought to be an admissible basis for expert opinion."[92] The testimony of the expert must be based on "scientific, technical, or other specialized knowledge."[93] Unless the evidence of abuse comports with rules of evidence, abuse victims are prohibited from claiming any of the established syndromes—whether Battered Woman Syndrome or Battered Child Syndrome.[94]

1. *Rules for the Admission of Past Abuse*

Evidence of past abuse may be used to prove that the defendant acted reasonably in the absence of an actual threat.[95] In order to admit testimony of past abuse during trial, the evidence must be weighed under four distinct criteria: materiality, probative value, helpfulness, and prejudicial impact.[96] In the past, syndrome evidence or abuse testimony had failed to overcome the materiality requirement because self-defense ignores the "special sensitivities" of the defendant, therefore hindering the consideration of the defendant's psychological impact from the prolonged abuse.[97]

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91. *See generally* Erich D. Anderson & Ann Read-Anderson, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 403 (1992) (asserting that expert testimony is necessary to the defendant's constitutional right to present a defense); *see also* Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 574-83 (1988) (arguing the expert testimony is necessary for the jury to understand a battered woman's self-defense claim).

92. Slobogin, *supra* note 65, at 110.

93. FED. R. EVID. 702.

94. *See* Slobogin, *supra* note 65, at 110.

95. *See* Rosen, *supra* note 37, at 41. Rosen states that the testimony of the woman may help explain why she chose to stay with her abuser, thus shedding light on the events leading to her situation. *See id.* The testimony allows the woman to explain herself as a victim, instead of a cold-blooded killer. *See id.* Absent this testimony, the jury would lack an understanding of the totality of the circumstances. *See id.*

96. *See* Slobogin, *supra* note 65, at 110. *Materiality* refers to "the logical relationship between the syndrome testimony and substantive criminal law doctrine." *Id. Probative value* means "the reliability/validity of the syndrome evidence." *Id. Helpfulness* is the "extent to which the evidence adds to the fact finder's knowledge." *Id. Prejudicial impact* refers to the "extent to which the expert testimony will be misused by or distract the fact finder." *Id.*

97. *See id.* at 111 ("[S]ome advocates have suggested that a battered woman is highly attuned to the batterer's tendencies and thus is much better than the reasonable person at determining when the batterer's violence will escalate to the

Assessing the probative value of syndrome testimony means measuring relevance through the likelihood that self-defense was required, and most jurisdictions acknowledge admitting BWS or other psychological syndromes on an empirical basis is necessary to establish that fact.[98] Although not all evidence aids the fact finder's decision, evidence of a syndrome can be helpful in providing an explanation for the abuse victim choosing to remain with the abuser; however, a common argument is that this evidence only supports the offending abuse victim's testimony.[99] Therefore, evidence of psychological syndromes may pass some requirements of evidence, but the evidence may nonetheless be rejected for prejudicing or distracting the jury.[100]

2. *Problems Associated with Expert Testimony*

Since the emergence of psychological syndromes, legal scholars have failed to reach a consensus in determining the relevancy of BWS evidence alleged in self-defense claims.[101] The 1980s highlighted this debate, as courts grappled over the admissibility of BWS evidence in criminal trials, resulting in numerous decision splits among states.[102] In order for an abuse victim

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point that serious bodily injury or death is likely. But, again, the traditional self-defense rule does not take into account special sensitivities of the defendant.").

98. *See id.* at 113 (discussing that admission of expert testimony evidence depends on jurisdiction and how those that follow the *Daubert* standard require more than general acceptance within the professional community to allow the testimony due to the methodological problems that arise, such as "obtaining control groups, selection bias with respect to the samples studied, and difficulty in gauging the motivation for not leaving or for attacking the batterer").

99. *See id.* at 114 ("[O]ne might argue that BWS testimony should *not* be admissible because it merely seconds the battered woman's testimony.").

100. *See id.* at 115 (detailing that such evidence may "paint . . . such a sympathetic picture of the woman that the jury will acquit simply because it feels sorry for the victim").

101. *Compare* Mihajlovich, *supra* note 63, at 1263 (discussing that abuse testimony should be inadmissible because it is "subject matter *not* beyond the ken of the average juror"), *with* Mathew Fine, Comment, *Hear Me Now: The Admission of Expert Testimony on Battered Women's Syndrome—An Evidentiary Approach*, 20 WM. & MARY J. WOMEN & L. 221, 238-42 (2013) (offering a solution to amend the Federal Rules of Evidence in a manner that would create uniformity across jurisdictions in the allowance of BWS testimony).

102. *See* Mather, *supra* note 91, at 575. *Compare* State v. Kelly, 478 A.2d. 364, 377 (N.J. 1984) (finding the expert testimony relevant to the defendant's belief she was imminent danger), *with* Commonwealth v. Grove, 526 A.2d 369, 371 (Pa.

to succeed in presenting BWS evidence, expert testimony must validate the claim.[103] Expert testimony aids the fact finder by providing a scientific explanation for the both the psychological effects of violence and the abuse victim's conditioned response to such violence.[104] According to Professor Mather, the debate in admitting expert testimony arose from factors such as "general acceptance [of BWS] within the scientific community; relevance of such testimony; whether the syndrome is beyond the understanding of the average juror; and the possible prejudicial impact of the testimony."[105]

States have overcome some of these issues by increasingly allowing expert testimony to credit evidence of abuse, but the problems associated with expert testimony have not dwindled entirely.[106] Currently, expert testimony of BWS for a woman who kills her abuser in a nonconfrontational setting is accepted by fewer than one-third of the states.[107] Although expert testimony of BWS in confrontational settings is generally accepted, most states do not allow an expert to comment on whether the abuse victim acted under a *reasonable* belief of imminent harm, which presents one of the many limitations on expert testimony.[108]

Limitations of expert testimony frequently occur in states that strictly require an objective standard for self-defense claims.[109]

Super. Ct. 1987) (finding that the trial court properly excluded testimony of the defendant's past abuse by the victim).

103. *See* Mather, *supra* note 91, at 574 ("Expert evidence is often crucial to a battered woman's claim of self-defense because . . . society widely subscribes to the myths surrounding the abusive relationship.").

104. U.S. DEP'T JUST., VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIAL: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996).

105. *See* Mather, *supra* note 91, at 574. Often the prosecutor would object to the expert testimony and claim such testimony prejudices the victim by marking him an abuser. *Id.* at 585.

106. *See* Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 715-16 (1994).

107. *Clemency Project*, *supra* note 20, at 5.

108. *See id.*; *see also* Bruce Ching, *Mirandizing Terrorism Suspects? The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 625 (2015).

109. *See* Slobogin, *supra* note 65, at 122-23 ("Testimony about BWS is not material in those jurisdictions that take an objective approach to self-defense and provocation and that do not recognize a nonpsychotic disorder as a mental disease or defect for insanity purposes.").

Expert testimony must comply with the state's substantive law regarding the rules of evidence.[110] These states may decide that the BWS testimony is immaterial to the defendant's case because the subjective component of the defendant's actions is absent from the law.[111] Moreover, the possibility of prejudicial impact of BWS testimony presents another obstacle for abuse victims.[112] BWS testimony may be excluded for "fear it will confuse the jury or distract the jury from the issue toward which the evidence is directed."[113]

Although the doctrine of self-defense has made significant strides in permitting evidence of abuse syndromes as mitigating evidence, and courts have also improved by admitting syndrome testimony, there is still disagreement among states in how to proceed in such cases, and juries may still render guilty verdicts regardless of the evidence presented.[114] Unfortunately, judicial failures often result in harsh sentences for abuse victims.[115] And just as the trial system has often failed abuse victims, the sentencing theories embedded in the judicial sentencing guidelines also fail in providing appropriate sentencing.[116]

II. SENTENCING THEORIES, THE NEW REHABILITATION MODEL, AND ABUSE VICTIMS

Exploring why society requires an institution of punishment helps frame where abuse victims who kill their abusers fit within the legal system.[117] Society has long used punishment to express disdain

110. *See id.* (stating that expert testimony rules vary among states and can vastly change the outcome).

111. *See id.* (discussing the possibility of certain jurisdictions determining this of testimony as irrelevant).

112. *See id.* at 115 ("One concern about defense-introduced BWS testimony . . . is that the evidence will paint such an ugly picture of the batterer and such a sympathetic picture of the woman that the jury will acquit simply because it feels sorry for the victim, even though the killing was a disproportionate response to the threat.").

113. *See id.* at 114.

114. *See id.* at 112 (discussing how jurisdictions have permitted evidence about BWS).

115. *See Clemency Project*, *supra* note 20, at 3 (discussing that more than 2,000 women are in prison from killing their abusive partners).

116. *See infra* Subsection II.A.2 (discussing the inadequacies of current sentencing guidelines).

117. *See* Kent Greenawalt, *Punishment, in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282-84 (Joshua Dressler ed., 2002). Greenawalt further describes two other

or condemnation for undesirable behavior.[118] Since human beings have fostered civilization, punishment has endured as a fundamental social custom.[119] The early civilizations originally implemented punishment through primitive and barbaric methods of torture, but by the seventeenth and eighteenth centuries, European philosophers and law makers refined punishment as a sophisticated correcting tool.[120] Punishment was viewed as both deserved and as a behavioral deterrent.[121]

As these notions of crime and punishment trickled from Europe to America, the developing American criminal system was instilled with similar sentiments toward society and punishment.[122] The American Revolution initially shifted those sentiments toward more rehabilitative practices and sought to use punishment as a remedy to cure the criminal, but the rehabilitative model did not survive the modern sentencing reform.[123] During the reform, the previous conceptions of just deserts and deterrence manifested into two dominant competing theories that govern the current American legal system—retributivism and utilitarianism.[124] These two theories suggest that criminal penalties are justified because either (1) the

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questions that may be asked in determining whether punishment is justifiable: (1) What are the "necessary conditions for criminal liability and punishment," and (2) what is the appropriate "form and severity of punishment" as it relates to the offense committed? *Id.* at 1282.

118. *See* A. Warren Stearns, *Evolution of Punishment*, 27 J. AM. INST. CRIM. L. & CRIMINOLOGY 219, 220 (1936) (discussing how society's origin of punishment developed out of expressing irritation toward individuals who failed to conform to norms and patterns).

119. *See id.* at 219 (explaining the origin of punishment as developing with "the dawn of known history").

120. *See id.* at 221-22 (discussing death by stoning or whipping).

121. *See id.* Punishment took a less primitive form as heinous torture methods were no longer accepted. *Id.* at 224.

122. Developments of crime and punishment in Europe spread to America through the arrival of the pilgrims in 1620, and serious crimes were punished by death. *Id.* at 225. Not until the nineteenth century did penitentiaries develop as an alternative to capital executions. *Id.* at 226; *see also* Jalila Jefferson-Bullock, *How Much Punishment Is Enough?: Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL'Y 345, 354 (2016) (stating that "colonial courts punished offenders according to three distinct purposes: retribution, deterrence, and incapacitation").

123. *See id.* at 355-70 (explaining the fall of indeterminate sentencing/rehabilitation model and the move to reform for harsher sentencing).

124. *See* Greenawalt, *supra* note 117, at 1284.

criminal deserves to be punished or (2) the punishment serves as a social deterrent to crime.[125]

Theories of punishment explain why the government should impose particular sanctions upon criminals.[126] However, these theories are not without their deficiencies when it comes to practical application.[127] While certain theories may provide an adequate foundation for punishing a particular criminal, they fail in universal application for *all* criminals.[128] In the American legal system, the theories of retributivism and utilitarianism serve as the primary basis for the Federal Sentencing Guidelines.[129] The Sentencing Guidelines included the possibility of rehabilitative practices, but such practices were given little credence or application in criminal sentencing.[130] However, modern scientific advancements are shaping the criminal

125. *See id.*; *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPALS OF MORALS AND LEGISLATION 15-16 (1823). Bentham, as the father of utilitarian theory, explains that the utility principle functions as behavioral test in which society either approves or disapproves of behavior depending upon the emotion elicited. *Id.* For example, Bentham states that the goal is to promote societal happiness and that actions interfering with that goal should be deterred. *Id.* at 16.

126. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 32 (2003) (discussing the principal philosophies governing sentencing guidelines).

127. *Compare* Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 354 (explaining that retributivism fails because it is too detached from practicality and "focuses solely on the moment of punishment and resists any discussion about criminal justice in general"), *with* Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 944-45 (2000) (explaining that deterrence suffers a predominant weakness by failing to recognize the conception of fault, which is the main component of blameworthiness at the crux of retributivism and a well-recognized requirement in the criminal justice system).

128. *See* Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 361 (1998) (expressing skepticism toward theories of punishment and questioning whether they fit appropriately with the offender and justify punishment).

129. *See* Jefferson-Bullock, *supra* note 122, at 351 ("The goals of federal punishment . . . rely on both utilitarian and retributivist principles that profess to punish offenders for both a larger societal benefit and to properly penalize moral blameworthiness.").

130. *See* Kimberly L. Patch, *The Sentencing Reform Act: Reconsidering Rehabilitation as a Critical Consideration in Sentencing*, 39 NEW ENG. J. CRIM. & CIV. CONFINEMENT 165, 171-72 (2013) (discussing how sentencing guidelines include a mention of rehabilitation but that the Sentencing Reform Act "doubted the efficacy of offender rehabilitation" and reflected that sentiment).

system and encouraging judges to use evidence-based strategies.[131] Moreover, the areas of neuroscience, psychotherapy, and behavioral science have strengthened the efficacy of rehabilitative practices, and scholars are breaking away from the stringent margins of retribution and deterrence and reconsidering rehabilitation as a possible alternative method in sentencing once more.[132]

A. Dominant Forms of Punishments and Sentencing Guidelines

In early America, the dominant forms of punishment theory opposed remedying the criminal's ill-desired behavior; instead, they promoted punishment that sought to make an example of the wrongdoer by publicly castigating his or her behavior with hopes it would serve as a societal deterrent.[133] Indeterminate sentencing—sentencing with an indefinite length—peaked in the nineteenth century, during which the American penal system embraced the belief that people could be purged of their moral ailments.[134] This rehabilitation model lasted well into the twentieth century, when criticisms of the model spilled over into sentencing in the 1960s.[135]

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131. *See* Rebecca Foxwell, *Risk Assessments and Gender for Smarter Sentencing*, 3 VA. J. CRIM. L. 435, 440-41 (2015) (discussing generally how new technologies are changing the penal system).

132. *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 335-36 (2013) (discussing the restoration of rehabilitation and how the use of meta-analysis, "a quantitative synthesis of studies," will help foster successful rehabilitation programs and create effective treatments that reduce recidivism rates); *see also* Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 413 (2015) (discussing the Supreme Court's decision in *Graham v. Florida* and the possibility of exploring rehabilitation as a more open method of criminal reform); Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 305-07 (2015).

133. *See, e.g.*, Russel L. Christopher, *Deterring Retributivism: The Injustice of 'Just' Punishment*, 96 NW. U. L. REV. 843, 857-58 (2002). Christopher examines the nuances between consequential and retributivist thought, in which he concludes that for consequentialism "[t]o achieve general deterrence, the appearance or publicity of punishment is crucial. Actual punishment, without society's awareness, generates no general deterrent effect[.]" *Id.*; *see also* Jefferson-Bullock, *supra* note 122, at 354.

134. *See* Jefferson-Bullock, *supra* note 122, at 354-55 (describing how criminal punishment "adapted to mirror society's overall perception of human beings as 'rational and responsible for their own acts'") (quoting ARTHUR W. CAMPBELL, THE LAW OF SENTENCING § 1:2 at 11 (1st ed. 1978)).

135. *See* Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 699-704 (2015) (stating the although rehabilitation was supported throughout the twentieth

Although earlier twenty-first century movements steered away from criminal rehabilitation,[136] scholars now urge the justice system to reconsider its benefits for certain classes of criminals deemed most eligible for restorative practices.[137]

1. *Overview of Dominant Punishment Theories and Criticisms*

Theories of punishment may be best arranged within two categories of either backward- or forward-looking approaches.[138] A backward-looking approach focuses on the moral blameworthiness of the criminal behavior and seeks to punish the crime already committed.[139] The quintessential backward-looking approach is retributivism, which asserts a wrongdoer receives the punishment he or she deserves.[140] Forward-looking approaches maintain that punishments serve to effectively abate criminal behavior within society.[141] Such approaches include the consequentialist theories of utilitarianism and deterrence.[142] Forward looking theories consider

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century, "achieving rehabilitation proved elusive"); *see also* Jefferson-Bullock, *supra* note 122, at 364-65.

136. *See id.* Fondacaro stated that Americans have moved away from the rehabilitative model because of a strong pessimistic view surrounding the "body of research on rehabilitation." *Id.* at 704.

137. *See id.* at 725 ("The old mantra, 'nothing works,' has been laid to rest by systematic research on the causes and consequences of human behavior across social, psychological, and biological levels of analysis."); *see also* Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121, 145-46 (2014) (discussing how modern biochemical innovations will help change offender behavior).

138. *See* Benjamin L. Apt, *Do We Know How to Punish?*, 19 NEW CRIM. L. REV. 437, 440 (2016).

139. *See id.* (assessing that the purpose for criminal punishment under a backward-looking theory is to focus "on the wrongfulness of the deed already done").

140. *See* Christopher, *supra* note 133, at 845. The essence of retributivist thought is that the person being punished is receiving his or her just deserts. *Id.* Retributivism also focuses solely on the "past wrong or offense." *Id.* According to John Rawls, "It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing." John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955); *see also* Apt, *supra* note 138, at 442. Apt discusses the set standard of punishment within retributivism, furthering that the severity of the punishment is correlated to the criminal's blameworthiness. *Id.*

141. *See* Apt, *supra* note 138, at 448-49.

142. *See id.* at 448-55. The crucial distinction between forward-looking and backward-looking crimes is the treatment of punishment. *Id.* at 448. Apt states that the Bentham's theory of utilitarianism hinged on the fact that "criminal punishment was defensible to the extent that it produced a positive social result by deflecting

how the punishment serves to benefit society, shifting the focus from the individual's blameworthiness to the effectiveness of his or her punishment in deterring crime within society.[143]

Scholars have been quick to criticize and invalidate the effectiveness of these theories in modern society.[144] Indeed, theories of punishment are subject to weaknesses and gaps in their logic, rendering them ill-suited for only one theory to formally control over every facet of legal punishment.[145] Professor David Garland urges that simply relying on these philosophical approaches for sentencing guidelines is not enough, as these theories often fall short of representing the nuances of modern punishment.[146] Instead, Garland advocates for the justice system to consider a more sociological approach, which would allow for an understanding of punishment as a social institution, alive and breathing, rather than as a one-dimensional, normative justification.[147] Although scholars disagree on which theory reigns as the formal sovereign of legal punishment,[148] they unanimously agree that punishment is not a one-size-fits-all game.[149]

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people from future crimes." *Id.* at 453. Consequentialism and deterrence also share the goal of preventing future crimes and "suppress[ing] certain undesirable incidents." *Id.* at 448. In deterrence theory, "[t]he goal of punishment is rather to broadcast the message that *this sort of crime* will be punished in this way should anyone, whether the subject or anyone else, do it in the future." *Id.* at 452.

143. *See id.* at 448-55.

144. *See, e.g.*, Christopher, *supra* note 133, at 975 (concluding that if retributivists do not relinquish the notion of "just deserts," the entire theory may collapse into consequentialism); *see also* Guyora Binder & Nicolas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 123-25 (2000). The Binder and Smith article defends utilitarianism from proponents of retributivism and argues that, although subject to extensive criticism, utilitarianism works as an institutional rather than ethical philosophy. *Id.*

145. *See generally* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (asserting that solving the problem of punishment theory involves not looking narrowly at one particular theory, but taking a hybrid approach incorporating multiple concepts).

146. *See* David Garland, *Philosophical Argument and Ideological Effect: An Essay Review*, 7 CONTEMP. CRISES 79, 82 (1983) (book review).

147. *See id.* at 80-83. Garland critiques an author for viewing the penal system under "terms of general moral philosophy." *Id.* at 81. He states that "social institutions such as penal sanctions find it difficult to confine themselves to the realm of philosophical negativity." *Id.* at 82. These systems require "definite techniques, practices, knowledges, objectives, and ideologies, all of which carry definite social and political implications." *Id.*

148. *Compare* Christopher, *supra* note 133 (striking down the validity of retributivism as a cogent legal principle of punishment), *with* Dan Markel, *Against*

a. Theory of Retributivism

Recently, retributivism has undergone criticism as an inadequate purveyor of justice.[150] Professor Christopher asserts that retributivism currently reigns as the dominant theory of punishment, yet stands as one of the weaker theories.[151] He claims one of retributivism's failures is its circular logic, meaning that it "fails to satisfy its own criteria of just punishment."[152] However, proponents of the theory insist that its values are justified through its deontological principles, meaning there is justification within its inherent value.[153] Yet, retributivism fails to answer the question of how society knows when an act is wrong, thus begging the question of what acts should be inherently wrong.[154] Since retributivism merely determines that behavior should be punished solely on the premise that it is wrong, while failing to offer a definition of "wrongness," it leads some scholars to conclude that the theory's function is arbitrary and serves a minimal social purpose.[155]

Mercy, 88 MINN. L. REV. 1421, 1433 (2004) (arguing for legal retributivism and removing mercy "from the realm of criminal justice").

149. *See* Apt, *supra* note 138, at 464.

150. *See* Christopher, *supra* note 133, at 975.

151. *See id.* at 847, 849. Christopher states in his introduction that his "project" is not to advocate for consequentialism, but to prove that retributivism is not better than any other theory; he strives to dethrone the theory by exposing its many flaws. *Id.* at 849.

152. *See id.* Christopher states that a major failure of retributivism is its circular logic; he mentions in his introduction "the circularity stemming from the simple retributivist formula of 'it's right to punish criminals because doing so is right.'" *Id.* at 851 (quoting David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 507 (1997)).

153. *See* Apt, *supra* note 138, at 441 ("Deontological principles are based on values of justice and fairness that are viewed as ends in themselves.").

154. *See id.* at 443. Apt further relays the "pitfalls" within retributivist theories by stating that "positive law does not replace a reliance on society's moral norms . . . society defers to the state to determine what is wrong and what is right." *Id.*

155. *See id.* ("Retributivism is an encompassing philosophy of punishment. It explains: *what* must be punished—blameworthy acts; *why* crimes must be punished—because they are blameworthy; and *to what degree* they must be punished—in proportion to their blameworthiness."); *see also* Flanders, *supra* note 127, at 354 (stating that retributivism fails as a theory of punishment because it is "detached from any empirical truths about the world").

b. Theory of Utilitarianism

Although consequentialist theories of punishment are more "attentive to epistemological justifications,"[156] one scholar concludes that even these theories have their flaws. Under deterrence theory, punishment discourages future crimes, but its effectiveness hinges on the communities' understanding of sentencing procedures and crime.[157] Critics of deterrence argue that many criminal offenders do not know the law; thus, they cannot be deterred from every crime.[158] Critics further argue that deterrence allows for punishment that is too far removed from the time of the violation, which decreases its effect and explanation as to why the system imposed the punishment—leaving the criminal unaware of the gravity of the harm caused.[159] However, defenders of the theory claim that deterrence has invaluable components that are necessary for the purpose of punishment.[160] Deterrence hinges on the innate human fear of punishment, and evidence suggests this conception withstands scrutiny.[161] But, as one commentator notes, deterrence alone cannot "successfully function as a full-service theory that accounts for why we punish."[162] Even with the weaknesses of these theories of

156. *See* Apt, *supra* note 138, at 448.

157. *See id.* at 450. Apt discusses that a major flaw in deterrence is its fixation on the punishment itself, in which the goal of punishment poses a nearly limitless degree of legal sentencing because the theory lacks a standard. *See id. See generally* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (discussing how incorporating social values would better shape the effect of deterrence in criminal law).

158. *See* Paul H. Robinson & John M. Darley, *Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953-54 (2003). Robinson and Darley contend that criminal deterrence is only effective when three elements are met: (1) the criminal must know the law of the crime committed; (2) "[the criminal] must perceive the cost of violation as greater than the perceived benefit"; and (3) the criminal must weigh these costs during the commission of the crime. *Id.* at 953.

159. *See id.* at 954.

160. *See, e.g.*, Donald A. Dripps, *Rehabilitating Bentham's Theory of Excuses*, 42 TEX. TECH L. REV. 383, 388 (2015). Professor Dripps explains how Bentham viewed deterrence as "both punishment's primary benefit and purpose." *Id.*

161. *See* Nygaard, *supra* note 128, at 361. Nygaard contends that "[a]t heart, deterrence is coercion by fear[.] . . . People do not act out of respect for, or duty to, the law[;] . . . [i]nstead they fear suffering if they do not act in accordance with the law." *Id.*

162. *Id.* at 361-62; *see also* Robinson & Darley, *supra* note 158, at 954.

punishment, both deterrence and retributivism remain the crux of modern sentencing guidelines.[163]

2. *Epistemic Punishment and Current Sentencing Guidelines*

The current sentencing guidelines, which primarily serve to advance retributivist and utilitarian theories of punishment, are deficient because they lack a reflection of the individual criminal and the requisite knowledge of social values.[164] Apportioning the proper sentence to a crime requires an understanding of why the justice system imposes punishment.[165] In part, this involves identifying the type of behavior society condemns.[166] In determining what constitutes reprehensible conduct, the criminal system often yields to the norms of social morality, as this may provide the purest source for why society inflicts punishment.[167] Alternatively, courts cannot rely on moral values alone to supply sufficient guidelines for punishment—there must be some other governing authority.[168] Thus, scholars contend that the judicial system must take into account a multiplicity of factors when apportioning sentencing.[169] To achieve

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163. *See* Frase, *supra* note 145, at 69, 73 ("[P]unishment purposes and limitations are traditionally grouped in two categories: utilitarian and nonutilitarian."). Frase further states that retributivism is the major nonutilitarian sentencing principle. *Id.* at 73.

164. *See* Apt, *supra* note 138, at 463. Apt discusses that sentencing guidelines fail to "tie[] punishment to knowledge." *Id.* These guidelines are "oriented around incarceration" and should include "advisory tools for analyzing a criminal's individual rehabilitative needs." *Id.* Apt states that "penal methods that apply evidence-based methods that are also not strictly deleterious to the subjects, are closer to an epistemic foundation and conflict less with other social values." *Id.* at 465.

165. *See* Frase, *supra* note 145, at 67-68.

166. *See* Apt, *supra* note 138, at 468-69. In *Do We Know How to Punish*, Professor Apt discusses the importance of how society knows to punish certain behavior. *See id.* In part, he states that sometimes society simply collectively agrees on some morally condemnable behavior that should be punished; other times, he remarks that it's simply because "the law tells us so." *Id.* He argues that society blindly accepts laws without questioning how it justifies punitive practices. *Id.*; *see also* Kahan, *supra* note 157, at 354 ("Empirical studies of why people obey the law suggest that these effects generalize. Such studies reveal a strong correlation between a person's obedience and her perception of others' behavior and attitudes toward the law.").

167. *See* Apt, *supra* note 138, at 468.

168. *See id.* (discussing that "[m]oral tenets do not suffice as a corpus of regulatory guidelines for criminal punishment").

169. *See* Frase, *supra* note 145, at 75 ("[D]isproportionate penalties undercut the law's desired norm-reinforcing messages and reduce public respect for the

that goal, one scholar concludes that sentencing guidelines could benefit from reflecting developments in areas such as social science and psychology.[170]

States and federal jurisdictions each abide by their own sentencing guidelines, but each system operates under similar objectives.[171] For instance, when federal and state judges consult sentencing guidelines, they are primarily focused on four purposes of sentencing: punishment, deterrence, incapacitation, and rehabilitation.[172] These purposes provide a relatively narrow means in achieving the desired sentencing goals because judges tend to weigh them disparately.[173] This results in courts distributing sentences based heavily on serving the purposes of punishment and deterrence and undermining practices of rehabilitation.[174]

a. Modern Sentencing Guidelines

The current motivations behind the Federal Sentencing Guidelines have been criticized as flawed and misguided approaches to punishing criminal behavior.[175] During the 1960s, the earlier

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criminal law and criminal justice systems."); *see also* Apt, *supra* note 138, at 463 ("If judges are to retain the power to sentence criminals, then they must at the very least compose sentences in consultation with experts from other fields, from psychology to sociology.").

170. *See* Apt, *supra* note 138, at 463.

171. *See* Mirko Bagaric, Nick Fischer & Gabrielle Wolf, *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785, 792 (2017).

172. *See* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 997 (2013).

173. *See id.* ("Although judges always had to consult these four purposes, not all purposes applied equally to every sentence.").

174. *See* Jefferson-Bullock, *supra* note 122, at 351, 402. The Sentences Guidelines do not treat rehabilitation as a primary purpose for incarceration. *Id.* at 402. The Sentencing Reform Act relinquished rehabilitative practices altogether and "promot[ed] retribution and deterrence to punishment purpose prominence." *Id.* at 389. *See generally* Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1 (2015) (discussing that the overall process of using the guidelines table has created narrow results of possible prison terms).

175. *See* Jefferson-Bullock, *supra* note 122, at 350 ("In an effort to appear tough on crime, lawmakers chose long sentencing periods almost arbitrarily, with no empirical foundation or justification for sentence length."). Jefferson-Bullock further discusses other misguided steps of sentencing reform, including how "lawmakers indiscriminately created an overly punitive sentencing scheme with disastrous outcomes." *Id.*

indeterminate sentencing model, which relied on rehabilitative practices and parole, suffered serious criticism as an efficient practice.[176] The determinate model, focusing on uniformity and longer sentences, replaced indeterminate sentencing with stricter guidelines to remedy the previous era of unbridled judicial discretion in apportioning sentencing.[177] The new Sentencing Guidelines under the Sentencing Reform Act of 1984 purported to create uniformity amongst courts when distributing sentences to criminals committing crimes of the same or similar nature.[178] The uniformity in sentencing would end disparity amongst criminals caused by factors such as socioeconomic status or race.[179]

However, the Federal Guidelines made it difficult for judges to part from the strict formalities because a judge could stray from the sentencing structure only under exceptional circumstances.[180] Although the Supreme Court in the *United States v. Booker* decision lessened the severity of the Guidelines by deeming them advisory and nonbinding, the system remains criticized for lacking hard data

176. *See id.* at 364-65 (discussing that, by the 1970s and 1980s, the public began to doubt "whether true rehabilitation of offenders was occurring or even achievable").

177. *See id.* at 366-67. Sentencing determinations sought to reform the previous unbridled discretion of the judiciary under the indeterminate sentencing era. *See id.* at 367. Consequentially, this reform lead to arbitrarily created harsher punishments. *See id.* at 366.

178. *See* Schuman, *supra* note 174, at 11; *see also* Jefferson-Bullock, *supra* note 122, at 352. Jefferson-Bullock states that "[t]he Sentencing Guidelines purported to establish honesty, uniformity, and proportionality in sentencing." *Id.* at 375; *see also* Rebecca Krauss, Comment, *Neuroscience and Institutional Choice in Federal Sentencing Law*, 120 YALE L.J. 367, 375 (2010) ("[T]he Guidelines ensure 'equal nonsense for all': they provide a means of confining intuitive and nonrational sentencing decisions to one decision-making body and then applying those decisions equally to all criminal defendants.").

179. *See* Schuman, *supra* note 174, at 12 ("Binding guidelines, it was thought, could end such disparities by ensuring that like cases were treated equally."); *see also* Ann Marie Tracey & Paul Fiorelli, *Throwing the Book[er] at Congress: The Constitutionality and Prognosis of the Federal Sentencing Guidelines and Congressional Control in Light of* United States v. Booker, 2005 MICH. ST. L. REV. 1199, 1202 (stating that sentencing guidelines "vastly [restricted] discretion" and sought uniformity).

180. *See* 18 U.S.C. § 3553(b)(1) (Supp. 2004) ("[T]he court shall impose a sentence . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(1) (U.S. SENTENCING COMM'N 2014); Bagaric, Fischer & Wolf, *supra* note 171, at 785 (stating that sentencing law among states is "fundamentally broken").

to support sentencing lengths.[181] The scheme lacks fair consideration of evidence-based sentencing, which would allow for more rehabilitation programs.[182] Scholars advocate for reforming sentencing guidelines to encompass more than merely purposes of punishment such that they begin to take into consideration concrete sciences and social institutions.[183]

b. Evidence-Based Sentencing and the Social Institution of Punishment

Current sentencing guidelines rely only on the general guidance of various punishment theories when considering the "suitability" of the crime to the criminal.[184] Although it seems the nucleus of punishment theory is proportionality—asserting the punishment must

181. *See* United States v. Booker, 543 U.S. 220, 266 (2005) (holding that the mandatory aspect of subsection (b)(1) of the Federal Sentencing Guidelines cannot be mandatorily required in a manner consistent with congressional intent); *see also* Jefferson-Bullock, *supra* note 122, at 376 (stating that the Sentencing Guidelines ranges are more biased than empirically based). The Supreme Court decided that the Guidelines, as they were written, imposed mandatory requirements binding on district judges. *Booker*, 543 F.3d at 233. The Court stated that the Guidelines should be one factor considered in the analysis of sentencing. *See id.* at 234; *see also* Schuman, *supra* note 174, at 18 ("Although *Booker* gives district judges significant discretion to depart from the Sentencing Guidelines, a number of pressures work together to encourage them to adhere to the Commission's recommendations.").

182. *See* Frase, *supra* note 145, at 69 (stating the "overall structure and specific provisions of the existing Guidelines lack any clear underlying or principled basis"); *see also* Jefferson-Bullock, *supra* note 122, at 379 ("One of the seven Commissioners, in a dissent, charg[ed] that the guidelines were preceded by little or no empirical study."). The Guidelines are also criticized for their "status quo bias," meaning that the Guidelines are anchored in a psychological bias of the current practices of punishment at the time. *Id.* at 379-80. Any attempts to improve the current sentencing models also "neglect to employ hard, evidence-based research to support sentencing choices." *Id.* at 383.

183. *See* Frase, *supra* note 145, at 69 ("[F]ederal sentencing is no more coherent and principled today than it was before the Federal Sentencing Guidelines were adopted."); *see also* Bagaric, Fischer & Wolf, *supra* note 171, at 813; Garland, *supra* note 146, at 82. The moral philosophies of retributivism and utilitarianism "divert attention from the social or political significance of the institutions of penalty." Garland, *supra* note 146, at 85.

184. *See* Apt, *supra* note 138, at 463, 469. Apt presents "suitability" as a means to "ti[e] punishment to knowledge." *Id.* at 463. Suitability requires (1) that the criminal justice system "attend more consistently to society's common moral values" and (2) that the criminal justice system incorporate "current empirical knowledge" that demonstrates reparative effectiveness through developments in psychology and sociology. *Id.*

fit the crime—scholars contend that the punishment should first fit the criminal.[185] Criminal justice reforms advocate for evidence-based sentencing guidelines that will consider various factors regarding the individual criminal, not just the crime.[186] Such relevant factors include the criminal's mental state, low recidivism rate, and threat to public welfare, which suggests that appropriate sentencing requires more than uniformly punishing a committed wrong.[187] Evidence-based practices have escalated in popularity as more states have implemented a variety of evidence-based sentencing procedures.[188]

Evidence-based sentencing implicates multiple facets of society, which legal scholars contend the current guidelines desperately require.[189] Professor Garland asserts that current philosophical theories influencing sentencing guidelines exist within a single dimension—therefore failing to account for the complexities and nuances of modern punishment.[190] He proposes viewing punishment as intertwined within the web of social structures; instead of making punishments arbitrarily fit into abstract theories, punishments should be more interpretive of present societal

185. *See generally* Frase, *supra* note 145 (discussing how sentencing principles fail to recognize the difference between high-risk offenders and low-risk offenders who commit the same crime and how giving each the same punishment conflicts with the purpose of sentencing).

186. *See generally id.* (stating that the current sentencing guidelines focus on promoting uniformity and proportionality and do not consider individual offenders); *see also* Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 237 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014) (discussing how evidence-based sentencing encourages judges to consider various factors about the criminal, such as "socioeconomic status, gender, age, family, and neighborhood characteristics," to help predict recidivism rates).

187. *See* Frase, *supra* note 145, at 68 ("[I]f two first-time offenders commit the same crime but one has genuine feelings of remorse, strong family ties, and other indications of amenability to supervision and low risk of reoffending, putting that offender on probation and sending his much riskier counterpart to prison saves scare correctional resources while still promoting public safety.").

188. *See* Starr, *supra* note 186, at 804-05 (discussing that a "growing number of U.S. jurisdictions are adopting policies that deliberately encourage judges" to consider various factors about the criminal).

189. *See* Apt, *supra* note 138, at 463; *see also* Bargaric, Fischer & Wolf, *supra* note 171, at 786; Jefferson-Bullock, *supra* note 122, at 395-97 (discussing the deficiencies in the current guidelines).

190. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 9 (1990) (stating that "philosophies of punishment, at least in their traditional form, are based upon a rather idealized and one-dimensional image of punishment").

infrastructures.[191] Punishment is viewed as a product of sociological forces merged together from "forms of knowledge, legal, moral, and cultural categories"—extending it far beyond just legal theory and penology.[192] Therefore, sentencing procedures must provide for a multitude of perspectives in different areas of research and studies in order to ensure fairness.[193]

Under a sociological approach, the source of authority for modern penal practices becomes associated with more than behaviors society deems fit for punishment—which also heavily influence theoretical sentencing.[194] As Garland further claims, cultural phenomena—the manner in which we "render [the world] orderly and meaningful"—significantly contributes to the methodology of punishment.[195] People often determine punishable behaviors based on their distinct value systems—tending to only condone harsh punishment when it coincides with what people deem truly "deserving" of the perpetrator.[196] Suitability and social

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191. *See id.* at 10. Garland further notes that:

> What is needed now, in the sociology of punishment, is an analytical account of the cultural forces which influence punishment, and, in particular, an account of the patterns imposed upon punishment by the character of contemporary sensibilities. Such an account must acknowledge the reality and determinative capacity of feelings, sensibilities, behavioral proprieties, and cultural values, in order to trace their influence upon the organization of punishment.

Id. at 197.

192. *Id.* at 21. Garland states that punishment is grounded in much more than mere legal theory; it survives on "social roots and . . . wider forms of life and their history [through which] we can begin to understand the informal logic that underpins penal practice." *Id.*

193. *See id.* at 11-12 ("[T]he sociology of punishment is presently constituted by a diverse variety of 'perspectives', each of which tends to develop its researches in virtual disregard of other ways of proceeding. In effect, the sociology of punishment is reinvented with each subsequent study.").

194. *See id.* at 195.

195. *Id.* ("[S]ensibilities and mentalities have major implications for the ways in which we punish offenders. These cultural patterns structure the ways in which we think about criminals.").

196. *See* SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 26-27 (Margit E. Oswald, Steffen Bieneck & Jörg Hupfeld-Heinemann eds., 2009) [hereinafter SOCIAL PSYCHOLOGY]; *see also* Apt, *supra* note 138, at 468 ("A society may have a strong consensus about what acts should be designated as crimes. Its members may generally agree about what acts are morally and legally permissible to prevent or combat imminent crimes. . . . The conflict of values and the consequent recommended actions becomes more ambiguous and difficult to resolve where the response is not so much rectification as reprobation."). SOCIAL PSYCHOLOGY OF

institutions of punishment reject using sentencing guidelines mainly to further retributivist and utilitarian agendas and assert rehabilitation as more than just a consideration, but as a primary form of sentencing.[197] The Supreme Court bolstered this assertion in the recent case of *Graham v. Florida*, in which the Court pronounced rehabilitation as a necessary penological goal.[198] Therefore, emerging scientific research from psychiatry, social psychology, genetics, pharmacology, and behavioral neuroscience can be used to create an innovative model of evidence-based guidance in sentencing, which would encompass more than the mere theoretical purposes of punishment.[199]

B. The Revival of the Rehabilitation Model: New Practices, Criticisms, and Abuse Victims

For decades, scholars assumed that the theory of rehabilitation had been cast into the shadows of the more-prevailing theories of retributivism and utilitarianism.[200] Recently, however, rehabilitation has received a breath of revival as a fair and viable sentencing

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PUNISHMENT OF CRIME discusses that society's compliance and acceptance of the law is largely based on how the law relates to larger moral value systems. SOCIAL PSYCHOLOGY, *supra* note 196, at 28. If the law corresponds to people's values, that in itself entices people to amend their behavior to the law. *Id.*

197. *See* Apt, *supra* note 138, at 463 ("[T]he principle of suitability inclines toward rehabilitation and related reparative theories.").

198. *See* Graham v. Florida, 560 U.S. 48, 48, 50 (2010) (holding that the Eighth Amendment prohibits sentencing a juvenile to life without parole for a nonhomicidal crime—"[a] State is not required to guarantee eventual freedom to such an offender, but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation").

199. *See* Nancy Gertner, *Neuroscience and Sentencing*, 85 FORDHAM L. REV. 533, 541 (2016); *see also* Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 551 (2015) (discussing how evidence-based correctional systems are on the rise and are considered a favorable method in the justice system). The current Guidelines have no rational basis; therefore, the system calls for sentencing by "more than [an] application of a formula." Gertner, *supra* note 199, at 541. It requires "evidence-based guidance from neuroscience, social psychology, and psychiatry." *Id.* Klingele defines evidence-based correction techniques as "practices includ[ing] the use of actuarial risk and need assessment instruments, motivational interviewing and counseling techniques, deterrence-based sanction programs, and incentives to probationers and parolees for successful compliance with court orders." Klingele, *supra* note 199, at 538-39.

200. *See* Nygaard, *supra* note 128, at 362 ("Today, rehabilitation is dead.").

procedure within the criminal justice system.[201] Although rehabilitation was a popular theory in the early twentieth century by which the Progressive Era shaped its modern form,[202] rehabilitative practices had lost their glamour by the 1960s and increasingly through the 1980s, when public officials implemented the "crack down on crime" frenzy—catalyzing the storming resurgence of retributivist theory.[203] But through developing areas of science,[204] rehabilitation is once more stationed at the frontline of criminal justice reform—discrediting the old "nothing works" mantra.[205] In undergoing its own reform, rehabilitation has shifted its focus away from treating criminals as those "mentally diseased" in need of a cure to considering the social, psychological, and behavioral channels that lead to criminal behavior and eliminating those factors to restore the criminal back to society.[206] These reformed strategies

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201. *See* Fondacaro et al., *supra* note 135, at 698. This renaissance of rehabilitation is based on the emerging "evidence-based intervention strategies that draw on social ecological theories of human behavior to not only understand the social, psychological, and biological drivers of crime, but to identify intervention strategies that are effective in preventing crime and reducing recidivism." *Id.*

202. *See id.* at 701. The Progressive Era gave birth to modern rehabilitation as it is understood today through the development of psychology. *Id.* This period focused on "indeterminate sentencing, parole, and probation." *Id.*; *see also* Ryan, *supra* note 132, at 274 ("It was during this period that the public's faith in scientific and psychiatric advances such as psychoanalysis grew.").

203. *See* Fondacaro et al., *supra* note 135, at 703. The 1980s in particular signaled the move away from rehabilitation because drug and violent crimes were on the rise. *Id.*

204. *See* Ryan, supra note 132, at 265 ("Recent scientific advances in the fields of pharmacology, genetics, and neuroscience—and the media's communication of these advances to the public at large—have paved the way for public acceptance of rehabilitative ideals.").

205. *See* Fondacaro et al., *supra* note 135, at 698, 703 ("Robert Martinson's evaluation of numerous rehabilitation programs was perceived to have demonstrated that 'nothing works' to reduce recidivism."); *see also* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INT. 22, 27-28 (1974) (stating that rehabilitation had not shown any progress in reducing recidivism rates amongst offenders); Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?* WASH. POST (Mar. 16, 1989), https://www.washingtonpost.com/archive/opinions/1989/04/23/criminology/3e8fb430-9195-4f07-b7e2-c97a970c96fe/?utm_term=.256c5db25fb4 [https://perma.cc/N4DE-PPQP]. The "nothing works" mantra was coined in response to the skepticism of rehabilitation and its ability to reform offenders. *Id.*

206. *See* Fondacaro et al., *supra* note 135, at 726; *see also* Apt, *supra* note 138, at 458-59; Gertner, *supra* note 199, at 544-45 ("The 'new rehabilitation'—now informed by neuroscience and evidence-based science—offers the possibility of yet another shift in American sentencing away from retribution toward an approach more finely tailored to the individual, his needs, and his future."); Nygaard, *supra*

have shifted rehabilitation's focus away from treating the "entire offender" to changing the offender's behaviors.[207]

1. *Resurgence of Rehabilitative Practices: The New Rehabilitation Model*

In its most basic form, rehabilitation sought to "resocialize" criminal offenders by providing treatment for their internal demons—typically manifested as deeply rooted psychological ailments leading to the commission of crime.[208] For the old rehabilitation model, successful treatment meant returning the offender back to society with a low recidivism rate and a greater appreciation for societal values.[209] Older rehabilitation models often achieved these ends through methods of religious education or counseling.[210] However, notions of curing criminals of their "mental illnesses" through methods of questionable success rates subjected rehabilitation theory to scathing skepticism of its effectiveness.[211] As crime rates rose in the 1980s, more scholars doubted the efficacy of the rehabilitation model.[212] Newer models are less susceptible to this

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note 128, at 362. New psychological and behavioral evidence is transforming the rehabilitative process to offer a clearer understanding of the criminal and further aids effective intervention programs. Fondacaro et al., *supra* note 135, at 699. Nygaard discusses rehabilitation as a means to "change" the criminal's behavior. Nygaard, *supra* note 128, at 362. He states part of demise of rehabilitation was this "flawed premise" that such practices could change the criminal into a productive member of society, but he recognizes change must come from the criminal's internal desire to want rehabilitation. *Id.*

207. *See* Ryan, *supra* note 132, at 266.

208. *See* Apt, *supra* note 138, at 458-59. Apt reminds his readers that although rehabilitation concentrates on psychological ailments, it also recognizes the psychology of the criminal is not the sole problem. *See id.* He states, "Ideally, rehabilitation should include efforts to ameliorate the social circumstances, such as deleterious family relations or child abuse, poverty and unemployment, inadequate education, or a local culture that encourages certain crimes." *Id.* at 459.

209. *See* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991) (stating that critics challenged rehabilitation's assumption that "criminals were sick and in need of treatment").

210. *See* Ryan, *supra* note 132, at 266.

211. *See* Apt, supra note 138, at 461 n.72. Common criticisms of rehabilitation found that the theory disregards the "wrongfulness of the crime" by placing attention on the criminal's needs and psychiatric care. *Id.* However, Apt states this criticism is misplaced as rehabilitation is still considered punishment through restraining the liberty of the criminal. *See id.* Fairness is assessed by considering "what is appropriate and effective for the individual subject." *Id.*

212. *See* Martinson, *supra* note 205, at 25 (asserting that rehabilitation does not work well as a system); Ryan, *supra* note 132, at 280.

criticism since rapid developments in technology have redirected rehabilitative approaches by reaching out to more criminals who would likely benefit from the programs.[213]

a. Rehabilitation and the Brave New World of Modern Science

Since rehabilitation has successfully parted from using methods of moral transformation to reform offender behavior, it has redeemed its credibility.[214] As of now, science serves as the leading mechanism propelling rehabilitation back into the criminal justice system and away from the pseudo-science realm.[215] Current rehabilitative programs rely on progressive bodies of research, conducted by behavioral experts and developmental psychologists, to explain how cranial features such as neuroplasticity—the brain's ability to change throughout an entire lifespan—alters the approach of modern rehabilitative practices.[216] Understanding the neurological nuances of the brain's function will not only lead to better treatment for criminals, but also "lead to better prediction of recidivism, a rational basis of sentencing, and customized rehabilitation."[217]

Neuroscience evidence suggests that new treatments may soon be available to alleviate criminal behavior.[218] In determining appropriate treatments, neuroscience technology may use functional

213. *See* Fondacaro et al., *supra* note 135, at 697-98.

214. *See* Gertner *supra* note 199, at 544 (stating that the difficulty is avoiding "the perils of the 'old rehabilitation' and its overreliance on faith").

215. *See* Ryan, *supra* note 132, at 305 ("But this return to rehabilitation has an even more important fount: it derives from recent scientific advances.").

216. *See* Fondacaro et al., *supra* note 135, at 721-22 ("Lifespan development theory is supported by research showing that identity relevant conflicts can spur psychosocial growth as individuals enter different life stages; environment changes can lead to adaptive responses throughout adulthood; and training can induce changes in the adult brain."); *see also* Ryan, *supra* note 132, at 264-66.

217. *See* David M. Eagleman, *Neuroscience and the Law*, 45 HOUS. LAW. 36, 37 (2008).

218. *See* Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KAN. L. REV. 1103, 1105-06 (2008) (asserting that an increased understanding of how the brain functions may be used to find "new ways to intervene in human behavior—to change minds by directly changing brains"); *see also* Regina Nuzzo, *Brain Scans Predict Which Criminals Are More Likely to Reoffend: Neuroimaging "Biomarker" Linked to Rearrest After Incarceration*, NATURE (Mar. 25, 2013), http://www.nature.com/news/brain-scans-predict-which-criminals-are-more- likely-to-reoffend-1.12672 [https://perma.cc/72MA-44JF].

magnetic resonance imagining (fMRI) screenings to decipher intricacies in brain function that would help discern the habits and patterns of criminal offenders.[219] The possibility of using brain scans to determine criminal culpability may be closer to reality than science fiction.[220] As one study by Joshua Buckholtz suggests, brain scans can reveal the neural activity involved in both the moral and legal decision-making processes.[221] Moreover, neuroscience technology allows researchers to develop successful therapeutic programs that will help offenders change their behavior by engaging in therapies that would improve social and relationship skills, particularly through practices such as mindfulness or cognitive remediation.[222] However, neuroscience is not the only option; other alternative methods such as "neurosurgery, deep brain stimulation, drugs, and vaccines" are just a few approaches that science can use to prompt medical intervention of criminal behavior.[223]

The pharmaceutical industry's advancements in drug production and mass marketing schemes have made this method of treatment one of the most accessible for the new rehabilitation model.[224] The continuous release of new drugs has contributed to staggering developments in treating substance addictions such as alcoholism or heroin abuse.[225] The pharmaceutical industry's

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219. *See* Nuzzo, *supra* note 218 (discussing how brain scans may indicate the likelihood of whether offenders will commit crimes again by assessing whether there is low or high activity in the region of the brain associated with decision making).

220. *See* Joshua Buckholtz et al., *The Neural Correlates of Third-Party Punishment*, 60 NEURON 930, 930-32 (2008) (discussing a neurological study assessing the brain's reaction when making culpability decisions).

221. *See id.* at 935 (discussing the results of the study pertinent to the brain regions affecting legal and moral reasoning).

222. *See* Fondacaro et al., *supra* note 135, at 724 (stating that the neuroscience-based method is "more effective than control oriented programs that emphasize discipline, surveillance, and intense supervision"); *see also* Arielle R. Baskin-Sommers & Karelle Fonteneau, *Correctional Change Through Neuroscience*, 85 FORDHAM L. REV. 423, 433 (2016) (discussing mindfulness as a verifiable treatment possibility influenced by neuroscience).

223. *See* Greely, *supra* note 218, at 1106. Greely states the progress of such methods may be speculative at best but are "guesses with some basis in science." *Id.* Current uses of pharmaceutical treatment haven proven to reduce aspects of criminal behavior through drugs for alcoholics and chemical castration for sex offenders. *See id.*

224. *See* Ryan, *supra* note 132, at 307.

225. *See id.* at 308 (discussing various drugs such as methadone and buprenorphine used to treat substance abuse); *see also* Greely, *supra* note 218, at

approach to mass marketing drugs through commercial advertisements has normalized this type of treatment method.[226] Although not fully realized in practice, new drugs could also be used to help control criminal behavior; for example, antidepressants may be used to combat violent tendencies.[227] But regardless of the various benefits offered by new drugs and other rehabilitative technologies,[228] this method remains vulnerable to abuse.[229]

b. Criticisms of the New Rehabilitation Model

To modify a popular saying, with new treatment comes great responsibility.[230] As science develops and rehabilitation implements various new methods of treatment, critics are wary of taking rehabilitation too far.[231] For instance, there is no regulatory framework that covers all the possibilities of rehabilitative treatment and procedures, specifically for invasive brain treatments.[232] Testing invasive treatments, such a psychosurgery, is not only difficult to regulate, but also difficult to accomplish according to ethical and

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1106 (stating that pharmaceutical treatments have been most successful with sex offenders and drug addicts).

226. *See* Ryan, *supra* note 132, at 311 ("The combination of this increased direct-to-consumer marketing of pharmaceuticals . . . has created a culture in which average consumers may believe that nearly all of their ills are treatable by pharmaceuticals.").

227. *See* Greely, *supra* note 218, at 1110.

228. *See* Fondacaro et al., *supra* note 135, at 723 (discussing various other recently researched rehabilitation treatments, including: "Aggression Replacement Therapy (ART), Cognitive Behavioral Therapy (CBT), [and] Milieu therapy"); *see also* Eagleman, *supra* note 217, at 37-39 (discussing the role of neuroscience and technology in developing new treatment); *see generally* Greely, *supra* note 218 (discussing throughout the article various methods of neuroscience treatments and their criticisms).

229. *See* Greely, *supra* note 218, at 1110 (cautioning that using drugs as treatment may lead to problems with "mandatory drug program[s] on non-institutionalized persons," which could further lead to forced injections or other invasive techniques).

230. This quotation was originally stated by Ben Parker in the movie Spider Man; he stated, "With great power comes great responsibility." SPIDER MAN (Columbia Pictures 2002).

231. *See* Greely, *supra* note 218, at 1121 (asserting that it is not entirely clear which neuroscience methods are "safe and effective for controlling criminal behavior").

232. *See id.* (asserting that although neuroscience treatment methods may be effective, there will likely be issues with ethical testing, even more so when dealing with human brains).

socially practical standards.[233] Further, new drug treatments can be effective, but approval for new drugs by the Food and Drug Administration (FDA) can take upward of ten years and millions of dollars in cost, thereby hindering rehabilitative processes.[234] One scholar also argues that "neorehabilitation" methods are so costly because they only acquire the best results by keeping offenders in the program longer.[235]

The new rehabilitation model also raises several problems at the sentencing level.[236] For instance, proper assessment of eligibility for rehabilitation sentencing poses familiar difficulties, particularly in the area of criminal risk assessment.[237] One critic expresses her concern that rehabilitative sentencing under the newer model not only rehabilitates the wrong offenders, but causes distortion of justice and creates constitutional conflicts.[238] To bolster her opinion, some studies suggest that rehabilitation methods would comprehensively benefit high-risk offenders,[239] but the current system focuses solely on low-risk offenders. Moreover, this preference of low-risk offenders would risk increasing harsh

233. *See id.* Greely discusses the difficulty in proving certain methods of "neuroscience interventions" as safe and effective modes of treatment. *Id.* In new drug cases there are various limitations on testing; for instance, it is particularly difficult finding volunteers for clinical trials. *See id.*

234. *See id.* (discussing various problems with regulating new rehabilitative treatments).

235. *See* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 212 (2013).

236. *See* Gertner, *supra* note 199, at 545 (stating that assessing criminals' eligibility for rehabilitative sentencing is still very complicated under the new rehabilitation model).

237. *See id.* ("[R]isk-assessment instruments, which enable a more informed choice about which offenders will recidivate than the judges 'back of the envelope' intuition, may well be skewed by inappropriate generalizations based on race or gender.").

238. *See* Eaglin, *supra* note 235, at 211, 218 (discussing how, statistically, high-risk offenders would benefit the most from rehabilitative treatment, though the system focuses on low-risk offenders, and commenting on how such treatment will "potentially increase[] punishment for those offenders viewed as undeserving of rehabilitation because they are not low-level offenders").

239. *See* Craig Dowden & D.A. Andrews, *Effective Correctional Treatment and Violent Reoffending: A Meta-Analysis*, 42 CANADIAN J. CRIMINOLOGY 449, 460 (2000); *see also* Christopher T. Lowenkamp, Edward J. Latessa & Alexander M. Holsinger, *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?*, 52 CRIME & DELINQ. 77, 88 (2006).

sentencing for those offenders deemed incapable of rehabilitation.[240] However, regardless of the new rehabilitative model's limitations and concerns, its ability to help offenders of low recidivism, minimal risk, or diminished culpability is indispensable.[241]

2. *Abuse Victims, Neuroscience, and Diminished Culpability*

Determining how the brain responds to prolonged abuse is essential in assessing criminal culpability.[242] Empirical studies illustrate a statistical correlation between victimization and violent offending.[243] The violent tendencies are often a result of the severe psychological abuse upon the abuse victim.[244] Physical battering can leave noticeable injuries such as concussions, but it can also leave traces of abuse that cannot be seen or detected.[245] These injuries are called physiological injuries.[246] As a result of these injuries, the abuse victim often chooses to subject herself to the abuse regardless of the availability of professional intervention.[247] The theory of BWS

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240. *See* Eaglin, *supra* note 235, at 219; *see also Clemency for Battered Women,* CRIM. JUST. RES., http://criminal-justice.iresearchnet.com/crime/domestic-violence/clemency-for-battered-women/ [https://perma.cc/NBW5-3P9P] (last visited May 7, 2018) (stating that statistically abuse victims have a recidivism rate of 23%).

241. *See supra* Subsection II.B.1.a (discussing the benefits of the new rehabilitation model).

242. *See* Jozsef Meszaros, *Achieving Peace of Mind: The Benefits of Neurobiological Evidence for Battered Women Defendants*, 23 YALE J.L. & FEMINISM 117, 146-47 ("[T]here are physiological effects of battering, which may result from any of the conditions imposed by the battering dynamic: sexual abuse, captivity, threats of harm, abuse of children and pets.").

243. *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, 17 (2014).

244. *See* Kendall Hamilton, Comment, *Virginia's Gap Between Punishment and Culpability: Re-Examining Self-Defense Law and Battered Woman's Syndrome*, 49 U. RICH. L. REV. 327, 329-30 (2014).

245. *See* Meszaros, *supra* note 242, at 153 (discussing how physical battering typically leaves traces of abuse that can be readily seen but other effects of abuse come in the form of an undetectable psychological trauma).

246. *See id.* ("Physiology, by definition[,] entails dynamism that could not be captured in a single image or scan.").

247. *See* Krause, *supra* note 41, at 557-58. There are several "key elements of a syndrome that help[] to explain how a woman might become trapped in an abusive relationship, and why killing her abuser might seem a reasonable course of action . . . (1) a 'tension-building' . . . (2) the 'acute battering incident;' and (3) 'loving contrition or absence of tension.'" *Id.* at 558. This cycle explains learned helplessness, "of which 'it becomes extraordinarily difficult for such women to change their cognitive set to believe their competent actions can change their life

designates this psychological phenomena as a type of "learned helplessness" established by a three-phase cycle in the abusive relationship.[248] The cycle of abuse often creates a perception that imminent harm is continually present.[249]

Neuroscience bolsters the credibility of BWS and provides a scientific explanation for this psychological phenomenon by explaining how cyclical battering "implicate[s] the brain's ability to regulate behavior and cognitions."[250] According to one scholar, when a woman is in an abusive relationship the stress of the physical abuse accumulates, not only making the stress unmanageable, but also affecting the parts of the brain in control of reason and decision-making.[251] Further development and understanding of these neurological processes can shift the narrative of an abuse victim's mere psychological delusion or syndrome into a trauma deserving of treatment.[252]

In sum, the emerging trend toward evidence-based sentencing signals a scientific revolution within the criminal justice system.[253] More states are implementing evidence-based practices—indicating the need to amend current sentencing guidelines to reflect punishment as a societal institution, not punishment as an instrument

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situation.'" *Id.* (quoting Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 531-32 (1978)).

248. *See* Hamilton, *supra* note 244, at 330-31; *see also* Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 219 (1995). Turk defines Battered Woman Syndrome as "[a] constellation of common characteristics which are manifested by women who have been abused physically and psychologically over a prolonged period of time by the dominant male in their lives." Turk, *supra* note 19, at 907 (quoting Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL'Y 349, 364 (1994)).

249. *See* Turk, *supra* note 19, at 908.

250. *See* Meszaros, *supra* note 242, at 154 (discussing the severe psychological effects of battering).

251. *See id.* ("Within a battering relationship, the unpredictability and escalation of abuse places a tremendous allostatic load on the battered woman. At certain levels of allostatic load, the mechanism by which individuals respond to the next stressful event becomes dysregulated . . . The detrimental effects of stress are magnified when the individual feels unable to control the stressor—in this case, the batterer.").

252. *See id.* at 175-76 (discussing how the courts would interpret neuroscience apart from the concept of BWS).

253. *See* Klingele, *supra* note 199, at 538-39 (discussing the surge in evidence-based correctional techniques and its effect on the criminal justice system).

of philosophy.[254] Evidence-based practices have carved a pathway for the resurgence of rehabilitative sentencing, and as more people put their faith into scientific advances in technology, rehabilitation will thrive as an acceptable alternative to harsh punitive sentencing.[255]

III. ASSESSING THE PROBLEM: ABUSE VICTIMS AND THE NEW REHABILITATION MODEL

Given the obstacles abuse victims face within the justice system, there is no guarantee that they will escape the judge's gavel unscathed.[256] Some self-defense cases may be successful, but on average most abuse victims can face up to fifteen to twenty years in prison on manslaughter or murder charges.[257] At best a nonconfrontational homicide provides the abuse victim with imperfect self-defense, which may lessen the murder charge to manslaughter but ultimately fails to acquit the abuse victim.[258] As a means of restoring uniformity within the system, rehabilitative practices would provide an outlet for all offending abuse victims to receive the proper treatment.[259] Incorporating more rehabilitative practices into sentencing would balance both the interests of the state and the victim, as it would require a specific level of detainment and also contribute to the healing and well-being of the abuse victim.[260] Understanding the new rehabilitation model as a larger player in sentencing reform for abuse victims requires assessing the failures of the criminal justice system to protect abuse victims,[261] the

254. *See id.* at 539 ("These new . . . practices have been promulgated at every level of government through both grassroots efforts and organized coalitions of established nonprofits seeking systemic criminal justice reform.").

255. *See supra* notes 199, 215 and accompanying text (discussing how evidence-based practices have influenced the revival of rehabilitative sentencing).

256. *See supra* Part I (analyzing the inadequacy of self-defense and admissibility of past abuse).

257. *See* Smith, *supra* note 20, at 169 (discussing the average sentence for abuse victims).

258. *See supra* Section I.A (asserting that an immediate belief of bodily harm or death has been traditionally insufficient).

259. *See supra* Part II (discussing the need to amend current sentencing guidelines).

260. *See supra* Part II (discussing the pros and cons of the rehabilitative model).

261. *See supra* Section I.B (contending that the trial system has often failed abuse victims).

inadequacies of current sentencing guidelines,[262] and how new rehabilitation practices would best serve abuse victims and provide them justice.[263]

A. Understanding How Self-Defense and the Trial System Fail as a Purveyor of Justice

Although the law is a central facet of society, it does not always deliver a just result. Assessing the interests of both the victim and the state is a necessary balancing act, but one the system fails to provide.[264] A striking example of this concept is the inability of the trial system to adequately protect abuse victims.[265] Seeking justice for the defendant becomes a Herculean task for a defense attorney as he or she fights to prove the defendant's actions were justified by previous long-term abuse.[266] Numerous cases have established that the fight for justice has improved but that offending abuse victims still face significant legal hurdles.[267] Unfortunately, many of these cases end with the offending abuse victim serving a minimum prison sentence, in part because of issues with claiming imperfect or perfect self-defense.[268]

In claiming perfect or imperfect self-defense, the issue of whether expert testimony of BWS will mitigate or acquit the offending abuse victim of the murder charge, or have no impact at all in the case, remains a continuous obstacle.[269] Both *McNeil* and *Wallace-Bey* demonstrate some of the current difficulties of

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262. *See supra* Subsection II.A.1 (arguing that there is a lack a reflection of the individual criminal and the requisite knowledge of social values).

263. *See supra* Section II.B (proclaiming that new treatments may be available to alleviate criminal behavior).

264. *See infra* Part III (discussing how rehabilitation meets the desired need to balance the interests of both the abuse victim and the state by keeping the defendant confined, but also providing the necessary treatment to return the victim back into society).

265. *See* Kinports, *supra* note 41, at 409 ("In such [nonconfrontational] circumstances, juries convict many battered women of murder or manslaughter despite claims of self-defense.").

266. *See* Burke, *supra* note 44, at 240-47 (explaining the difficulty in making BWS fit neatly into a self-defense claim by stating that it is "imperfect at best").

267. *See* McNeil v. Middleton, 402 F.3d 920, 921-22 (9th Cir. 2005).

268. *See Comparative Study*, *supra* note 19, at 1.

269. *See McNeil*, 402 F.3d at 923 (Paez, J., dissenting). The dissenting judge illustrates how the system struggles to properly instruct juries on how to apply BWS evidence to perfect or imperfect self-defense. *See id.* He writes that this impacts the defendant's right to due process. *See id.*

presenting a successful imperfect or perfect self-defense claim.[270] In *McNeil*, the improper jury instructions conveyed how courts may err in articulating how juries are to apply BWS testimony to imperfect or perfect self-defense.[271] These instructions are often legally complex and can prejudicially impact the defendant when delivered improperly.[272] Although the Supreme Court found this error was not so prejudicial as to disrupt due process, the Ninth Circuit judges did not unanimously agree with the Court's holding, further exposing the system's flaws.[273]

In a similar vein, *Wallace-Bey* demonstrates that BWS evidence may be insufficient to mitigate a murder charge.[274] The defendant was convicted *twice* of second-degree murder.[275] Moreover, the fact that the defendant is now facing a third trial expressly portrays the inexcusable pitfalls of the trial system.[276] The defendant was limited in her presentation of the BWS evidence; therefore, she was limited in effectively presenting her defense.[277] However, these two cases establish merely one aspect of how the trial system fails abuse victims who kill their abusers.

Although the law of self-defense has increasingly incorporated mitigating evidence of abuse syndromes, the system remains an imperfect means of protecting abuse victims from incarceration.[278] The lack of uniformity among states means that outcomes for abuse victims vary depending on the state in which the nonconfrontational homicide occurs.[279] This also concerns whether the state requires an objective belief of imminent harm versus an MPC jurisdiction that focuses on the subjectivity of the person claiming self-defense.[280]

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270. *See id.* at 921-22; *see also* Wallace-Bey v. State, 172 A.3d 1006, 1032 (Md. Ct. Spec. App. 2017).

271. Middleton v. McNeil, 541 U.S. 433, 435, 437 (2004) (per curium) (stating that the last four words of the jury instruction, *as a reasonable person*, should not have been included in the jury instruction but was unlikely to have misled the jury).

272. *See McNeil*, 402 F.3d at 922 (majority opinion).

273. *See id.* at 923 (Paez, J., dissenting).

274. *See Wallace-Bey*, 172 A.3d at 1011-12.

275. *Id.* at 1011.

276. *See id.* at 1041.

277. *Id.* at 1019-20.

278. *See supra* Subsection I.A.2.; *see also* Subsection I.B.2.

279. *See supra* Section I.A.

280. *See* Kinports, *supra* note 41, at 409-10 (stating that majority jurisdictions require both a "subjective and an objective component, mandating that the defendant's fear be both honest and reasonable"); *see also* MODEL PENAL CODE § 3.04(1) ("[T]he use of force upon or toward another person is justifiable when the

These inconsistencies of the system demonstrate that self-defense law alone is an insufficient means of protecting abuse victims from prison bars.[281]

In moving against the current trend of amending self-defense to account for abuse victims, the most persuasive argument for maintaining the current legal status quo is the possible effect on self-defense law if nonconfrontational homicides are consistently justified.[282] Critics such as Professor Joshua Dressler maintain that current self-defense laws should not modify their elements to harbor syndromes of abuse, reasoning these syndromes are difficult to prove conclusively and would effectively eradicate the imminence requirement.[283] Dressler denounces the current trend to readily absolve those who kill under nonconfrontational circumstances merely because their past experiences of abuse signal the existence of a possible syndrome.[284] He rejects the concept that syndromes diminish the culpability of the defendant committing the nonconfrontational homicide.[285]

Professor Dressler's position may present the minority view among legal scholarship,[286] but courts have refused self-defense

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actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

281. *See supra* Section I.A (discussing the failure of self-defense to effectively serve justice for abuse victims).

282. *See* Dressler, *supra* note 43, at 462-63. Dressler views BWS as a flawed syndrome that transforms self-defense into an excuse, not a justification. *Id.* at 463. He further argues that like an excuse, BWS focuses on the "actor's state of mind, and not [] the act itself." *Id.* Dressler states that assessing the reasonableness of the actor from the perspective of one suffering from a syndrome is illogical. *Id.* at 464.

283. *See id.* at 467 ("The traditional requirement of imminency—a temporal requirement, a relative closeness in time between the aggressor's unlawful threat and the innocent person's defensive efforts to repel it—serves an important, life-affirming, purpose. To suggest that a battered woman should be able to kill *today* because sooner or later the batterer will inevitably kill her strikes me as unacceptable.").

284. *See id.* at 464 ("In short, if BWS is permitted to support self-defense, the bad-old-days of the she-is-crazy burning-bed approach to battered women are back, albeit now disguised in more elegant justification clothing.").

285. *See id.* at 468 ("I contend that we should not justify the Judy Normans who kill their tormenters in passive circumstances. To do so unduly expands the lawful use of deadly force to a point dangerous to the community and debilitating to our belief in the general sanctity of human life.").

286. Some scholars disagree with Dressler's understanding of abuse victims who kill. In fact, one has gone so far as to directly address an entire article to his

claims in cases of nonconfrontational homicide in the past.[287] Other scholars have also voiced their skepticisms of acquitting abuse victims who commit homicide in nonconfrontational settings.[288] A common criticism of allowing women to successfully claim self-defense in these types of cases is the possibility that such behavior promotes a social consensus that killing a "bad" person is legally permissible and that self-help techniques are socially commendable.[289] Critics reason that broadening self-defense to include abuse syndrome evidence may encourage such self-help techniques.[290] It is broadly accepted that the law protects those who kill in self-defense, but critics assert that killing should not be the primary means of self-defense if other alternatives are available.[291] Even though abuse victims are resorting to self-help under extraordinary circumstances, such methods weaken the authority of the law and normalize societal violence.[292] Many legal scholars would find this view flawed,[293] but the current system only bends the law so far.[294] With such powerful criticisms influencing the courts,

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arguments. *See generally* Krause, *supra* note 41 (asserting that Professor Dressler has a skewed view of abuse victims who kill their abusers).

287. *See, e.g.*, State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989); State v. Stewart, 763 P.2d 572, 577 (Kan. 1988).

288. *See* Rosen, *supra* note 37, at 50-52 ("A victim of battered woman syndrome, however, may be mistaken as to the true nature of her spouse's threats on a particular occasion. Even if the mistake is reasonable or if there is no mistake, the difficulty with the calculus remains."); *see also* Coughlin, *supra* note 51, at 90 (stating the modifying self-defense "construes women as only partially (innately inadequate) responsible agents").

289. *See* Dressler, *supra* note 43, at 466 ("[A] core feature of self-defense law is that *the life of every person, even that of an aggressor, should not be terminated if there is a less extreme way to resolve the problem*.").

290. *See* Rosen, *supra* note 37, at 53 ("Relaxation of any of these strict, narrow requirements raises the spectre of justifying, and thus encouraging, self-help—conduct that the law and society prefer to discourage.").

291. *See* Rosen, *supra* note 37, at 53 (stating that the defense should be proportional and killing should only be used in circumstances with no feasible alternative); *see also* Dressler, *supra* note 43, at 466.

292. *See* Rosen, *supra* note 37, at 52 (stating that "self-help tends to diminish respect for the rule of law").

293. *See* Krause, *supra* note 41, at 563 ("There is ample literature suggesting that a battered woman may in fact be accurate in predicting the imminent threat of such harm from a sleeping abuser."); *see also* Kinports, *supra* note 41, at 395-96 (asserting that self-defense laws do not need to be modified at all and battered women can successfully claim them).

294. *See* Dressler, *supra* note 43, at 464 (asserting that the elements of self-defense cannot bend to support a battered woman's claim; instead, the "BWS evidence essentially converts the battered woman's claim from the justification of

abuse victims require a different avenue of sentencing to avoid the issues in conviction.[295]

B. Inadequate Sentencing: Moving Away from Retributivism and Utilitarianism

Formulating the correct legal approach for abuse victims who kill their abusers requires parsing the nuances and complexities of why society imposes certain punishments and subsequently reforming sentencing guidelines to properly achieve this goal.[296] Therefore, the question to ask is not whether the punishment fits the crime, but whether the punishment fits the criminal.[297] In applying this question to abuse victims who kill their abusers, the law under principles of deterrence and retributivism determine that the offending abuse victim receives fifteen-plus-years' incarceration because that is the punishment rightfully deserved.[298] But because an abuse victim's sense of rationality is deeply impaired from years of psychological diminution and physical battering, extreme emotional and cognitive trauma upon the abuse victim logically separates her from the class of criminals "deserving" harsh punishment.[299] Abuse victims do not fit neatly into the theories of retributivism and utilitarianism because their circumstances transcend these dominant theories of punishment as they are not the type of criminal society needs to punish; they are simply not a social threat.[300]

Because the theories of retributivism and utilitarianism heavily influence the sentencing guidelines of the American criminal justice

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self-defense to a mental incapacity defense, such as insanity or diminished capacity").

295. *See infra* Section III.C (discussing how the new rehabilitation model will solve the issues of disparity in sentencing and the pitfalls of abuse syndromes).

296. *See supra* Section II.A.

297. *See* Apt, *supra* note 138, at 468.

298. *See Clemency Project*, *supra* note 20, at 3 (stating that on average women who kill their "intimates" receive a fifteen-year sentence); *see also* Smith, *supra* note 20, at 169 (stating that children who kill their parents may serve fifteen- to twenty-year sentences).

299. *See* Meszaros, *supra* note 242, at 154 (discussing the physical and physiological effects of battering).

300. The theories of retribution and utilitarianism focus on bringing the defendant his just deserts or making an example of the defendant so that it creates future deterrence of the crime in society. Conversely, abuse victims who kill their abusers act with an element of justifiable need that defies these purposes of punishment. *See infra* Part III.

system,[301] they often leave abuse victims suffering through punishments neither deserved nor effective as social deterrents.[302] Since the Sentencing Reform Act of 1984, many courts have used sentencing guidelines for these purposes—resulting in higher incarceration rates and harsher sentencing.[303] By breaking down the flaws of these theories, the trend toward evidence-based corrections is increasingly justifiable.[304]

1. *Problems with Retributivism and Utilitarianism*

The movement toward evidence-based sentencing relies on exposing the deficiencies in the major theories of punishment embedded within the current Sentencing Guidelines.[305] The Sentencing Commission formulated the Sentencing Guidelines absent any evidence supporting their accuracy or effectiveness;[306] instead, it based its formulation on popular data supporting the current practices favoring retributivist and utilitarian theories.[307] But these theories hardly skim the surface of justifying punishment.[308]

Retributivism's most notable deficiency is failing to define which behavior should be regarded as reprehensible and, then, severely punishing the criminal behavior or immoral conduct.[309]

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301. *See* Jefferson-Bullock, *supra* note 122, at 351 (discussing how sentencing guidelines are primarily influenced by retributivist and utilitarian theories).

302. *See* Kahan, *supra* note 157, at 358 (implying deterrence does not work for actions society does not deem fit for punishment).

303. *See* Doherty, *supra* note 172, at 996 (discussing the Sentencing Reform Act as a means to amend the errors of indeterminacy by replacing the system with harsher and more predictable punishments).

304. *See* Klingele, *supra* note 199, at 551 (considering the events leading to the movement toward evidence-based correctional practices).

305. *See* Apt, *supra* note 138, at 438 (stating that most theories of punishment are lacking an important dimension that explains the purpose behind why society imposes punishment).

306. *See* Jefferson-Bullock, *supra* note 122, at 376 ("Surprisingly, length of confinement and severity of sentence was not premised on any evidence-based data, and '[n]owhere in the forest of directives that the Commission has promulgated over the last decade can one find a discussion of the rationale for the particular [sentencing] approaches.'").

307. *See id.* at 392 (discussing how the guidelines were "informed and shaped by utilitarianism and retributivism").

308. *See supra* Subsection II.A.1 (emphasizing that the theories of punishment do not bear all these answers to how punishment is to function).

309. *See* Apt, *supra* note 138, at 443 (stating that "[r]etributivism is not clear about *how* we all know which acts are reprehensible and which are not").

According to Professor Richard Nygaard, society needs a clear philosophy for why punishment is imposed and the purposes served by it.[310] A retributivist framework assumes the wrongdoer deserves the punishment solely on the basis of guilt and, therefore, takes the form of a "crime always equals punishment" theory.[311] Under legal retributivism there is little justification or leniency for an abuse victim who commits a nonconfrontational homicide.[312] In a strict application of retributivism, if the abuse victim has committed a crime, she *deserves* to be punished because she committed the act, regardless of any mitigating circumstances, such as diminished culpability.[313]

Under utilitarianism, the purpose of punishment is to warn society of the consequences of unlawful actions.[314] The value of these deterrent effects has heavily influenced the lawmakers formulating criminal law policy.[315] However, deterrence theory is deprived of a deeper connection to social influences that would effectively modify or shape behavior.[316] Criminalizing abuse victims' homicidal actions against their abusers bears little deterrent value when society's majority finds their behavior justifiable and the violence is an isolated incident.[317] Although the law may not recognize a

310. *See* Nygaard, *supra* note 128, at 360.

311. *See* Christopher, *supra* note 133, at 860 (discussing that a morally culpable wrongdoer "deserves, merits, or warrants punishment"); *see also* Apt, *supra* note 138, at 442 (stating the punishment is derived from the criminal's "blameworthiness"); Nygaard, *supra* note 128, at 358 (stating that major punishment theories focus on "wrongness" and under retributivism punishment takes the form of revenge).

312. *See* Christopher, *supra* note 133, at 885-86 (differentiating between moral retributivism and legal retributivism, under which "punishment is justified . . . for those who are legally convicted of committing a criminal offense regardless of their moral culpability").

313. *See generally id.* (discussing how legal retributivism justifies punishment even if the person committing the crime is morally innocent—meaning that the crime bore no inherent wrong).

314. *See* Apt, *supra* note 138, at 450 ("Deterrence hedges its bets on the hunch that, at some point, penalties become so severe that . . . they surely discourage the targeted crimes.").

315. *See* Binder & Smith, *supra* note 144, at 956 (advocating that deterrence is valuable in criminal law because it will influence conduct).

316. *See* Kahan, *supra* note 157, at 358-60 (stating that effective deterrence has society's values embedded within it because social influence is the driving force in modifying behavior).

317. *See* Dressler, *supra* note 43, at 457. Professor Dressler discusses that many individuals, including most of his students, find that abuse victims who kill

justification for killing in a nonconfrontational setting, if society voices that such behavior is morally justifiable, that opinion should be considered.[318] Professor David Garland refers to society's opinion as part of Durkheim's "conscience collective"—meaning that there are "violations of the fundamental moral code which society holds sacred."[319] Therefore, deterrence cannot effectively steer abuse victims away from self-help techniques if society itself does not fully condemn such behavior.[320]

Currently, sentencing guidelines are fundamentally flawed in their failure to account for evidence or knowledge-based sentencing.[321] This failure to account for knowledge and empirical evidence in sentencing has not only failed abuse victims, but also contributed to an incarceration crisis.[322] The flaws of sentencing derive from overreliance on deterrence and retributive justice.[323] However, emerging trends in evidence-based sentencing suggest that the system is amenable to change by considering the developments in modern technology giving rise to rehabilitation.[324]

2. *Jump-Starting Rehabilitation: Evidence-Based Sentencing and Criticisms*

One of determinate sentencing's most evaluated criticisms is its ability to render convictions that society deems unjust.[325]

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their abusers in nonconfrontational settings are morally justified in their actions. *See id.*

318. *See* Gallek, *supra* note 10 (suggesting that 7,000 people having signed a petition for the release of Bresha Meadows demonstrates society's sentiments toward a young girl who kills her mother's abuser).

319. GARLAND, *supra* note 190, at 29 (discussing that society has understood rules that when violated deserve sanction).

320. *See* Kahan, *supra* note 157, at 358-59 (stating that society has the strongest influence on determining whether punishing behavior has any deterrent effect; for example "if a person is surrounded by persons who are (or appear to be) morally opposed to crime, she is likely to share their aversion").

321. *See* GARLAND, *supra* note 190, at 280 (stating that the approach to understanding punishment "should be a sociology which strives to present a rounded, completed image; a recomposition of the fragmentary views developed by more narrowly focused studies").

322. *See* Bargaric, Fischer & Wolf, *supra* note 171, at 787.

323. *See id.*

324. *See* Klingele, *supra* note 199, at 568 ("The first, and superficially most obvious, way to view evidence-based correctional practices is as a form of neorehabilitationism.").

325. *See* Jefferson-Bullock, *supra* note 122, at 349-50 (stating that determinate sentencing is an unjust structure and should be abolished); *see also* Apt,

Determinate sentencing was instituted to resolve issues of disparate sentencing caused by previous indeterminate methods,[326] yet it still manages to ineffectively distribute sentencing lengths.[327] Modern criminal justice reformers implore judges to abandon uniform sentencing guidelines and consider variables of individual offenders based on characteristics contributing to recidivism.[328] Evidence-based practices that are supported by empirical data and scientific research may soon replace the unresearched and empirically unsupported determinate model.[329] Evidence-based sentencing techniques already permeate the justice system by means of "actuarial risk assessment instruments" used for granting bail or parole.[330] It is only a matter of time before judges may use them to determine an abuse victim's rehabilitative sentencing needs.[331]

Further, evidence-based corrections signal the embrace of the new rehabilitation model as more practices are based on hard data and scientific research.[332] Unlike determinate sentencing, evidence-based sentencing reform encourages judges to evaluate the offender's background and risk factors to determine sentencing

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supra note 138, at 463 ("Sentencing guidelines would be more defensible were they restructured to be advisory tools for analyzing a criminal's individual rehabilitative needs.").

326. *See* Jefferson-Bullock, *supra* note 122, at 353 ("Indeterminate sentencing acknowledged that it is impossible to accurately determine duration of incapacitation at sentencing.").

327. *See id.* at 389 ("Oddly, the principal purpose of punishment radically changed while the punishment distribution tool remained unaffected.").

328. *See* Starr, *supra* note 186, at 805 (discussing the emerging judicial trend in using evidence-based sentencing).

329. *See* Klingele, *supra* note 199, at 551 (stating that evidence-based correctional practices are those that use "research data to identify and evaluate successful programs").

330. *See id.* at 552 ("In jurisdictions across the country, probation officers now discuss their contracts with clients in terms of 'dosage;' magistrates and correctional officers routinely employ actuarial risk assessment instruments in deciding whether to grant bail, often to require reporting, and whether to grant parole; and judges increasingly refer to defendants' 'criminogenic needs' when imposing sentence.") (citations omitted).

331. *See* Apt, *supra* note 138, at 463.

332. *See* Klingele, *supra* note 199, at 553-54 (stating that multi-discipline fields are embracing an evidence-based approach, such as nursing and psychology); *see also* Eaglin, *supra* note 235, at 201 ("The increased use of [evidence-based programs] arguably rehabilitates rehabilitation: It prevents the theory from falling prey to the criticisms launched against rehabilitation in the 1960s through 1970s that led to its national demise.").

lengths.[333] If judges can consider scientific evidence when assessing the individual's risk of reoffending, it is more likely a judge will consider that a defendant abuse victim should benefit from and deserve rehabilitative treatment, rather than incarceration.[334]

However, this new model of evidence-based sentencing raises a number of critiques. First, one scholar comments that this method favors the wrong offender.[335] If the purpose of evidence-based sentencing is to vet the offenders who would benefit most from rehabilitative treatment, Professor Eaglin argues this method excludes the high-risk offenders who are best suited for rehabilitation.[336] According to one study, high-risk offenders sustained greater treatment effects as opposed to low-risk offenders,[337] thus demonstrating evidence-based sentencing's "misguided focus."[338] Professor Eaglin argues this underinclusive sentencing creates a result that is not only a "cherry-picked" success rate, but a failure to accurately assess offender behavior.[339] Although this criticism diminishes the credibility of the program, evidence-based programs signal a movement toward justice—albeit an imperfect movement, but an improvement nonetheless.[340] It allows for certain offenders to receive the treatment needed and provides a much fairer result than uniform sentencing currently offers.[341]

Second, another legal scholar argues this method promotes the "scientific rationalization of discrimination."[342] Professor Starr urges

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333. *See* Klingele, *supra* note 199, at 560 ("Predicting the risk that a convicted person will commit future crimes and thereby endanger the community has long been an important piece of correctional decision making.").

334. *See supra* notes 243-49 and accompanying text (discussing how physical abuse diminishes a victim's culpability).

335. *See* Eaglin, *supra* note 235, at 211 (arguing that the goal of evidence-based sentencing is flawed because it leaves out high-risk offenders).

336. *See id.* at 211-12 (discussing research that analyzes high-risk offenders benefiting most from rehabilitation).

337. *See* Dowden & Andrews, *supra* note 239, at 460. However, the study did not yield such results to a statistically significant degree. *Id.*

338. *See* Eaglin, *supra* note 235, at 212 ("[N]eorehabilitation stands to institutionalize the misguided focus on diverting only low-level, low-risk offenders into rehabilitation programs.").

339. *See id.* at 213-14 (discussing how courts "cherry pick low-risk offenders and skim high-risk clients to boost their success rates") (internal citations omitted).

340. *See generally* Doherty, *supra* note 172 (discussing the return of indeterminate sentencing and its positive effect on sentencing).

341. *See supra* notes 184-87 and accompanying text.

342. *See* Starr, *supra* note 186, at 805 (arguing that such practices require judges to determine low-risk offenders based off of socioeconomic conditions and may be a violation of the Equal Protection Clause of the Constitution).

that using evidence-based sentencing to lower incarceration rates by identifying low-risk offenders is a mistake.[343] Judges who rely on actuarial risk assessment instruments[344] will determine high-risk offenders largely based on their socioeconomic and demographic statistics.[345] According to Starr, the results not only end with disparity, but violate the Constitution's Equal Protection Clause.[346] However, most of the classifications of persons affected by risk-assessment tools are those which would be reviewed under the nonsuspect standard of rational basis review because socioeconomic status is not considered a protected class.[347] Moreover, when risk assessment is analyzed among a wide variety of factors, discrimination is not only incidental, but an unintended consequence of the risk-assessment.[348] Thus, it is unlikely that any court would find that risk-assessment tools amount to constitutional violations.[349]

Evidence-based practices have indicated the rise of the new rehabilitation model.[350] Without risk-assessment tools, the courts would have little guidance in resolving the sentencing issues created

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343. *See id.* (discussing this method as unconstitutional).

344. *See id.* at 809. Actuarial instruments can assess offender characteristics and recidivism rates. *See id.* at 811. Starr states that these instruments "generally incorporate criminal history variables, such as number of past convictions, past incarceration sentences, and number of violent or drug convictions." *Id.*

345. *See id.* at 807-08 ("EBS advocates thus often argue that judges will inevitably predict risk and may well rely, usually covertly, on demographic and socioeconomic factors.").

346. *See id.* at 821-41 (discussing how the results will end in gender discrimination and wealth discrimination); *see also* Eaglin, *supra* note 235, at 214-18 (arguing the use of evidence-based sentencing will exacerbate racial disparities as well). *But see* Hamilton, *supra* note 186, at 242 (discussing constitutional considerations of risk-assessment tools and arguing they can survive an equal protection analysis).

347. *See* Hamilton, *supra* note 186, at 244 (stating that most classifications would be reviewed under rational basis and a "socioeconomic class is not accorded any special status in equal protection").

348. *See id.* at 263 ("There is simply no evidence that the criminologists, forensic scientists, policy advocates, criminal justice officials, or politicians who have embraced evidence-based criminal justice practices in general, and risk-needs assessments in particular, did so for any reason related to a discriminatory animus of a group subject to heightened scrutiny.").

349. *See id.* at 285 (discussing the importance of evidence-based decisions and how government's compelling reasons for creating these tools for risk-assessment would likely overcome any constitutional challenges).

350. *See* Klingele, *supra* note 199, at 550-52 (discussing the promotion of evidence-based sentencing correlating with the rise in rehabilitation).

by the uniform guidelines.[351] Ideological concerns garner the most opposition to evidence-based sentencing.[352] However, the new rehabilitation model extends beyond ideological perspectives, as it now relies on hard science to achieve its goals.[353]

C. The New Rehabilitation Model: Treating Abuse Victims Who Kill Their Abusers

Formulating an appropriate legal response requires an intricate comprehension of the psychological trauma sustained by abuse victims—a solution that can be achieved through the new rehabilitation model.[354] Until recently, the rehabilitation model had died as a viable theory of punishment.[355] However, advances in neuroscience, pharmacology, genetics, and behavioral sciences have reformed the old model into a more "treatment"-oriented program, which would better serve abuse victims than a prison sentence.[356] As the earlier model of rehabilitation focused on resocializing the criminal back into society by means such as religious counseling—which many critics rightfully doubted—the shift toward science verifies that rehabilitation *can* work.[357]

The new rehabilitation model has discarded the old methods of rehabilitation by implementing new techniques achieved through

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351. *See* Hamilton, *supra* note 186, at 284 (discussing that the current guidelines do not create a system of uniformity and conceding that evidence-based sentencing may not be perfect but still adds value to the justice system).

352. *See id.* at 273 ("More often the qualms are ideological in nature, drawing on the long-standing debate about the relative roles in sentencing of retributive, deterrence, utilitarian, and rehabilitative concerns.").

353. *See* Ryan, *supra* note 132, at 305 (discussing scientific advances in rehabilitative practices).

354. *See* Meszaros, *supra* note 242, at 154 (discussing the psychological horrors of prolonged abuse).

355. *Compare* Nygaard, *supra* note 128, at 362 (stating that rehabilitation is no longer a viable method of criminal punishment because it failed to reduce recidivism rates), *with* Fondacaro et al., *supra* note 135, at 725 (demonstrating that rehabilitation is now experiencing a "rebirth" in the criminal justice system due to technological advances in the behavioral sciences).

356. *See, e.g.*, Brian T.M. Mammarella, *An Evidence-Based Objection to Retributive Justice*, 16 YALE J. HEALTH POL'Y L. & ETHICS 289, 291 (2016) (discussing various scientific advancements); Ryan, *supra* note 132, at 272.

357. *See* Ryan, *supra* note 132, at 330 ("This emphasis on behavioral change is beginning to move rehabilitative efforts toward changing offenders' biochemical compositions rather than taking the more holistic approach of transforming offenders' personhoods.").

scientific advances that focus on changing offender behavior.[358] These advances—shown through fields such pharmacy and neuroscience—indicate a renewed legal interest in the possibility of using rehabilitation, despite harsh criticisms.[359] Neuroscience, in particular, indicates that rehabilitative sentencing will better serve abuse victims because research has formulated a scientific answer to how individuals respond to prolonged abuse.[360] With forthcoming innovations in the pharmaceutical industry, behavioral sciences, and MRI and fMRI technology, the new rehabilitation model is better equipped to treat the sustained physical and physiological trauma endured by abuse victims.[361] Further, criticisms such as funding expenses, practical appliance and methodologies, and permanency disputes do not diminish the quality of advancements and potential value the new rehabilitation model offers defendant abuse victims.[362]

1. *Abuse Victims, Diminished Culpability, and Qualifying for Treatment*

Before developments in neuroscience, effects of abuse manifested as syndromes grounded in well-attested, respectable psychological theories.[363] Dr. Lenore Walker explained Battered Woman Syndrome as a three-phase cycle of violence experienced by the abuse victim.[364] However, absent the support of scientific data, Dr. Walker's theory of "learned helplessness" would remain nothing

358. *See id.* at 264 (stating that "advances in pharmacology, genetics, and neuroscience have provided stunning examples of how individual's physical characteristics and behaviors can be altered through treatment").

359. *See id.* at 265.

360. *See* Meszaros, *supra* note 242, at 154 (discussing neurobiology and the general effects of battering upon brain functions).

361. *See* Eagleman, *supra* note 217, at 37-38 (discussing various new technologies emerging to help neuroscience in rehabilitation).

362. *See* Eaglin, *supra* note 235, at 212 (discussing rehabilitation funding depending largely on its success); Greely, *supra* note 218, at 1116-17, 1121 (discussing the effectiveness and ethicality of new rehabilitative treatments); Klingele, *supra* note 199, at 575 (discussing whether rehabilitation will last as a sentencing method).

363. *See* Kinports, *supra* note 41, at 396 (stating that the "'battered woman syndrome' describes identifiable psychological characteristics exhibited by women whose husbands have physically and psychologically abused them over an extended period of time").

364. *See* WALKER, *supra* note 63, at 55 (describing the cycles of battered woman syndrome).

more than a theory.[365] Therefore, analyzing the impact of abuse through a neurobiological lens signals that (1) physical and physiological impairment causes diminished culpability in abuse victims[366] and (2) diminished culpability renders abuse victims highly responsive to rehabilitative treatment.[367] Although the concept of diminished culpability typically applies in the juvenile context,[368] the emergence of neuroscience in the law now provides scholars and advocates with the arsenal of research needed to evaluate the diminished culpability of abuse victims.[369]

In evaluating the effects of abuse, it is important to recognize that neuroscience research does not discredit Battered Woman Syndrome. It merely supplements its credibility.[370] Thus, what BWS provided in psychological theory, neuroscience complements with empirical research.[371] In the past, juries have been wary of abuse syndrome evidence—expressing their skepticism through guilty verdicts despite experts attesting to the victim's abuse and its effect on the victim's mental state.[372] To rebut that skepticism, neuroscience provides a highly nuanced and scientifically grounded explanation corroborating abuse victims' diminished culpability that may sway the court from imposing harsh sentences or, at best, persuade juries against returning guilty verdicts.[373]

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365. *See* Meszaros, *supra* note 242, at 131 (discussing how the syndromes rely on "education and media penetration to subtly massage society's notions about battering and its effects").

366. *See id.* at 161 (discussing how battering renders a victim less culpable of a crime).

367. *See* Fondacaro et al., *supra* note 135, at 716 (discussing how diminished culpability in juveniles makes them amenable to rehabilitation treatment).

368. *See id.* at 715. *Diminished culpability* is a term used for warranting lenient treatment for juveniles based on their immature minds. *See id.* at 717. Diminished culpability has typically been used as a mitigating factor, but punishment often results in harsh sentencing. *See id.* at 718.

369. *See* Eagleman, *supra* note 217, at 37 (discussing how neuroscience serves as "biological mitigation" in that it can assess the notion of culpability in offenders, particularly those who have undergone traumatic experiences); *see also* Mammarella, *supra* note 356, at 317 (stating that advances in science, particularly neuroscience, will diminish retributivism).

370. *See* Meszaros, *supra* note 242, at 129 ("Supplementing defense theories with neurobiological evidence is an incremental change that also offers the rigorous scientific framework commentators argue battered woman syndrome is lacking.").

371. *See id.*

372. *See supra* Subsections I.B.1-I.B.2.

373. *See* Meszaors, *supra* note 242, at 145 ("When assessing the culpability of an individual, jurists often use the same language that a scientist or medical professional would use in assessing the effects of battering on an individual:

Decades of scholarship suggests that current law must undergo a substantial reform in order to fashion an appropriate legal response for abuse victims who kill their abusers, and scholars suggest using neuroscience to understand the effects of physical and psychological battering provides a new lens through which to understand an abuse victim.[374] Empirical research shows diminished culpability is attributable to brain "defects" or damage.[375] This damage can result through physical battering or psychological abuse.[376] Most often in battering relationships, the brain accumulates stress hormones in response to the unpredictability of the abuse.[377] This accumulation of stress impairs the abuse victim's decision-making skills by damaging the prefrontal cortex of the brain,[378] therefore establishing diminished culpability and raising questions as to an abuse victim's responsibility for her actions.[379]

By establishing diminished culpability, the offending abuse victim can present herself as an offender in need of treatment, not incarceration.[380] Studies have suggested a correlation between abuse victimization and increased violence.[381] However, an abuse victim's proclivity to violence is arguably attributable to the side effects of prolonged psychological and physical abuse; therefore, any violence

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capacity, judgment, awareness. While an attorney may argue lack of judgment to defend an accused adolescent perpetrator, a neuroscientist would argue that an individual's judgment is impaired by repeated instances of head trauma. Despite their shared vocabulary, there is a dearth of legal precedent merging scientific thought on the effects of battering with the defense of a battered woman who commits a crime.").

374. *See* Smith, *supra* note 20, at 169.

375. *See* Meszaros, *supra* note 242, at 147.

376. *See id.* Physical battering often results in head injuries such as concussions. *See id.* at 148. However, physiological effects of battering are not as obvious and can be just as detrimental to the brain. *See id.* at 154.

377. *See id.* at 154-55 (explaining in medical terminology the intricate process of how this happens).

378. *See id.* ("Recent work has shown that chronic exposure of the brain to epinephrine and norepinephrine, two molecules released by the body during a stressful situation, can result in loss of important neuronal structures in the prefrontal cortex. At the same time, structures in the amygdala actually expand. This coupling of prefrontal diminution with amygdalar potentiation leads to impaired decision-making and other consequences for behavior.").

379. *See id.*

380. *See supra* Subsection II.B.2 (explaining why establishing diminished culpability can allow the offending abuse victim to present herself as an offender in need of treatment).

381. *See* Dennis & Jordan, *supra* note 243, at 17 (discussing correlations between victimization and criminal offending).

on behalf of the abuse victim should be understood as a product of diminished culpability.[382] Similar to juveniles who have presumed diminished culpability because of age,[383] abuse victims exhibit a similar condition and are equally deserving of lenient sentencing.[384] Under parallel reasoning, abuse victims suffering from severe trauma should receive the benefits of lenient sentencing through the form of rehabilitative treatment.[385] The most compelling reason for allowing abuse victims to receive rehabilitation is the new model's formulation of treatment aimed toward helping those suffering from psychological ailments.[386]

2. *Emerging Treatments and Benefits for Abuse Victims*

Rehabilitation is the ideal sentencing for offending abuse victims because medicinal technology and therapy have developed in ways that will treat them effectively.[387] Although many new rehabilitative methods concentrate specifically on treating sex offenders or drug addicts, other methods are developed for offenders suffering from psychological impairments.[388] The pharmaceutical industry continuously releases new drugs to alleviate mental health disorders.[389] Even though using drugs to treat mental health is a common practice, the pharmaceutical industry is heavily influenced by neurobiological developments that will aid in their efficiency and progress by treating the underlying pathologies, which for abuse victims means treatment for the underlying cogitative side effects of abuse.[390]

Other methods include behavioral and psychotherapeutic interventions, which emphasize amending behavior through practices

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382. *See* Meszaros, *supra* note 242, at 144-45 (discussing how battering creates a presumption of diminished culpability).

383. *See* Fondacaro et al., *supra* note 135, at 716.

384. *See id.* at 717 (discussing how the "immaturity of the adolescent mind" has been cause for lenient sentencing).

385. *See* Meszaros, *supra* note 242, at 144-45 (discussing the effects of battering).

386. *See* Greely, *supra* note 218, at 1104.

387. *See id.* at 1116-17.

388. *See* Ryan, *supra* note 132, at 308-11.

389. *See* Greely, *supra* note 218, at 1106 ("Mentally ill people in the criminal justice system . . . have sometimes been compelled to take drugs to treat their mental illnesses.").

390. *See generally* Baskin-Sommers & Fonteneau, *supra* note 222, at 433 (discussing pharmacology treatments for those with mental illness).

of mindfulness and cognitive remediation.[391] Mindfulness treatments remedy "anxiety, depression[,] and other psychological issues."[392] Mindfulness behavior therapy encourages the individual to be "present [in the] moment," as the activity helps reduce stress and increase awareness of thoughts and behavior.[393] Neuroscience research and studies corroborate the effectiveness of this practice.[394] Cognitive remediation is a similar treatment, but it is more innovative as it aims specifically at the "cognitive-affective dysfunctions" within offenders.[395] This treatment method has been shown to improve functioning within an area of the brain called the prefrontal cortex—an area described by another scholar as damaged by prolonged battering.[396] Targeting the prefrontal cortex allows cognitive remediation to reverse the effects of abuse, such as accumulated stress and any resulting criminal tendencies that abuse victims often exhibit.[397] Both treatments of mindfulness and cognitive remediation would benefit abuse victims by using neuro-psychotherapy to abate the side effects of abuse.[398] Although new rehabilitative treatments would largely benefit offending abuse victims, critics still voice their skepticisms of the new model.[399]

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391. *See* Fondacaro et al., *supra* note 135, at 724 (discussing various "therapeutic programs aimed at changing behavior by improving social skills and relationship"); *see also* Baskin-Sommers & Fonteneau, *supra* note 222, at 433-34 (discussing neuroscience influence in mindfulness treatment).

392. *See* Baskin-Sommers & Fonteneau, *supra* note 222, at 434.

393. *See id.* at 433-34.

394. *See id.* at 434 ("[N]euroscience research related to mindfulness demonstrates that brain regions such as the anterior cingulate cortex and orbitofrontal cortex become more functional, and connectivity across hemispheres and with other important brain regions such as the amydala also may improve as a result of mindfulness training.").

395. *See id.* at 434-35 ("Cognitive remediation is an approach that trains the brain through a targeted skill-building model that focuses on particular neurobiological deficits, ranging from executive function to attention to emotional regulation.").

396. *See id.* at 435 (discussing how cognitive remediation improves the functioning of the prefrontal cortex); *see also* Meszaros, *supra* note 242, at 154-55 (asserting that battering can result in "loss of important neuronal structures in the prefrontal cortex").

397. *See* Baskin-Sommers & Fonteneau, *supra* note 222, at 435 ("[C]ognitive remediation approaches offer promise for changing neural and behavioral patterns.").

398. *See id.* at 434.

399. *See* Ryan, *supra* note 132, at 335 (evaluating the negative side effects of new rehabilitative treatments); *see also* Eaglin, *supra* note 235, at 210-11 (discussing the limitations of the new rehabilitation model).

3. *Criticisms of Using the New Rehabilitation Model for Abuse Victims Who Kill*

The new rehabilitation model has progressed its treatment programs, but critics doubt areas of the program such as funding expenses, ethical testing of treatments, and stability as a practice.[400] Successful rehabilitation programs rely on proper funding to continue their services.[401] However, funding is dependent upon proven success of the programs, which, in turn, relies upon results proving these methods are effective.[402] Unfortunately this creates a vicious cycle, as testing these new rehabilitative techniques requires time and willing participants in research studies.[403] Although it is certainly harder to find participants for more invasive treatments, such as psychosurgeries,[404] testing for new pharmaceutical drugs poses its own difficulties in proving safety and efficacy.[405] Accordingly, nonhuman research—research performed exclusively on animals—does not provide sufficient evidence of how humans react to the same treatments.[406] Thus, issues in proving safety and efficacy subsequently impede the progression of treatments, which may affect the lasting use of rehabilitative programs.[407] One scholar warns that the new rehabilitation model is a fleeting trend—as it has proven to be in the past.[408] As rehabilitation continues to implement

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400. *See* Eaglin, *supra* note 235, at 212-14 (discussing rehabilitation funding depending largely on its success); Greely*, supra* note 218, at 1116-17 (discussing the effectiveness and ethicality of new rehabilitative treatments); Klingele, *supra* note 199, at 575-76 (discussing whether rehabilitation will last as a sentencing method).

401. *See* Eaglin, *supra* note 235, at 212 ("Where the funding for programs depends on proven success, there is less room for additional expenses.").

402. *See id.* at 212-13.

403. *See* Greely, *supra* note 218, at 1116-17 (asserting that "[t]he criminal justice system should not directly intervene in people's brains unless the intervention has been proven safe and effective").

404. *See id.* at 1123 (stating that it is "highly unlikely that healthy volunteers would be willing to undergo psychosurgery, with its consequent destruction of parts of their brains, to test the procedure's safety").

405. *See id.* at 1121 (arguing that there are "practical and ethical difficulties of finding volunteers for clinical trials to test prevention of criminal behavior, as well as the political risks such trials pose").

406. *See id.* at 1121-22 (stating these treatment methods may be comparable but are ultimately inconclusive).

407. *See* Klingele, *supra* note 199, at 575-76 (discussing whether rehabilitation will last as a sentencing method).

408. *See id.* at 575 ("[I]t is easy to forget that some of the scientific tools in which neorehabilitionalists place so much stock are not that far removed from the

scientifically advanced treatments, these treatment methods are under pressure to yield successful results or the entire institution may crumble.[409]

However, these criticisms should not deter researchers and rehabilitative enthusiasts from striving to improve the system.[410] New rehabilitative practices offer better alternatives for abuse victims who kill their abusers and do not receive an acquittal.[411] It is a far more productive alternative than an incarceration sentence—in which defendant abuse victims would receive little to no treatment.[412] Despite drawbacks to the system, abuse victims deserve the benefits provided by new innovative treatments.[413]

CONCLUSION

In cases where abuse victims kill their abusers under nonconfrontational circumstances, the legal system offers no guarantee that they will be acquitted of the murder or manslaughter charges.[414] The law has progressed to allow syndrome evidence as a mitigating factor, but presenting evidence of the abuse in court does not promise a lenient sentence, and severity in sentencing varies across states and between judges.[415] The current flaws in sentencing guidelines contribute to harsher punishments for offending abuse victims as these guidelines are influenced by theories of punishment, which primarily aim to impose punitive, rather than restorative, sentences.[416]

However, offending abuse victims who do not receive an acquittal now have a safety net.[417] If the trial system fails, the new

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now-discredited science that rehabilitationalists promulgated less than a century ago.").

409. *See id.* at 576.

410. *See supra* notes 358-59 and accompanying text (detailing the ways the new rehabilitation mode is progressing).

411. *See supra* notes 387-99 and accompanying text (explaining the various innovations in rehabilitative practices that would help abuse victims).

412. *See Clemency Project*, *supra* note 20 (discussing how battered women who kill are sentenced an average of fifteen years in prison).

413. *See supra* notes 358-60 and accompanying text.

414. *See supra* Sections I.A-B.

415. *See Clemency Project*, *supra* note 20 (discussing how two different cases presented in the same state involving women who kill their husbands received different sentences; one woman received eighteen months whereas another woman received three years).

416. *See supra* Section II.A.

417. *See supra* Subsection II.B.1.a.

rehabilitation model allows for proper treatment to be incorporated into sentencing.[418] In light of modern scientific advancements, rehabilitation has risen from the ashes to revolutionize the way the criminal justice system imposes punishment.[419] The new rehabilitation model will utilize neuroscience, pharmaceutical, and behavioral treatment methods to remedy the effects of prolonged abuse and return the abuse victim to society.[420] As more scientific data emerges, these rehabilitative programs will continue to improve and prevail as viable sentencing for this type of offender.[421] Abuse victims who kill their abusers may not always receive the justice they deserve, but the criminal justice system, at the very least, owes them guaranteed treatment.[422]

418. *See supra* Subsection III.C.2.
419. *See supra* Subsection II.B.1.a.
420. *See supra* Subsection II.B.1.a.
421. *See supra* Subsection II.B.1.
422. *See supra* Part III.