Battered Women and Sleeping Abusers: Some Reflections

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This Commentary is about domestic violence. More specifically, the issue I consider here is this: How should the criminal law deal with battering victims (primarily, women) who, after months or years of abuse, kill their (primarily, male) abusers? My concern, however, is not with the more common case of the woman who uses deadly force against her abuser during an attack or because of an immediately impending one; rather, my focus is on the less common—but morally perplexing—situation of the battered woman who kills her tormenter when he is *not* attacking, or about to attack, her. I am interested, in other words, in "nonconfrontational homicides," such as when the abuse victim kills her abuser while he sleeps, or as he is watching the Super Bowl game, or eating dinner.[1]

The temptation is to say that a nonconfrontational "self-defense" homicide is morally justifiable. Many individuals, including many of my own criminal law students each year, express this opinion. And, in the past two decades, legal

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More people than I can list here read earlier versions of this Commentary (many of whom disagree with some or much of what I have to say), and helped me refine my arguments. I thank them all. I have also benefited from the wisdom of members of the audience at the 2006 Pacific Division Meeting of the American Philosophical Association held in Portland, Oregon, where I presented versions of this Commentary. I also thank my own university for the great honor of permitting me to give the 2005 University Distinguished Lecture, at which I presented this Commentary in different form, and Professor Irene Rosenberg who invited me to give the Yale L. Rosenberg Memorial Lecture at the University of Houston Law Center on this same subject.

Finally, I thank my colleague Alan Michaels for his editorial assistance and, quite simply, for being my friend.

[1] Professor Holly Maguigan surveyed appellate court decisions published between 1902 and 1991 and discovered 223 cases involving women accused of killing their domestic partners, in which there was evidence of physical abuse of the woman by the man, the woman claimed self-defense, and she was convicted. Of that number, Maguigan characterized twenty percent of the cases as nonconfrontational in nature. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 394–97 (1991). Of course, this study fails to account for homicides that did not result in prosecution; and as Maguigan recognizes, her study cannot account for prosecutions that resulted in dismissal prior to trial or that were resolved by guilty pleas. Also excluded are any prosecutions resulting in acquittal (*see infra* note 2), as well as cases in which—whatever the outcome—the defense sought acquittal on some ground other than self-defense, such as insanity or lack of *mens rea* ("it was an accident").

advocates for battered women have sought, albeit with only minimal appellate-court success so far,[2] to convince courts to permit battered women (at least, those suffering from battered woman syndrome), who kill in nonconfrontational circumstances, to assert the defense of self-defense.[3]

The thesis of this Commentary is that the proposition that a battered woman is justified in killing her sleeping abuser, although well-meaning, is wrong, and that any serious effort to expand self-defense law—for battered women but also, presumably, for others—to permit such killings is a "reform" society ultimately will regret. Although there *is* reason to reform—and expand—self-defense law,[4] I fear that the result of expanding self-defense law to the extent required to justify the killing of a sleeping abuser would be the coarsening of our moral values about human life and, perhaps, even the condonation of homicidal vengeance.

I also seek to show in this Commentary that we don't need to run these risks in order to provide potential legal protection to battered women who kill in nonconfrontational circumstances. I will suggest a moral and legal theory that, on the one hand, respects the basic right of the abuser *not* to be killed while he sleeps and, on the other hand, provides a battered woman a potential criminal law defense that treats her with compassion and, at least as importantly, the dignity she deserves, but one that moves lawyers away from self-defense.

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[2] When I first began thinking about this topic I expected to see the law move forthrightly in the direction of expanding self-defense law to cover nonconfrontational homicides by battered women. My expectation was based, first, on the claim that, notwithstanding existing law, juries were acquitting women in a "surprising number" of nonconfrontational cases. Sunny Graff, *Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law*, 10 LOY. L.A. INT'L & COMP. L.J. 1, 17 (1988); *see also* Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1725 & n.314 (1981) (citing perhaps outdated data supporting the claim that jury nullifications are relatively common in such cases). Also, there was—and, for that matter, still is—a growing legal trend (*see infra* note 3) in favor of "subjectivizing" the objective "reasonable person" standard. This trend could have resulted—and still might result—in changes in the law I reject in this Commentary.

[3] One of the few cases to authorize a self-defense claim in an unambiguous, nonconfrontational case is *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1982). The battered woman in *Leidholm* stabbed to death her abusive husband as he slept. The court held that the defendant was entitled to raise a self-defense claim. In so ruling, the court approved a highly subjective version of the "reasonable person" standard, stating, *id.* at 818, that:

> [A] correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused, viz., to place itself as best it can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm.

[4] *See infra* note 27.

I. TRADITIONAL SELF-DEFENSE LAW AND THE TRAGIC STORY OF JUDY NORMAN

Let me start by positing facts—real facts—that seemingly make the case against my thesis compelling:

> Defendant [Judy Norman]'s evidence, presented through several different witnesses, disclosed a long history of verbal and physical abuse leveled by decedent [J.T. Norman] against defendant. Defendant and Norman had been married twenty-five years at the time of Norman's death. Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married. The couple had five children, four of whom are still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.
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> Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a minimum of one hundred dollars per day; if she failed to make this minimum, he would beat her.
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> Norman commonly called [Judy a "bitch" and "whore"] and referred to her as a dog. Norman beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face . . . . Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.
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> Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.[5]

As for the fateful last hours of J.T. Norman's life, here is what happened:

> On or about the morning of 10 June 1985, Norman forced defendant to go to a truck stop or rest stop on Interstate 85 in order to prostitute to make some money . . . . Some time later that day, Norman went to the truck stop, apparently drunk, and began hitting defendant in the face with

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[5] State v. Norman, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

his fist and slamming the car door into her. He also threw hot coffee on defendant. On the way home, Norman's car was stopped by police, and he was arrested for driving under the influence.

When Norman was released from jail the next morning, . . . he was extremely angry and beat defendant . . . . Defendant testified that during the entire day, when she was near him, her husband slapped her, and when she was away from him, he threw glasses, ashtrays, and beer bottles at her. Norman asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; Norman again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. Norman took the third sandwich and smeared it in defendant's face.

On the evening of 11 June 1985, at about 8:00 or 8:30 p.m., a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her. A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, "'If you want to die, you deserve to die. I'll give you more pills,'" and "'Let the bitch die . . . . She ain't nothing but a dog. She don't deserve to live.'" . . . Defendant was taken to Rutherford Hospital.

The therapist on call at the hospital that night stated that defendant was angry and depressed and that she felt her situation was hopeless. On the advice of the therapist, defendant did not return home that night, but spent the night at her grandmother's house.

The next day, . . . the day of Norman's death, Norman was angrier and more violent with defendant than usual. According to witnesses, Norman beat defendant all day long. . . . [Later,] Norman kicked defendant in the side of the head while she was driving and told her he would "'cut her breast off and shove it up her rear end.'"

Later that day, one of the Normans' daughters . . . reported to defendant's mother that her father was beating her mother again. Defendant's mother called the sheriff's department, but no help arrived at that time. Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.

> In the late afternoon, Norman wanted to take a nap. He lay down on the larger of the two beds in the bedroom. Defendant started to lie down on the smaller bed, but Norman said, "'No bitch . . . Dogs don't sleep on beds, they sleep in [sic] the floor.'" Soon after, one of the Normans' daughters . . . came into the room and asked if defendant could look after her baby. Norman assented. When the baby began to cry, defendant took the child to her mother's house, fearful that the baby would disturb Norman. At her mother's house, defendant found a gun. She took it back to her home and shot Norman [to death].[6]

Now, of course, if Judy Norman had killed J.T. during any one of his many attacks on her over the years—when he was beating her face with a fist, or hitting her with a beer bottle or with a baseball bat—Judy Norman would have had an obvious case of self-defense. Indeed, in such circumstances, a sensible prosecutor would not have brought charges against Judy. But, in nonconfrontational cases, what should the criminal law say?

The first thing to keep in mind is that for most of our history the criminal law's answer to the Judy Normans of our society has been that they cannot claim self-defense—they are not even entitled to have the jury instructed on the defense. The traditional rule, which still prevails in most jurisdictions, is that self-protective force can only be used to repel an *ongoing* unlawful attack or what the defender reasonably believes is an *imminent* unlawful assault;[7] and "imminent" or "immediate" has come to mean that the attack will occur momentarily, that it is just about underway.[8] By definition, of course, no assault is taking place or imminent in nonconfrontational cases.

The other thing to appreciate about self-defense is that it is a *justification* defense. To characterize a homicide as "justifiable" is to say that killing the abuser while he sleeps is the right, good, or proper thing to do, or, at least, that killing him constitutes a tolerable, permissible, or non-wrongful outcome.[9] For the reasons I set out below, I believe that we should be very, very slow to suggest that the killing of a sleeping abuser is a "proper" or even "tolerable" moral or legal outcome.

II. GETTING AROUND THE IMMINENCY PROBLEM: THE INSANITY DEFENSE

Relatively early on in the history of the prosecutions of battered women, defense lawyers typically avoided the stringency of self-defense law by avoiding the defense entirely in nonconfrontational cases. The defense lawyer would

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[6] *Id.* at 587–89.

[7] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01 (3d ed. 2001) (setting out the elements of the common law defense of self-defense).

[8] *Id*. at § 18.02[D][1].

[9] *Id*. at § 16.03.

contend that the battered women should be acquitted because of "temporary insanity." For example, when battering victim Francine Hughes poured gasoline over her sleeping husband's bed and set him ablaze, her defense counsel successfully obtained an acquittal on insanity grounds, thanks in part to the testimony of a clinical psychologist that Hughes "experienced a breakdown of her psychological processes so that she was no longer able to utilize judgment . . . no longer able to control her impulses . . . [and] unable to prevent herself from acting in the way she did."[10]

Thus, Hughes avoided incarceration, but she did so at a cost. As some women's groups and domestic violence experts appreciated, the moral message sent by the verdict was that Francine Hughes acted wrongly in killing her husband. She escaped conviction because the jury believed she suffered from a disabling mental condition that rendered her morally blameless for her wrongful actions. In short, Hughes, the woman, was *excused*; her actions, however, were not *justified*.

Although critics of the insanity strategy might not have understood the issue in sophisticated "justification versus excuse" terms, they perceptively understood the bottom line: The criminal law should send the proper moral messages, and, to them, the message should *not* be that a battered woman is crazy and deserves a compassionate and potentially demeaning pat on the head, but rather should be applauded for what she did, for asserting her *right* of self-defense. And so, in more recent years, defense lawyers have typically sought to defend battered women, even in nonconfrontational cases, on the basis of the justification defense of self-defense, rather than the excuse defense of insanity.

III. GETTING AROUND THE IMMINENCY PROBLEM: THE FALSE SOLUTION OF BATTERED WOMAN SYNDROME

So, what about self-defense? As I have suggested, appellate courts have only rarely authorized a jury instruction on self-defense in nonconfrontational circumstances. But, if my criminal law students, year in and year out, are any indication, many people believe that the law *should* permit the defense in such cases. And, that is the direction to which battered women advocates want the law to turn. But, can this be done in view of the imminency requirement?

The potential, but I believe flawed, solution to the imminency problem has come through the research of Dr. Lenore Walker and her finding of "battered woman syndrome" (BWS). According to Walker, a three-phase cycle of violence characterizes the typical battering relationship. In the initial "tension-building" phase, there are minor incidents of abuse, during which time the abused party attempts to calm the batterer in order to avoid repetition. These efforts increasingly fail, the tension mounts, and the abuse intensifies. The second phase involves the acute-battering incident, as the batterer explodes as the result of the earlier tension. This is followed by a tranquil, nonviolent phase, in which the

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[10] FAITH MCNULTY, THE BURNING BED 269 (1980) (testimony of Dr. Arnold Berkman).

batterer expresses loving contrition, seeks forgiveness, and promises to amend his ways. But, eventually, the cycle begins anew. Over time, as the cycles repeat themselves, the victim is reduced to a state of emotional paralysis, of "learned helplessness."[11] The battered woman feels psychologically trapped, psychologically unable to leave the battering relationship. According to Walker, "[b]attered women don't attempt to leave the battering situation, even when it may seem to outsiders that escape is possible."[12]

How do lawyers use this syndrome information? First, and quite properly, BWS evidence helps the jury understand why, if the defendant's claim of prior abuse is real, she didn't leave her abuser. "Learned helplessness" explains this phenomenon and makes the battered woman's abuse claim more credible. Second, and somewhat more controversially, BWS testimony is used to support the defense claim that the battered woman—let's say Judy Norman—subjectively, in her own mind, believed that J.T. Norman represented an immediate threat even while he slept.

Third, and most controversially, battered woman advocates have pressed the argument that BWS testimony should be used to inform the objective analysis required in self-defense law, namely, to show that a reasonable woman with BWS—not just the defendant, subjectively—would believe that the abuser, even in nonconfrontational circumstances, represents an immediate threat to her life. Thus, when the battered woman kills in such circumstances, she is responding to what a reasonable person would believe is an imminent threat.

I submit that introduction of syndrome evidence to satisfy this third and essential feature of self-defense is undesirable. Self-defense, after all, is a justification defense, not an excuse defense. The claim of a defendant pleading self-defense is that she has acted properly or, at least, not wrongfully, in doing what she did. She is not claiming, as she would be if she asserted the defense of insanity or any other excuse defense, that her conduct was wrongful but that she should not be blamed for her actions. Put a little too simply, justifications focus on the act; excuses focus on the actor.[13] Yet, BWS evidence—indeed, any syndrome evidence—speaks to the actor's state of mind, and not to the act itself. It explains to us why we should treat this actor differently than others, and not blame her when we would blame others who commit the same act.

My point is more evident if we turn to Judy Norman's act of killing her husband while he slept. There is simply no basis for suggesting that J.T. Norman *in reality* represented an imminent threat to Judy Norman, as traditional law

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[11] LENORE E. WALKER, THE BATTERED WOMAN 174 (1979).

[12] LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 50–51 (1989).

[13] I have argued elsewhere that this act/actor distinction, although a very useful starting point to understanding the justification/excuse distinction, is not necessarily always accurate. Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 93 n.174 (1984).

defines "imminence." It is hard to believe that she subjectively could believe this. Indeed, if Judy Norman *did* believe, because of BWS, that her sleeping husband represented an instantaneous threat, what would that suggest to us? It should suggest that there was something wrong with Judy Norman's psychological connection to reality. And, *that* is an argument of excuse, *not* justification by self-defense. In short, the syndrome evidence pathologizes Judy Norman.

But, let us ignore this problem. After all, if Judy Norman truly believed J.T. represented an immediate threat—whether because of BWS or for any other reason—then she *has* satisfied a key element of self-defense. Granting this, I would submit that there is no basis for claiming that such a belief is *reasonable*, unless we assume that the reasonable person suffers from BWS. But, that's the rub. How can we say that a belief is reasonable when we are judging the reasonableness from the perspective of someone who, by definition, is experiencing a set of symptoms that renders her state of mind abnormal? As Professor Anne Coughlin has observed, the battered woman defense "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates."[14] It makes no sense, therefore, to describe a belief in "imminent deadly force" as reasonable—to say that killing a sleeping person is *justified* to prevent an imminent death—if the only reason for describing the situation this way is that the person suffers from emotional paralysis, learned helplessness, or is the victim of any other behavioral syndrome.

BWS evidence essentially converts the battered woman's claim from the justification of self-defense to a mental incapacity defense, such as insanity or diminished capacity. Indeed, in some jury simulations, BWS evidence caused "jurors to view the defendant as more distorted in her thinking, less capable of making responsible choices, and less culpable for her actions."[15] 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,[16] albeit now disguised in more elegant justification clothing.

IV. JUSTIFYING JUDY NORMAN WITHOUT BWS

Even if I am right so far, does this mean that, if we exclude BWS testimony in self-defense cases,[17] there is no basis for justifying Judy Norman's conduct? Many

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[14] Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 7 (1994).

[15] Regina A. Schiller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167, 169 (1996).

[16] Indeed compare the insanity testimony in Francine Hughes' trial, *see supra* text accompanying note 10, with the significance of BWS testimony as characterized by Anne Coughlin, *see supra* text accompanying note 14.

[17] I am only suggesting here its inadmissibility in evaluating the objective prong of self-defense.

people feel that a battered woman, with or without BWS, *is* justified in killing her abuser, even while he sleeps. But, why? Their answer: The son-of-a-bitch deserved what was coming to him. Consider, for example, the remarks of North Carolina Supreme Court Justice Harry Martin in his dissent in the *Norman* case:

> By his barbaric conduct over the course of twenty years, J.T. Norman reduced the quality of the defendant's life to such an abysmal state that, given the opportunity to do so, the jury might well have found that she was justified in acting in self-defense for the preservation of her tragic life.[18]

Or, consider the dissent in a battered *child* syndrome case, in which a teenager, after years of alleged abuse, killed his father by ambush, as the father came home at night, and then sought to claim self-defense:

> This case concerns itself with what happens—or can happen—and did happen when a cruel, ill-tempered, insensitive man roams, gun in hand, through his years of family life as a battering bully—a bully who, since his two children were babies, beat both of them and his wife regularly and unmercifully.[19]

What I think is going on here is an implicit assertion of one potential argument for justification, namely, the moral theory of forfeiture. That is, a person, by his willful, ongoing, egregious conduct may forfeit his right to life. Therefore, termination of his life constitutes no socially recognized harm to society. Thus, Judy Norman was justified in killing her tormenter, not because her conduct was reasonable to the clouded mind of a syndrome victim, but because J.T. Norman had it coming. By acting as a monster for all those years, he forfeited his right to life. J.T.'s death constituted, as I have previously put it, "a mere blip on society's social-harm radar screen."[20] As one philosopher has critically expressed the significance of the forfeiture theory, the wrongdoer "no longer merits our consideration, any more than an insect or a stone does."[21]

Please notice the implications of this moral view. We have decided that a human life is expendable. We can swat him like a fly and toss him in the garbage without guilt feelings. If we follow the logic of this position, imagine—as has occurred[22]—a battered woman hires a contract killer to take her husband's life, and then seeks to justify her conduct. No court has allowed such a claim. But, if the

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[18] State v. Norman, 378 S.E.2d 8, 21 (N.C. 1989) (Martin, J., dissenting).

[19] Jahnke v. State, 682 P.2d 991, 1011 (Wyo. 1984) (Rose, J., dissenting), *overruled on other grounds by* Vaughn v. State, 962 P.2d 149 (Wyo. 1998).

[20] Dressler, *supra* note *, at 270.

[21] Hugo Bedau, *The Right to Life*, 52 MONIST 550, 570 (1968).

[22] *E.g.*, People v. Yaklich, 833 P.2d 758, 759 (Colo. Ct. App. 1991).

death of an abuser is equivalent to throwing out the garbage or swatting a fly—if he is not recognized as a human being deserving of the law's protection—what basis do we have for prosecuting the woman or, for that matter, the contract killer (or, let's assume, the abused woman's brother, who acts for reasons of love and not greed) who swats the fly or (switching metaphors) kills the vermin?[23]

I reject the forfeiture theory as morally unacceptable, although others may not. Is there another moral theory, however, to justify Judy Norman killing her abuser? Yes. Judy Norman possesses a moral—if you will, natural—right of autonomy, a right that J.T. Norman violated on a daily basis by his physically injurious conduct, which right entitled Judy to kill him to protect her autonomy. This theory is vastly preferable to the forfeiture theory because it does not require us to claim that J.T. Norman's life is worthless. The focus here is on Judy and her rights, and not on J.T.'s lack of rights. And, this theory quite adequately explains the ordinary self-defense situation: When a person, backed to the wall by an imminent threat, kills her deadly attacker, her right of autonomy entitles her, if necessary, to take his life.

In my view, the autonomy theory is the best justification for self-defense, but only when it is narrowly circumscribed. Traditionally, there are both proportionality and necessity limits placed on the theory. For example, surely if someone is violating my right to bodily integrity by repeatedly shoving his finger into my chest, that does not give me the right to kill him to stop his offensive conduct. My right to bodily integrity entitles me to demand that he desist and, if that fails or if such a request would be futile, I surely have the right to use proportional force—perhaps a shove—to get him to stop. But, the law has always taken the position that if the only way I can stop his obnoxious behavior is to kill him, I may not do so, even though he is violating my autonomy. Killing him would be a disproportional response.

But also—and this is where Judy Norman comes in—the right to protect one's autonomy by using deadly force is limited to cases in which such an extreme response is necessary. Stemming from the common law, 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.*

Can we justifiably claim that a person's right of autonomy extends to taking a human life while that person is asleep, because of his ongoing violent conduct? And, given that we are excluding syndrome consideration from this analysis, can we justify the use of deadly force in defense of one's autonomy if there are

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[23] Or, imagine that a burglar had entered the Norman house while Judy was away securing the weapon to kill her husband. If the burglar killed J.T., to ensure that there were no adult surviving witnesses to his burglary, would the burglar be able to say that there was no social harm in killing the vermin?

It is also worth noting that "vermin," like J.T. Norman, are presumably not born that way. Many victimizers were themselves victims. This does not justify or excuse their behavior, of course. It is worthwhile, however, to keep this in mind if we are going to justify killing people for being or becoming who they are.

nonviolent solutions available? Although reasonable minds will differ on this, I submit that we should hesitate at expanding the right to kill as far as the Judy Norman cases could take us.

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. First, it is hard to imagine that it is necessary to kill to prevent deadly force from being inflicted far down the time-line. The greater the time span between the defensive act and the predicted act being defended against, the greater are the options available to the innocent person. *Some* reasonable temporal requirement is needed.[24]

The more we permit early use of force, the greater the risk that the force used was not necessary. But, because deadly force *is* used—and the putative aggressor is now dead—we will never know for sure if the feared attack *was* going to occur and whether some other, less extreme, remedy *would* have been sufficient. After all, there is the slight possibility—remote in J.T. Norman's case but perhaps less so in some other battering cases—that the batterer will change his behavior if permitted to live. Maybe he will "see the light"; more plausibly, since so many batterers have drinking problems, he will get help to combat his alcoholism; or maybe he will go through counseling or anger management training. Professor Al Alschuler, speaking on a different issue, has remarked that "even funnel clouds"—danger—"sometimes turn around, and human beings"—because they possess free will—"sometimes defy predictions."[25] I would suggest that human tornadoes will defy our predictions far more often than their cousins in Nature, if they are allowed to live. We should not entirely give up on the ability of people to change—that is one reason why *some* reasonable temporal requirement is in order.

Beyond this, there is always the possibility that some other event will intervene to render an apparent necessity to use deadly force inoperative. Maybe the batterer will have a debilitating stroke. Or, maybe, as sometimes happens, the batterer will abandon the family, thus freeing the woman from further abuse, and rendering deadly, autonomy-protecting, force unnecessary. My point, simply, is that once the law gets away from a requirement of an immediate need to use force and begins to authorize preemptive strikes, we increase the risk of repeating on an

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[24] Stephen J. Morse, *The "New Syndrome Excuse" Syndrome*, 14 CRIM. JUST. ETHICS 3, 12 (1995) (arguing for the following standard: "If death or serious bodily harm in the relatively near future is a virtual certainty *and* the future attack cannot be adequately defended against when it is imminent *and* if there really are *no* reasonable alternatives, traditional self-defense doctrine ought to justify the pre-emptive strike.").

[25] Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 557 (1986).

individual scale what happened in Iraq—a claimed need to invade preemptively to get rid of weapons of mass destruction that proved non-existent.[26]

So, in summary so far, 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. Admittedly, it is a tempting direction to go when we look at evil persons such as J.T. Norman and when we see the "solution" of execution of the sleeping abuser as a way of relieving the victim's agony. But it strikes me as a path we should be slow to condone. And, that is especially the case when there is another theory—another potential basis—for handling the issue. And, it is to that possible new solution to which I now turn.[27]

V. EXCUSING JUDY NORMAN IN A DIGNITY-AFFIRMING MANNER

If battered women are not generally justified in killing their abusers in entirely passive circumstances, must they be convicted of some form of criminal homicide? No. We may be able to *excuse* them, but without falling back on the old claim of temporary insanity (or diminished capacity).

To explain, let me say a few initial words about excuse defenses. As already noted, an excuse defense is recognized in the law when the actor has performed a

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[26] I do not want to overstate this argument. J.T. Norman was a far more real future threat to Judy Norman than Saddam Hussein was to the United States. But, without a meaningful temporal requirement, the risk of false positives increases, as does the likelihood that some alternative to deadly force would have demonstrated itself.

[27] So far, I have sought to justify what I have characterized as the "traditional"—basically, common law—approach to self-defense. In fact, however, I would expand self-defense law in the manner recommended by The American Law Institute in its Model Penal Code and enacted in some states.

Section 3.04 of the Code justifies the use of self-protective force, including deadly force subject to certain limitations, when the actor believes (and such belief is reasonable, *see* MODEL PENAL CODE § 3.09(2) (1962)) that the force used is "immediately necessary . . . on the present occasion."

This is a sensible reform of self-defense law. Notice that, unlike the common law, which focuses on the time span between the innocent person's use of defensive force and the threatened act of aggression being repelled, the Code simply asks whether the *necessity* to use the defensive force is immediately at hand. For example, suppose that Judy Norman had been in her kitchen making dinner when J.T. entered the kitchen and said to her, "This is it, bitch. Today you die. I am going to the bedroom, getting my gun, and killing you here and now." He then turns toward the bedroom, and Judy takes this moment with his back turned to lethally stab him in the back with a large kitchen knife. The common law, if strictly followed, would probably suggest that she acted prematurely. (If she *were* allowed to successfully plead self-defense on these facts it would be an implicit admission by the law, and jurors, that the traditional law is unrealistic.) But, Judy would very likely win in a Model Penal Code jurisdiction: The use of force was "immediately necessary . . . on the present occasion." If she waited for J.T. to return with the gun, to be sure that he meant business, she would have been helpless.

This wise expansion of self-defense law would not, I think, save the day for Judy Norman or others who kill their sleeping abusers, for I do not think it can fairly be said that a midnight shooting or bed-burning is *immediately* necessary *on the present occasion*.

wrongful act—an unjustified act—but we believe that she should not be blamed for her actions.

When do we *not* blame persons for their wrongful conduct? Although various explanations, founded on utilitarian considerations, or non-consequentialist considerations of character or cause, are sometimes suggested,[28] I submit the best answer (although one I do not have space to defend here) is this: A person may properly be blamed for her conduct if she had the capacity and fair opportunity to choose freely whether to violate the moral/legal norms of society.[29] According to this account, a person lacks free choice—and, thus, cannot be blamed—if, at the time of her wrongful conduct, she lacked "the substantial capacity or [fair] opportunity to: (1) understand the facts relating to her conduct; (2) appreciate that her conduct violates society's mores; [or] (3) conform her conduct to the dictates of the law."[30] In my view, this is the underlying basis of *all* excuse defenses, regardless of the label we attach to any particular claim.

To understand where I am going here, it is important to distinguish between incapacity claims (more accurately, "lack of substantial capacity" claims) and no-fair-opportunity claims. Incapacity claims focus on *internal* malfunctionings, on *internal* disabilities—that is, on mental illnesses or syndromes. In essence, we are claiming here a defect in the human "machine." For example, we may assert that the actor suffered from irrationality—due to some disorder; she was so far out of touch with reality that (let's say) she did not understand the relevant facts surrounding her conduct (the first of the three criteria set out above), namely, that the man asleep in her bed did not constitute an imminent threat to her safety. As is readily apparent, early lawyers tried to bring battered woman within the scope of just such an incapacity claim by asserting, in a manner viewed by some as demeaning, that the battered woman was deranged—insane—albeit temporarily, at the time of the crime.

We do not need to focus on syndromes, however, to provide a potential excuse for a severely battered women. We can provide a theory for acquittal that is, I think, more consistent with our moral intuitions, and which is not potentially demeaning to the woman. The solution is found in applying the no-fair-opportunity prong of excuse theory. A no-fair-opportunity excuse claim is based on some *external* factor that acts on the individual in a way that convinces us that she did not have a fair opportunity to conform her conduct to the law (the third criterion above). The key word here, of course, is *fair*. This is a normative judgment. We do not need expert psychiatric testimony to handle *this* question, because this form of excuse recognizes that there is nothing wrong with the woman—what was "wrong" were external circumstances that we believe, but for the grace of God, would probably have caused us, as well, to act unlawfully.

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[28] DRESSLER, *supra* note 7, §17.03, at 210–14.

[29] Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701 (1988) (footnote omitted).

[30] DRESSLER, *supra* note 7, at 213.

Can we make a plausible no-fair-opportunity claim in Judy Norman's case? Yes. Think about what a jury might have asked itself if it had been given the opportunity. Could Judy have avoided the situation by walking out the door? (Remember, we are not using syndrome evidence, so the battered woman's learned helplessness, if it exists, is not relevant.) To answer *that* question, the jury would likely ask itself other questions: Did Judy Norman have children, thus making it more difficult for her to leave? Yes. She had four living at the time of J.T.'s death. What then were her options? Leave them with J.T.? That would be unthinkable for any loving parent. Leave *with* them? Where would she have gone? How would she have supported the children? What safety nets had been set up in her community to make such an option realistic? Moreover, what would have prevented J.T. from finding her and "punishing" her for her departure? Rather than leave, could she have called the police for help? *She did*, and they did nothing to protect her. And, so on.

This is the way to try to make the case for excuse, one that a jury might—or might not—accept given the facts of a particular case. And, lo and behold, in about a dozen states, there already is a recognized statutory basis—one apparently not appreciated by enough defense lawyers—for making this claim. It is the defense of duress, as defined by the Model Penal Code.[31] The Code provides a defense if a person is coerced to commit a crime—including murder—as the result of prior use of unlawful force upon the person (there is a lot of that in domestic violence cases) and/or imminent or *non*-imminent threats by the aggressor to use unlawful force upon the person in the future, if a person of reasonable firmness in the actor's situation would have been unable to resist committing the crime.[32]

Thus, we would test the abused woman, Judy Norman, against the standard of a person of reasonable firmness, not one who has learned to be helpless. This is a normative standard, not a medical one requiring expert psychiatric testimony. This is an issue that quite properly resides with the jury. In my view, given extreme facts, a full defense could, would, and should be recognized, but it would be recognized while sending the right moral message: We do *not* want women to kill their sleeping husbands, but we *will* excuse them under extreme circumstances.

Unfortunately, most states currently do not define duress as broadly as the Model Penal Code. Most states do not even permit the defense to be raised in homicide cases. Therefore, battered-women advocates should expend some of

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[31] MODEL PENAL CODE § 2.09 (1962). I appear to be chiding defense lawyers for failing to appreciate this defense. Perhaps that is unfair, because the use of the Code's duress defense in the manner described in the text is atypical. The paradigmatic duress case involves a coercer ordering an innocent person to commit an offense against a third party, which is not the case in the Judy Norman situation. The language of the Code, however, permits the interpretation I am offering here.

[32] I favor retention of a reasonable temporal requirement with self-defense, albeit a reformed version (*see supra* note 27). Such a requirement is unnecessary in the duress context, since this defense is an excuse, rather than a justification. However, the fact that a threat is or is not imminent *is* a factor that would affect whether a person of reasonable firmness would feel compelled as act as she did.

their energies seeking legislation defining duress in Model Penal Code terms.[33] In the absence of such a reform, lawyers are either forced to claim insanity, a claim that many consider demeaning and inaccurate, or self-defense based on BWS, a morally undesirable, morally coarsening, and ultimately pathologizing claim, in nonconfrontational circumstances.

VI. CONCLUDING THOUGHTS

Philosopher J.L. Austin has written that "words are our tools, and, at a minimum we should use clean tools: we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us."[34] He was speaking to philosophers. Too often, however, I am afraid, that lawyers—for whom words are also their (our) tools—fail to speak clearly, in part because too many of us fail to *think* clearly enough about the underlying moral bases of our laws. Too often we think only about legal verdicts ("Who cares how we obtain an acquittal, since excuse defenses and justification defenses result in the same outcome?").

Nowhere does morality play a more important role than in our criminal laws. Criminal trials of women like Judy Norman are like morality plays. Therefore, we should want our criminal laws to send proper moral messages, for the "moral of the story" to be the right one, the one we want to teach ourselves and each other.

The law rightly expects us to fly straight, to obey the relatively uncomplicated rules that "thou shalt not murder, rape, or rob." As Professor Stephen Morse has wisely observed, many factors serve to make it possible for people generally to "stay on the straight and narrow."[35] But, it is also true that the law cannot be unflinching. We should not punish people who disobey those strictures if we believe that a person of reasonable firmness would have been unable to resist. We should not expect more of others than we reasonably can expect of ourselves.

Some marital abuse cases are such that we should excuse the woman who kills in those cases. But, let's get our moral messages clear. Let's not seek to justify the death of the abuser in nonconfrontational circumstances. Let's reaffirm the basic common law message that the taking of life should be an act of last resort.

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[33] Women's groups have successfully lobbied for other changes important to their concerns, including reform of rape law, so the reform advocated here it is not beyond possibility. What needs to be kept in mind by legislators—a matter that should be emphasized to them—is that recognition of a potential duress defense in such circumstances does not mean that battered women who kill in nonconfrontational circumstances will inevitably be acquitted. The case would go to the jury, but we should not expect jurors to excuse homicides too quickly.

[34] J.L. Austin, *A Plea for Excuses*, *in* FREEDOM AND RESPONSIBILITY 6 (Herbert Morris ed., 1961).

[35] Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1605 (1994).