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FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL REFLECTIONS

JOSHUA DRESSLER*

I. INTRODUCTION

Today I want to talk about proposals to “reform” (notice the quotes) the law of self-defense. The proposals I will discuss are intended to expand the scope of the criminal law defense—that is, to justify greater use of force, specifically deadly force, in self-protection than currently is authorized. I will be criticizing these proposals, some more harshly than others. And, as it turns out, these reform proposals are, to differing degrees, advocated by persons who espouse feminism or, at least, characterize themselves as feminists and who support their reform proposals with feminist rhetoric.

In critiquing these so-called feminist reform proposals, I do so with trepidation. First, I am sensitive to the fact that attaching labels, such as “feminism,” to ideas or proposals often interferes with serious discussion. I don’t want that to happen. Also, of course, there are ideological schisms within feminism, as there are with all intellectual theories. I do not intend to discuss those distinctions.¹ I am quite prepared to accept that, while some

* Frank R. Strong Chair in Law, The Ohio State University, Michael E. Moritz College of Law. This Essay is a revised version of the George and Margaret Barrock Lecture on Criminal Law, which I gave at Marquette University Law School on April 8, 2010. As this Essay is, at its core, a lecture, I have tried to retain its informality and relative brevity. Unfortunately, my Type A personality and three-decades-plus habit of footnote writing compelled me to add more footnotes to the text than a lecture requires. For those who find footnotes irritating, you can safely ignore them. For those who want everything footnoted that can be, my apologies (and condolences). I thank Professor Michael O’Hear, Dean Joseph Kearney, and all the other fine people at the Law School who made my time at Marquette so enjoyable. I also thank participants at a faculty workshop at the University of Oregon School of Law for their input on the topic.

1. As some evidence that the term “feminism” has become almost mainstream, we find that Sarah Palin told Katie Couric that she (Palin) is a feminist. Couric asked Palin, “Do you consider yourself a feminist?” Palin responded,

I do. I’m a feminist who believes in equal rights and I believe that women certainly today have every opportunity that a man has to succeed and to try to do it all anyway. And I’m very, very thankful that I’ve been brought up in a family where gender hasn’t been an issue. You know, I’ve been expected to do everything growing up that the boys were doing. We were out chopping wood and you’re out hunting and fishing and filling our freezer with good wild Alaskan game to feed our family. So it kinda started with that. With just that expectation that the boys and the girls in my community were expected to do

persons who call themselves feminists may agree with all of the reform proposals I will discuss today, other feminists do *not* favor one or another of the proposals. Indeed, I have doubts about characterizing one particular proposal as feminist, but I do so—at least, in quotes—because its chief advocate calls herself a feminist and has proposed changes in self-defense law on the ground of empowering women. So if you object to the label “feminism” attached to one or more of these proposals, I can’t fault you. I could strip the word “feminism” from title of today’s lecture, but this change would not lessen the importance of the subject: any effort to expand the legal use of deadly force is surely a matter about which we should have considerable concern.

I have decided to focus on the feminist aspects of this area because I consider myself a feminist, and I respect and value feminism, so it is a matter of concern to me when people with whom I am generally allied go in a direction I regret. As other scholars, such as Jeannie Suk and Aya Gruber have noted, “the feminist war on crime”² has brought us to “strange crossroads,”³ in which feminists and law-and-order advocates, such as the National Rifle Association and the Victims’ Rights movement, seem at times to be—if you will pardon the expression—in bed together.

For today’s lecture, when I *do* use the term “feminism” or “feminist,” I do so in the very general sense explained by Martha Chamallas in her book *Introduction to Feminist Legal Theory*:

Most legal writers or practitioners who identify themselves as feminists are critical of the status quo. The root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination. Whatever their differences, feminists tend to start with the assumption that the law’s treatment of women has not been fair or equal and that

the same and accomplish the same. That’s just been instilled in me.

When Couric asked for Palin’s definition of a feminist, Palin said, “Someone who believes in equal rights. Someone who would not stand for oppression against women.” Transcript: Palin and McCain Interview (Sept. 30, 2008), <http://www.cbsnews.com/stories/2008/09/30/eveningnews/main4490788.shtml?source=m>.

Talk show host Laura Ingraham stated that “Sarah Palin represents a new feminism. . . . And there is no bigger threat to the elites in this country than a woman who lives her conservative convictions.” Robin Abcarian, *Insiders See “New Feminism,”* L.A. TIMES, Sept. 4, 2008, at A13; see also Posting of Peter Hamby to Palin Changes Tune on “Feminist” Label, CNN.com, <http://politicalticker.blogs.cnn.com/2008/10/23/palin-changes-tune-on-feminist-label> (Oct. 23, 2008 20:32 CST) (noting Palin’s remark that “I’m not going to label myself feminist or not”).

2. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

3. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 275 (2008).

change is desirable. . . . Feminist legal scholarship is . . .
oppositional; it assumes there is a problem and is suspicious
of current arrangements

. . . .
. . . Feminist critiques [of the law] can take many forms; they
can consist of thick narrative descriptions, causal analyses, or
advocacy of reform.⁴

My comments, of course, will focus on feminist advocacy of reform of the
criminal law.

One last introductory comment: As I consider myself a feminist, I find the
premise that the “criminal law is, from top to bottom, preoccupied with male
concerns and male perspectives”⁵ an uncontroversial observation. How could
it be otherwise, when the criminal law—at least the most important crimes
and doctrines—was developed at a time when men, exclusively, served as
judges and, later, legislators. Even the most fair-minded person can only see
the world through his or her own eyes, based on his or her own life
experiences, so the criminal law necessarily has a gender-based imbalance
that justifies our serious attention. Thus, feminism has enhanced the law by
forcing us to rethink all of our presuppositions to determine if we can defend
the status quo. And, in some areas of criminal law, feminist reform efforts
have, to my mind, improved the law, most notably rape law.⁶ But a lecture
about what is right and good is not especially interesting, so I want to spend
my time here focusing on an area that concerns me.

II. GENERAL FEMINIST CRITICISMS OF SELF-DEFENSE LAW

A. *Pre-Reform Law*

Recent modifications in self-defense law, as well as currently proposed
changes, are the focus of this Barrock Lecture. I need to start, however, with
a brief review of traditional (“old fashioned,” if you will) self-defense law.
First, in recent centuries self-defense has been characterized as a justification
defense. That is, when a person claims self-defense, she is stating that killing
the aggressor was the right thing to do—that the result of a dead human being
is a good result or, at least, a non-wrongful result. Thus, in thinking about the

4. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1–2 (2d ed. 2003).

5. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151,
2151 (1995); see also CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE
161–62 (1989) (“The state is male in the feminist sense: the law sees and treats women the way men
see and treat women.”).

6. Even here, I once had concerns with some feminist-supported changes in the law. See
Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary
Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409 (1998).

reform proposals we should not lose sight of the fact that by expanding the right to use deadly force, our society is asserting that greater use of deadly force by persons threatened with harm is desirable or, at least, okay with us.

When *is* deadly force justifiable? In general, traditional self-defense law provides that such force may be used only by an innocent person against an aggressor if the non-aggressor reasonably believes (even if she is wrong) that deadly force is necessary to repel an imminent unlawful deadly attack.⁷ Under this doctrine, if the innocent person can reasonably avoid death using no force at all, she must use the nonviolent route rather than kill. Similarly, if she can reasonably avoid death by using *nondeadly* force, then she must use this lesser degree of force. And she must use deadly force only if the unlawful deadly attack reasonably appears to be imminent; that is, it will occur almost immediately. One message, therefore, of traditional self-defense law is that it generally values human life.⁸ Even the bad guy, the aggressor, should not be killed unless there reasonably appears to be no realistic option. Another reason (one to which I will return later) for the narrow rules of self-defense is the belief that use of deadly force should, whenever possible, be reserved to the state because, as Hale put it in the seventeenth century, “private persons are not trusted to take capital revenge one of another.”⁹

I don’t want to overstate the narrowness of traditional self-defense law. There have always been exceptions to the law I just described. Most notably, it has always been the case that a person, attacked in his castle—that is, in his home—need not flee his dwelling, even if such retreat would make deadly defensive force unnecessary. And, over time, the law of self-defense, which we adopted from England, was reshaped in some jurisdictions, originally primarily in western states, to permit innocent persons to stand their ground, rather than retreat, outside the home, and use deadly force if it is otherwise necessary. But, in general, self-defense law has favored, to the extent possible, protecting *all* human life, including the aggressor’s.

7. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01[B] (5th ed. 2009).

8. See Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 878–81 (1976). Kadish states that “[i]t is clear . . . that we value life very highly.” *Id.* at 878. He discusses various perspectives: from the “good and simple moral principle that human life is sacred,” *id.* (citing GENERAL SYNOD BOARD FOR SOCIAL RESPONSIBILITY, CHURCH OF ENGLAND, ON DYING WELL: AN ANGLICAN CONTRIBUTION TO THE DEBATE ON EUTHANASIA 24 (1975)), which suggests that no killing is ever justifiable; to a weaker (and legally more accurate) statement that “one may never intentionally” (purposely, as distinguishable from knowingly) “choose to take the life of another, for whatever end,” *id.* at 879; to a somewhat weaker proposition still, namely, there exists “a presumption in favor of life and against killing, so that there can be exceptional circumstances in which the value of life is outweighed by other values or in which killing may be justified on other grounds,” *id.* at 880. And, Kadish argues, the law supports a “principle of equality; namely, that all human lives must be regarded as having an equal claim to preservation simply because life itself is an irreducible value.” *Id.*

9. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *481.

B. Feminist Critique

So, what is wrong with this picture? Feminists point out that self-defense law developed primarily in the context of male-on-male violence. The law developed in two general circumstances: first, when an aggressor, typically a male, threatened an innocent person, typically another male; and, second, when two men, unrelated to each another, got into an altercation (perhaps today we would envision two strangers in a bar) that escalated into violence. As Cynthia Gillespie described the latter scenario, but which could just as easily apply to the former, “[t]he law of self-defense . . . [took] on the character of a code of acceptable manly behavior for a person who was facing a dangerous adversary It was all very masculine, two-fisted stuff”¹⁰

Feminists also remind us that self-defense law developed during a time when a man was supposed to be his wife’s and children’s protector. Thus, self-defense law did *not* develop with a mind to the case in which a woman—at that time, almost always in the home or in her husband’s company—might need to use force against a male aggressor; and certainly the law did not have in mind the scenario of a wife using force against her husband.¹¹ As a consequence, males judges developing self-defense law did not seriously consider the problems that arise from the inherently unequal strength of the parties if a woman has to defend herself against a male aggressor; and the law did not consider the fact that females typically have less experience in defensive use of force than men; and, perhaps most significantly, the law did not consider that, in cases of domestic violence, the female is unlikely to be free of her aggressor-partner’s violence. Even if she can avoid injury today, she is effectively incarcerated in the home with a violent partner, creating an ongoing danger to her—a very different scenario than the single-incident aggression in a bar or on the street. As a result of these differences, some feminists have argued that self-defense law is guilty of applying—to use a term coined by Susan Estrich in the context of rape law¹²—“boys’ rules,” that is, rules that might make sense in the context of men fighting other men, but which have no place in the context of male-on-female aggression or,

10. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 41 (1989).

11. Indeed, for support of this feminist critique one need only look to Blackstone’s *Commentaries*, which observed that “[i]f the baron kills his feme it is the same as if he had killed a stranger, or any other person,” but, lo and behold, “if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *445 n.103 (William Draper Lewis ed., Philadelphia, Rees Welsh & Co. 1897) (1765). According to the *Commentaries*, the killing of one’s husband was a “species of treason,” for which the wife was to be drawn and burnt alive. *Id.*

12. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986).

therefore, the case of female-on-male self-protection.

Consequently, feminists have sought self-defense reforms. Before turning to their proposals, however, let's put things in perspective. The "boys' rules" label attached to self-defense law is an overstatement, as Professor Estrich has observed.¹³ Remember the message I suggested is at the core of common law self-defense law: Human life is deeply valued, even that of the aggressor. As Estrich has written, self-defense rules do not exist to "torment" women: "Unlike, say, the resistance requirement in rape law, [self-defense rules] are not born from a historic distrust of women, or a desire to keep them powerless. They exist, quite simply, to preserve human life where deadly force is not reasonably necessary."¹⁴ According to Estrich, "these rules were [not] designed to define 'manly behavior.' . . . In many cases, the rules exist not so much to define manly behavior as to limit manly instincts—in order to preserve human life."¹⁵

For example, when I am threatened by an aggressor, one non-violent solution might be for me to run—or, as the law puts it, to retreat to a place of known safety. Though, as I have noted, the retreat requirement has never been absolute, there *was* a retreat requirement outside the home in most American states during much of our nation's history. *That* is not a boys' rule. Real Men, Clint Eastwood Men, Macho Men, do not run from their attackers. That's "cowardly." The retreat rule is, as one scholar put it, an "affront to . . . values of masculinity and bravery."¹⁶ Real Men stand their ground and tell aggressors, "Make my day!"¹⁷ But, as Blackstone observed, "though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor."¹⁸ So, to the extent that traditional retreat requirements remain in force, the law resolutely rejects "boys' rules," or if you will, "Real Men's rules." Furthermore, retreat issues aside, the requirement that one not use deadly force if lesser force will do—that is, that innocent persons not use disproportional force against attackers—shows a gentility inconsistent with machismo. Indeed, even the imminent-threat requirement serves to punish one manly "instinct," namely, a male's desire for "vigilante revenge for

13. Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1431 (1990) (reviewing GILLESPIE, *supra* note 10).

14. *Id.*

15. *Id.*

16. Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 245 (2006).

17. See *Erwin v. State*, 29 Ohio St. 186, 199–200 (1876) ("[A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life . . .").

18. 4 WILLIAM BLACKSTONE, COMMENTARIES *185.

attacks on one's family that occurred hours or days before."¹⁹

Thus, the feminist-based stigma attached to self-defense law is not altogether fair. Let's not be *too* quick, then, to think self-defense law requires feminist reform from top to bottom. But perhaps *some* reform is in order, so let's look further.

III. "MAKE MY DAY": WOMEN ACTING JUST LIKE MEN

Professor Elaine Chiu has observed that legal doctrine usually outlasts the culture in which the law developed.²⁰ However, the retreat doctrine, specifically the requirement that a person retreat if she can do so at no reasonable risk to herself rather than stand her ground, is eroding at a particularly fast pace. The change may be, in part, a function of the violent nature of modern American life, but it is more likely the result of the ability of groups like the National Rifle Association to play on our fears of violence. But it is also the result of feminist "empowerment" efforts or, at a minimum, the astute (one might even call wily) efforts of conservative law-and-order advocates to use feminist arguments in support of their self-defense reform proposals, and thus co-opt some feminists.

The erosion of the retreat requirement, in part by invoking feminist rhetoric, is ironic. As I just noted, the retreat rule is perhaps the least "male" self-defense doctrine. Consider how Harvard Professor Joseph Beale explained the doctrine more than a century ago:

A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.²¹

Since 2005, however, this seemingly pro-cowardice, anti-macho, doctrine of self-defense law has been successfully attacked. With the passage of Florida's "Make My Day" law,²² twenty-six other states have significantly expanded the scope of their self-defense rules.²³

19. Estrich, *supra* note 13, at 1431–32.

20. Chiu, *supra* note 16, at 231–32.

21. Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 581 (1903).

22. FLA. STAT. ANN. § 776.013 (West Supp. 2010). The term "make my day law" was coined in 1985 when Colorado expanded its self-defense law to provide more protection for homeowners when they use deadly force against intruders. WILLIAM WILBANKS, *THE MAKE MY DAY LAW: COLORADO'S EXPERIMENT IN HOME PROTECTION* 1 (1990).

23. I base this figure on Suk, *supra* note 3, at 263–64 nn.159–62. Professor Suk also cited "live bills" in 2008 that would have similarly expanded self-defense law, *id.* at 264 n.164, but only one of

Florida's law, a model for the other states, provides a person with the statutory right to stand one's ground and use deadly force outside the home—to meet force with force—in any public place where the person has a right to be (as well as in one's automobile), as long as the individual “reasonably believes [deadly force] is necessary . . . to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.”²⁴ As well, the new law provides the self-defender immunity from criminal and civil actions that arise out of use of deadly force in the preceding circumstances.²⁵

Thus, the castle doctrine has come to the public streets, bars, and other public areas. And the leading proponent of this change in Florida (and, indirectly, in the many states that have followed the Florida model) was Marion Hammer. Who is Hammer? She described herself in 2006 as a 4-foot-11, 67-year-old woman who “wouldn't hesitate to shoot you” if she felt her life was in danger or she feared injury.²⁶ Perhaps more pertinently, however, she is a past president of the National Rifle Association—the law was an NRA measure. One should not lose sight of the fact, however, that her rhetoric in support of greater use of deadly force in self-defense usually centered on the need to empower women—that is, her strategy was “to feminize the NRA's message through the linking of gun ownership with protection [of women] against male violence.”²⁷ Indeed, Hammer observed that women need protection in our modern era because they are now “working outside their homes, . . . [and] [t]hey [become] vulnerable to crime and criminals”²⁸ For example, she defended the Florida law this way:

A woman is walking down the street and is attacked by a rapist who tries to drag her into an alley. Under prior Florida law, the woman had a legal “duty to retreat.” The victim of the attack was required to run away. Not anymore. Today, that woman has no obligation to retreat. If she chooses, she may stand her ground and fight.²⁹

Now, of course, the previous law did not require the woman in her

those states, Ohio, has since enacted expansive self-defense legislation, OHIO REV. CODE ANN. § 2901.05(B) (LexisNexis Supp. 2009).

24. FLA. STAT. ANN. § 776.013(3) (West Supp. 2010).

25. FLA. STAT. ANN. § 776.032(1) (West Supp. 2010).

26. P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground*, 35 S.U. L. REV. 1, 16 (2007) (quoting Hammer).

27. Suk, *supra* note 3, at 267 (quoting Hammer).

28. Nancy Norell, *Women are Champions of Concealed Carry Reform*, WOMEN & GUNS, May/June 1999, at 12, 14, available at <http://www.saf.org/pub/rkba/women-guns/wg990506nn.html> (quoting Hammer).

29. Suk, *supra* note 3, at 266 (quoting Hammer).

scenario to run away if doing so would have jeopardized her safety. But, the message is clearly one of empowerment of women.

On closer analysis, the feminist argument here is not as feminist as it first appears. Basically, Hammer's message is that women in modern times are vulnerable outside the home—outside, that is, the protection their husbands are expected to provide them in the castle—and, therefore, women need to be armed. But once we arm these vulnerable women, we are essentially being told that women should not have to retreat because they can be as macho as men and stand their ground. Thus, the NRA project simultaneously “embraces feminine”—we are the weaker sex and need a gun as equalizer³⁰—”and feminist rhetoric.”³¹

These new no-retreat laws have affected changes inside the home as well. When a person uses defensive force against someone unlawfully and forcibly attempting to enter a dwelling (or occupied vehicle) or against one who has already entered the residence, the new law creates a presumption that the defender “held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another.”³² Although this is a rebuttable presumption, prosecutors have typically treated the presumption as virtually conclusive. One can shoot the intruder almost at will.

The latter in-home rule is not particularly feminist or even pseudo-feminist in character. However, Florida law (followed by some other states) *does* provide explicit benefits to domestic violence victims, presumably usually women, in the home. Under the new law, if a victim of domestic violence receives a protective order against another person—including a spouse or live-in partner—and if that person seeks to enter her *or their* home in violation of the protective order—even if he is entering, for example, to pick up his belongings—the legal presumption I just described applies to the woman living there. If she kills in these circumstances, the legal presumption is that she killed lawfully.³³ Effectively, these changes give the domestic violence victim a justification to purchase a weapon, *maybe* learn how to handle it properly, and then use it on *anyone* who enters the home. On this matter, the NRA and women's groups worked closely in alliance.

Consider, as well, North Carolina's new Domestic Violence Victims Empowerment Act, which provides that when a domestic violence victim receives a “protective order restraining the defendant from further acts of

30. Norell, *supra* note 28, at 14 (quoting Sue King, a former NRA board member, as saying, “Being the weaker sex and the preferred prey of predators, we are the highest profile target.”).

31. Suk, *supra* note 3, at 267.

32. FLA. STAT. ANN. § 776.013(1) (West Supp. 2010).

33. *See* FLA. STAT. § 776.013(2)(a) (providing that the defense applies if “there is . . . an injunction for protection from domestic violence”).

domestic violence,” the clerk of the superior court that issues the order is required to provide the victim an informational sheet that includes a notice of the woman’s right to apply for a concealed weapon permit, and to receive a temporary ninety-day permit while her application is being considered.³⁴

Some feminists have criticized these latter changes on the ground that they are likely to result in more, not less, harm to women. But the position of some advocates of arming domestic violence victims is that:

The right to protect oneself with a firearm is . . . an issue of choice, and an issue that is clearly a woman’s issue. Why do the politically correct “official” feminists recoil from women defending themselves and their families with firearms? Is it because, in spite of all the[ir] rhetoric about “empowerment” and not being victims, there is still a thrill in being, after all is said and done, just a trembling damsel?³⁵

So we learn that some feminists are Real Women, just like their Real Men comrades-in-arms. Still, I am gratified that, as other feminists demonstrate, one can surely be a feminist and not believe that arming women with concealed weapons, inviting them to kill their abusers in the home, and abandoning the retreat rules outside the home, are signs of cultural progress. Indeed, I would rather consider the abandonment of the retreat rule as, primarily, an NRA victory, perhaps disguised in feminist rhetoric, and not one truly supported by most feminists. Let me move on, however, to reform proposals that lack NRA DNA, and which are more evidently identifiable as feminist proposals.

IV. BATTERED WOMEN AND NON-CONFRONTATIONAL SELF-DEFENSE

Some feminists have sought to make it possible for battered women to claim self-defense when the abuse victim kills her abuser in non-confrontational circumstances, that is, when the abuser is *not* attacking the woman but is asleep, watching television, or in some other passive, non-threatening condition. Consider, for example, the horrendous abuse of Judy Norman at the hands of her husband J.T.,³⁶ a man whom I have described in prior scholarship as a “moral monster.”³⁷ Basically, this is her story: For years, J.T. forced Judy to prostitute herself while he remained at home, often drunk. He beat her regularly if she didn’t bring home enough money or,

34. N.C. GEN. STAT. §§ 50B-3(c1)(6), 14-415.15(b) (2009).

35. Norell, *supra* note 28, at 12.

36. *State v. Norman*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988), *rev’d*, 378 S.E.2d 8, 9 (N.C. 1989).

37. Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 259, 264 (Stephen Shute & A.P. Simester eds., 2002).

really, for any reason or no reason at all. Over the years, he beat her with his fists, a broken beer bottle, a bat, and other objects. Finally, on the day in question, after failed efforts to obtain police protection, Judy obtained a gun and killed J.T. while he slept.

Judy Norman sought to defend her actions on self-defense grounds. The imminence requirement prevented her claim from succeeding. Indeed, since no reasonable person could consider J.T. Norman, *as he slept*, an imminent threat to Judy's life, the traditional rule is that no jury instruction on self-defense should be given in such circumstances; and that was the result in the *Norman* case.³⁸ In response, some feminist reformers have sought to avoid the "imminency" obstacle in non-confrontational cases by sleight-of-hand: They have argued that juries should be permitted to hear evidence of battered woman syndrome (BWS) and, if this is done, they claim there is a basis for a self-defense jury instruction.

What is battered woman syndrome? Dr. Lenore Walker, the originator of the concept,³⁹ has described a cycle of violence typical in the battering relationship: The cycle includes periods of calm, followed by minor violence, leading to an acute act of violence, which is followed by contrition, often sincere, by the abuser, after which the process recycles. Part of the syndrome, Dr. Walker asserts, is that the battering victim begins to suffer from psychological paralysis, and thus is unable to leave her abuser. Despite criticisms of some empiricists,⁴⁰ and in recent years of some scholars sympathetic to feminism,⁴¹ the syndrome has gained broad acceptance in the courts. Indeed, advocates for battered woman have successfully convinced some state legislatures to codify the admissibility of BWS testimony in specified circumstances,⁴² rather than leave the matter to the discretion of trial judges on a case-by-case basis.

How does BWS testimony supposedly solve the self-defense problem confronting a Judy Norman-like battered woman who kills in non-

38. *Norman*, 378 S.E.2d at 12.

39. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

40. E.g., Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 53–59; David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 630–43 (1986); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 75 (1997) (noting that "[s]urprisingly, no proponent of the [BWS] has responded" to Faigman's 1986 critique).

41. E.g., Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 459 (2005) (criticizing BWS as one-dimensional, stating that it "paints a simplistic emotional picture, one of a woman who is helpless, not one who is struggling").

42. Lauren K. Fernandez, *Battered Woman Syndrome, Criminal Law Chapter of the Eight Annual Review of Gender and Sexuality Law*, 8 GEO. J. GENDER & L. 235, 239 & n.26 (citing statutes in eight states).

confrontational circumstances? First, BWS evidence arguably helps jurors understand why the battered woman did not leave her batterer—namely, emotional paralysis. Of course, the law doesn't require a woman to leave her husband at the risk of losing her right of self-defense, but I am sympathetic to the concern that jurors may think that way ("If she *really* was abused, if things were *really* as awful as she claims, she would have left him."), and BWS evidence may reduce that risk by enhancing her credibility after she provides testimony of prior abuse. To that extent, BWS has a proper place in some self-defense homicide trials. But, conceptually, there is more going on here. The argument of reformers is that BWS evidence should be permitted in order to justify the claim that the battered woman *subjectively* believed her sleeping abuser⁴³ represented an imminent threat *and* that a reasonable person would have so believed.

Assuming appropriate expert testimony, syndrome evidence should also be admissible to support a battered woman's *subjective* belief that her abuser is an imminent threat to her life while asleep.⁴⁴ There is no basis, however, for claiming that such a belief is a reasonable one unless the reasonable person is understood to be a reasonable battered woman suffering from BWS, and then only if we assume that "reasonable" people fail to understand reality. Isn't it a contradiction in terms, however, to describe the "reasonable person" as one who believes that an unarmed sleeping man represents an instantaneous threat? Remember, the issue here is not whether the imminency requirement is good public policy. Perhaps it isn't, an issue to which I will turn momentarily. But, *given the requirement*, I submit it can't seriously be argued that a reasonable person would believe J.T. represented an imminent threat.

Ironically, the practical effect of BWS evidence is to pathologize the battered woman. Indeed, a juror simulation study has reported that "the presence of expert evidence providing a diagnosis of [BWS], compared to a no expert control, [causes] the jurors to view the defendant as more distorted in her thinking, and less capable of making responsible choices, and less culpable for her actions."⁴⁵ As Anne Coughlin has wisely observed, BWS "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense

43. The non-confrontational cases are the ones in which syndrome evidence is most needed. In a traditional self-defense case, a confrontational situation, the battered woman will be able to get a self-defense jury instruction because the abuser is attacking her at that time.

44. In *Norman*, the Court of Appeals judges that believed that Judy Norman was entitled to a self-defense instruction based their position on expert testimony that Judy believed that killing J.T. while he slept was *necessary*, not that she believed that the threat was *imminent*. *State v. Norman*, 366 S.E.2d 586, 592 (N.C. Ct. App. 1988).

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

is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.⁴⁶ Professor Coughlin characterizes use of BWS evidence in this context as a “misogynist defense.”⁴⁷ Indeed, use of BWS testimony potentially brings courts back, full circle, to the early battered women cases, in which women sought to defend themselves on grounds of temporary insanity or diminished capacity.⁴⁸ The only difference is that the mental health testimony is now disguised in self-defense clothing.

Of course, one can put aside battered woman syndrome and argue that a battered woman who chooses to kill her abuser while he sleeps is morally justified in doing so even though harm to her is not imminent, and that the law should give its legal imprimatur to this moral judgment. I turn, therefore, to another feminist argument for expanding the defense of self-defense.

V. ABOLISHING THE IMMINENCY REQUIREMENT

Although courts today generally permit evidence of BWS for various purposes, reformers have failed to convince many appellate courts to permit self-defense jury instructions in non-confrontational homicide cases. That, to me, is good news. As I have tried to demonstrate, the underlying argument of the battered woman who makes her case with BWS testimony is, really, that she should be *excused* for her actions because she failed to understand reality (namely, that her batterer cannot kill her while asleep), and not that the defense fits within the common law *justification* claim of self-defense.

Many feminists are now more direct in their approach and, ultimately, make a far more plausible claim. They argue that the imminency requirement in self-defense law should be abolished. Conceptually, they argue, the purpose of the imminency requirement is to ensure that the self-defensive force was necessary. But the law already requires proof that the use of deadly force was necessary; so the imminency requirement is superfluous. Worse, the argument proceeds, the imminency rule is dangerous to women in the home. This is not a case of two men in a bar or on the street; this is a woman, living with a violent, physically stronger partner, who must protect herself. To wait until an attack is imminent is to leave her defenseless. She needs to act sooner. Thus, the imminency requirement leaves the woman legally unprotected. So, abolish the rule.

Is abolishing the imminency rule a good idea? First, it should be observed that the Model Penal Code, which some American states have adopted in this

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

47. *Id.* at 70.

48. For example, in perhaps the most famous case of a non-confrontational homicide, Francine Hughes poured gasoline over her sleeping abusive husband and burned him to death. The case is reported in FAITH McNULTY, *THE BURNING BED: THE TRUE STORY OF AN ABUSED WIFE* (1980). Hughes was acquitted on the ground of insanity.

regard, does not require that the aggressor's attack be imminent. It requires instead that *use of deadly force by the innocent party be "immediately necessary . . . on the present occasion."*⁴⁹ This is a significant and wise change. For example, let's assume in the Norman situation that J.T. drunkenly enters the kitchen where Judy is making dinner, and he says to her, "Bitch, I am done with you, I am going upstairs to find my gun, come back, and kill you." Traditional law, if it were strictly applied, would require Judy to wait until he returned with the firearm before she protects herself, a foolhardy scenario. Under the Code, if Judy stabs J.T. in the back with a kitchen knife after he turns to go to the bedroom (presumably to obtain the weapon), she could reasonably argue that such force was "immediately necessary on the present occasion." J.T.'s use of force was not yet imminent, but the necessity to repel his threat *was* immediate. I advocate states implementing this Model Penal Code reform.

The problem for Judy Norman is that this hypothetical case involved an immediately existing threat of deadly force, one very soon to be implemented. Judy Norman's real case involved non-confrontational self-defense. As wise a change in the law as the Model Penal Code advocates, I don't think it would have helped Judy Norman in her real situation, as deadly force was not *immediately* necessary in the middle of the night while J.T. slept. As far as we know, tomorrow was going to be no different than yesterday or the day after tomorrow. This is why some feminists want *all* temporal limitations abolished. They advocate so-called "preemptive self-defense."

I oppose this. First, one benefit of a strict temporal requirement is that it considerably reduces the risk of false positive killings—that is, when a person kills based on an incorrect belief that such force was necessary. When an attack is underway, the risk of a false positive is virtually non-existent. In the absence of *any* temporal limitation, however, false positives will increase dramatically. As Professor Albert Alschuler has nicely put it in a different context, but which applies here as well, "even funnel clouds sometimes turn around, and human beings sometimes defy predictions. They turn around as well."⁵⁰ Indeed, in view of meteorological advances, I would submit that the general path of funnel clouds is *more* predictable than the free-willed actions of human beings. Lest we be *too* pessimistic, *some* abusers *do* turn their lives around. Many of them are alcoholics; when they stop drinking, violence ends. Thus, what seems necessary now—killing the batterer—may turn out to be unnecessary. Or, the abuser may find religion and turn his life around. Or, the abuser might abandon his family and no longer represent a threat to the

49. MODEL PENAL CODE § 3.04(1).

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

spouse. Yes, he might represent a threat to someone else, but *self*-defense is just that—the right to use force to protect oneself, not to execute dangerous people. One can list other possibilities, albeit far more remote: Maybe the abuser, if allowed to survive, will have a stroke and become an invalid or, for that matter, be hit by a truck and killed. The point is just this: Once we dispense with a temporal requirement, we will find ourselves justifying the use of deadly force that *would have proven* unnecessary—but by killing the abuser today, we will never know if this was one of the false positive cases. And, if we abolish the temporal requirement, the newly expanded defense will presumably be available to *all* defendants, not just domestic violence victims. A self-defense rule with no temporal limitation, therefore, strikes me as quite troubling.

Second, abolition of any temporal element could (and I fear would) too easily become a mere justification (by the abused woman and jurors) for revenge. We would be inviting jurors to approve a homicide because the decedent, in their mind, deserved to die. Indeed, when I teach *Norman* in my class or talk about it with others, this is what often comes out: Essentially, the “SOB doesn’t deserve to live.” Consider how a judge in the *Norman* case put it: “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.”⁵¹ Translation: By his egregious conduct over many years, by making Judy Norman’s life so dismal, a jury should be allowed to say, “Good, he is dead. Not guilty.” Or, consider another judge in another non-confrontational case, albeit involving a battering *father*: “This case concerns itself with what happens . . . when a cruel, ill-tempered, insensitive man roams through his years of family life as a battering bully”⁵² These statements—focusing, as they do, not on a single confrontational moment but on a life of depravity and brutality—seemingly come down to the primitive point that the decedent deserved what was coming to him. He had no moral right to life.

This is the moral forfeiture theory of self-defense.⁵³ As Hugo Bedeau has put the forfeiture theory, “[the wrongdoer] no longer merits our consideration, any more than an insect or a stone does.”⁵⁴ I don’t deny that some people, even many, buy into this principle, but I prefer a society that does not treat humans as no better than noxious insects. We shouldn’t let this be the basis for self-defense law. And, please notice, if we *really* accept the moral

51. *State v. Norman*, 378 S.E.2d 8, 21 (N.C. 1989) (Martin, J., dissenting) (emphasis added).

52. *Jahnke v. State*, 682 P.2d 991, 1011 (Wyo. 1984) (Rose, J., dissenting).

53. DRESSLER, *supra* note 7, at § 17.02[C].

54. Hugo Bedeau, *The Right to Life*, 52 *MONIST* 550, 570 (1968).

forfeiture doctrine, here is one effect: In Colorado, an abused woman once hired a contract killer to kill her husband; after the killing, she and he sought to justify the killing on the ground of self-defense (and defense-of-other).⁵⁵ If the abuser forfeits his right to life, then it shouldn't matter who kills the noxious insect. Abandonment of a temporal requirement invites us, *sub silentio*, to go down a very, very ugly road.

Two other reasons exist for rejecting this proposal. First, as Professor Kim Ferzan writes, “[s]elf-defense is uniquely justified by the fact that the defender is responding to aggression. Imminence, far from simply establishing necessity, is conceptually tied to self-defense by staking out the type of threats that constitute aggression.”⁵⁶ In the absence of imminence there is no aggression, and thus “we blur the distinction between offense and defense.”⁵⁷ One need only consider the American invasion of Iraq to see that so-called “preemptive self-defense” can easily result in a false positive (that Saddam possessed “weapons of mass destruction” that would be used to attack the United States) and convert the defender into the aggressor.

Finally, a significant temporal requirement of imminence is defensible on political theory grounds. Generally speaking, the authority to use force in society is allocated to the state, rather than to the individual citizen. As Whitley Kaufman has put it, “[t]he basic idea is that the state claims a monopoly on force, under which no individual or non-state group is permitted to resort to force without the state’s authorization.”⁵⁸ This requirement of authorization, which serves to control the use of violence in society, “rests on the venerable natural law principle . . . that no one should be a judge in his own case; the decision to use force against another person must be made by an objective and disinterested authority.”⁵⁹ The exception to this rule is when “danger is present and immediate, and there is no time to resort to a central authority.”⁶⁰ Abolition of the temporal requirement threatens this principle. One should not accept an idea merely because it is old and has survived for centuries, but one should still respect tradition enough to place a heavy burden on those who claim that we have somehow become a society that no longer can live by these venerable rules.

One last point: If we retain an imminency or immediately-necessary requirement, this does *not* mean that a battered woman like Judy Norman

55. *People v. Yaklich*, 833 P.2d 758, 759 (Colo. App. 1991).

56. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 262 (2004).

57. *Id.* at 259.

58. Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 354 (2007).

59. *Id.* at 359.

60. *Id.* at 354.

need be without criminal law protection if she kills in desperation when her abuser is not immediately threatening her. I have written elsewhere⁶¹ that the answer is to apply a *currently existing* version of the duress defense to battered women who kill in nonconfrontational circumstances. Specifically, the Model Penal Code definition of duress should apply.⁶² Essentially, the claim would be that, as a result of prior use of unlawful force by the abuser (no current threats are required under the Code), the battered woman was unable to resist killing her abuser, and that any other person of reasonable moral firmness (again, the language of the Code) would have been so inclined.

This is an excuse claim, however, not a justification. This defense does *not* assert that the killing was proper, but rather claims that, even though the killing is wrong, the battered woman is not culpable for her homicidal action. She is blameless not because she is crazy or suffers from some syndrome, but because she is all too normal, all too human, because anyone else in her situation might have acted as she did. I want juries to have a chance to—and, on the proper facts, they will—exculpate the Judy Normans of the world, but it should be by way of excuse, rather than justification.

Let's leave the justification defense of self-defense as it is or, even better, as it was. Let's not start authorizing deadly force in more cases than the common law or Model Penal Code permit. Feminist proposals and the proposals of others to expand the defense are, in my view, unwise.

61. Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 468–71 (2006).

62. MODEL PENAL CODE § 2.09(1) provides: “It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”