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Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler

Joan H. Krause*

I. INTRODUCTION

In *Battered Women and Sleeping Abusers: Some Reflections*,¹ Professor Joshua Dressler offers cogent criticism of the application of self-defense to battered women who kill their abusers under “nonconfrontational” circumstances, such as when the abuser is asleep. Dressler is critical of using evidence that the defendant suffered from “Battered Woman Syndrome” (“BWS”) to establish the requisite defense elements, which historically have applied only in confrontational contexts. According to Dressler’s critique, legislators, judges, and academics have far too easily accepted the proposition that the battered woman’s actions are morally justifiable, and have been far too willing to stretch the limits of the doctrine to accomplish this end. Dressler asserts that “[t]he proposition that a battered woman is justified in killing her sleeping abuser, although well-meaning, is wrong, and . . . any serious effort to expand self-defense law . . . to permit such killings [risks] . . . the coarsening of our moral values about human life and, perhaps, even the condonation of homicidal vengeance.”² In place of self-defense, Dressler proposes an expanded use of the duress doctrine to excuse rather than justify the battered woman’s actions, permitting society to condemn the killing while simultaneously acknowledging that the defendant lacked a “fair opportunity to conform her conduct to the dictates of the law.”³

Although not explicitly stated, Dressler’s criticism appears to rest on three core assumptions: one moral, one factual, and one practical. For Dressler, the underlying moral basis of self-defense is “the basic common law message that the taking of life should be an act of last resort.”⁴ In accordance with this principle,

* George Butler Research Professor of Law and Co-Director, Health Law & Policy Institute, University of Houston Law Center. I am grateful to Professor Joshua Dressler for his inspiring criminal law scholarship, and for his good humor in tolerating my criticism. My thanks to Leslie Griffin, Ellen Marrus, Gerry Moohr, Laura Oren, Nancy Rapoport, Irene Rosenberg, Richard Saver, and Sandra Guerra Thompson for their suggestions regarding this Commentary, and to Librarian Peter Egler for his assistance. For my earlier thoughts on some of these issues, see Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699 (1994).

¹ Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457 (2006).

² *Id.* at 458.

³ *Id.* at 469.

⁴ *Id.* at 471.

the use of deadly force in self-defense is permissible only when the actor reasonably believes it is necessary to protect herself from an imminent, unlawful, deadly attack.⁵ Dressler's second assumption is that, as a factual matter, a battered woman who kills her abuser under nonconfrontational circumstances will *never* be able to establish that she faced such an objectively imminent threat. From this, it follows that any attempt to characterize a battered woman's nonconfrontational killing as justifiable can succeed only by, in essence, making a mockery of the doctrine's moral underpinnings. Finally, in positing that the excuse of duress is a better fit for such defendants, Dressler assumes as a practical matter that jurors will be competent to assess whether or not a battered woman acted as a "person of reasonable firmness" would have acted under the circumstances, without the need for expert testimony. The goal of this Commentary is to demonstrate that each of these core assumptions is flawed in an important way.⁶

As an initial matter, it is useful to understand just how rarely this issue arises. In reality, few battered women kill their abusers, and fewer still do so in nonconfrontational situations. While it is difficult to identify all such homicides, a comprehensive study of appellate cases from 1902 to 1991 in which female defendants claimed to have killed their abusive domestic partners in self-defense estimated that 20% of such killings (roughly 45 cases) were nonconfrontational, with 8% (roughly 18 cases) involving sleeping victims.⁷ These figures are roughly consistent with a more recent study of self-defense cases between 1979 and 1999 in which imminence was at issue, which found that approximately 9% of such killings were committed by battered women in nonconfrontational settings.⁸ While Dressler suggests that these numbers may be underinclusive,⁹ the available research indicates that most battered women who kill do so in the midst of a confrontation.

With regard to Dressler's first assumption regarding the moral basis of self-defense, while the preservation of life is indeed one of the foundations of the doctrine, there are competing philosophical theories that accord the abuser's interests significantly less weight than those of his victim. In terms of Dressler's core factual assumption, the assessment of whether a sleeping abuser constitutes an

⁵ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.01[B], at 237 (4th ed. 2006).

⁶ In a previous conversation, Professor Dressler characterized himself as "a pacifist who trusts the jury system." Unfortunately, I'm not and I don't. To the extent our disagreements are purely normative, then, we may find little common ground.

⁷ Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 394-97 (1991). Maguigan identified 223 cases meeting her criteria, generating 270 opinions.

⁸ V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1249, 1253 (2001).

⁹ See Dressler, *supra* note 1, at 457 n.1 (noting that Maguigan's study did not take into account acquittals, guilty pleas, pre-trial dismissals, or killings that were not prosecuted). Moreover, in some unsolved nonconfrontational cases the perpetrator may in fact have been the decedent's battered wife or girlfriend.

objectively imminent threat is confounded by imprecise definitions of the concept of imminence, by a reasonable person standard that is significantly less objective than it appears, and by confusion over the nature of the threat the battered woman is asked to predict. Finally, as for Dressler's faith that the jury will be able to resolve these issues without the help of expert testimony, the end result may be merely to refocus the jury on an issue that should be irrelevant to the inquiry: why didn't the battered woman extricate herself from the relationship long before this point? My position, ultimately, is that all the moral risks supposedly presented by battered women who kill in nonconfrontational circumstances are, instead, dangers inherent in the doctrine of self-defense. We may decry these dangers or we may embrace them, but it is both incorrect and unfair to hold battered women to a higher standard than the doctrine requires.¹⁰

II. SELF-DEFENSE AND THE BATTERED WOMAN

To understand why battered women who kill their abusers have generated so much attention, one must first understand the basic contours of self-defense. Self-defense developed as a legal doctrine that, in limited circumstances, would render an otherwise criminal act of violence acceptable. Under the traditional formulation, an actor may defend herself with deadly force only when she reasonably believes such force is necessary to defend against an imminent (or in some jurisdictions an "immediate") unlawful threat of death or serious bodily harm.¹¹ This belief must be both *subjectively* reasonable, in that the actor herself truly believes it, and *objectively* reasonable, in that a reasonable person would similarly so believe. Self-defense generally is characterized as a justification, although there is some evidence that the defense originally functioned, at least in part, as an excuse at English common law.¹² The distinction is not merely semantic: if the defense is viewed as an excuse, we focus on a particular actor's lack of moral culpability for what is acknowledged to be an improper killing. In contrast, construing the defense as a justification means that despite the legal prohibition against homicide, in this situation the killing "was right, or at least not wrong"¹³—not just for this defendant, but for all those in similar circumstances. The choice of defensive theory also has implications for mistakes: while a reasonable error about the nature of the threatened harm may be justifiable, an

¹⁰ As Professor Victoria Nourse has argued, "it is time to stop blaming the downfall of the criminal law on subjectivity and the battered woman; she has not created new problems, but simply reminded us of the importance of resolving old controversies." Nourse, *supra* note 8, at 1294–95.

¹¹ See WAYNE R. LAFAVE, *CRIMINAL LAW* § 10.04, at 539, 540–41, 544–46 (4th ed. 2003).

¹² See Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 26 (1986).

¹³ DRESSLER, *supra* note 5, § 16.03, at 218–19.

unreasonable error is not, and thus can only excuse the actor (generally by reducing the charge to manslaughter).¹⁴

For a battered woman who kills in nonconfrontational circumstances, the chief obstacles to proving self-defense are the requirements that she *reasonably* believe the threatened harm to be *imminent*, as the killing occurs in the absence of any ongoing physical attack. As discussed below, at least on a theoretical level these barriers may not be insurmountable. Practically, however, these challenges were the genesis of efforts to introduce expert testimony regarding BWS. After years of working with battered women, Dr. Lenore Walker identified key elements of a syndrome that helps to explain how a woman might become trapped in an abusive relationship, and why killing her abuser might seem a reasonable course of action. Walker described a three-stage escalating “cycle of violence” consisting of: (1) a “tension-building” stage, in which the woman suffers minor verbal or physical abuse and tries to prevent escalation; (2) the “acute battering incident”; and (3) “loving-contrition or absence of tension,” a relatively peaceful stage marked by the abuser’s remorse and the battered woman’s hope that the cycle will finally end.¹⁵ To explain why a woman who has experienced this cycle remains in the relationship, Walker posited that battered women suffer from “learned helplessness,” as a result of which “it becomes extraordinarily difficult for such women to change their cognitive set to believe their competent actions can change their life situation.”¹⁶ Over time, the periods of respite become shorter and the stages of tension and violence escalate—until, for some women, it becomes quite literally “kill or be killed.”

As discussed below, Walker’s research has been extensively criticized for its methodological, cultural, and normative shortcomings. Assuming for the moment that BWS paints an accurate picture of at least *some* battered women, however, how is it relevant to self-defense? At trial, expert evidence concerning BWS is offered to help judges and jurors understand how the woman’s actions are reasonable (and hence justifiable) under the circumstances. Dressler acknowledges that such evidence is relevant to two basic questions: why the defendant remained in the abusive relationship over time, and (less clearly) whether she herself truly believed that a sleeping or otherwise incapacitated abuser presented an imminent threat.¹⁷ Most controversially, this evidence has been used to explain how the

¹⁴ *Id.* § 18.03, at 249.

¹⁵ Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 531–32 (1978).

¹⁶ *Id.* at 529. Walker adapted the theory of learned helplessness from the work of Dr. Martin Seligman, who found that laboratory animals subjected to random electrical shocks continued to behave passively even when later given an opportunity to avoid additional shocks. *Id.* at 526. See generally MARTIN E. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975).

¹⁷ Dressler, *supra* note 1, at 463. Note that the testimony’s relevance to the first point, why the woman remained in the relationship, is something of a red herring in self-defense cases, as the defense does not impose a general duty on individuals to avoid potentially violent situations. See Nourse, *supra* note 8, at 1284–85 (criticizing such a “pre-retreat” requirement).

defendant's actions satisfy the *objective* aspect of the reasonableness inquiry, a task made easier if she can be compared to a "reasonable battered woman" rather than the generic "reasonable person."¹⁸ It is this third use of BWS evidence that most offends Dressler, and to which I now turn.

III. IMMINENCE AND THE OBJECTIVELY REASONABLE PERSON

If self-defense requires the actor's *reasonable* belief in the existence of an *imminent* threat, the definitions of those terms become crucial. "Imminence" has been defined as requiring the attack "to be almost immediately forthcoming."¹⁹ In other words, we think of imminence as encompassing a traditional confrontation, where the actor responds almost instantaneously to a threatened attack. An unprovoked knife fight, an armed home intruder, a mugger demanding money at gun-point on a darkened street corner—these we consider imminent threats. When the purported assailant is asleep, however, it would appear this standard cannot be met. Yet even at common law, the fact that an actor *misperceives* the immediacy of the threat may not be fatal to a claim of self-defense. As noted above, the doctrine encompasses reasonable errors about imminence; it is only where the error is *unreasonable* that the defense is unavailable, and the actor must instead try to mitigate the severity of her crime through an imperfect self-defense excuse.

The concept of a "reasonable" belief in imminent harm forms the crux of Dressler's criticism of the battered woman's defensive claim. Dressler shapes his argument by using the facts of *State v. Norman*, a North Carolina case in which a woman who killed her long-time abuser while he slept raised a claim of self-defense.²⁰ After quoting the horrific facts of the case—which included more than 20 years of physical abuse during which J.T. Norman forced his wife into prostitution to support the family, the fact that the violence escalated so much in the days prior to the killing that Judy Norman attempted suicide, and the fact that the police were called at least twice in the final 24 hours—Dressler concludes that, at the moment of his death, "[t]here is simply no basis for suggesting that J.T.

¹⁸ At least one court has adopted a highly subjective approach to reasonableness in a nonconfrontational battered woman case. See *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983) (holding that defendant's "actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows.").

¹⁹ LAFAVE, *supra* note 11, § 10.04(d), at 544. See also Dressler, *supra* note 1, at 461 (defining imminence to mean "that the attack will occur momentarily, that it is just about underway."). Some jurisdictions, as well as the Model Penal Code, have broadened the formulation slightly to encompass "immediately necessary" killings. MODEL PENAL CODE § 3.04(1)(1985). Even a broader formulation, however, requires the threat to occur in the *present* situation; it does not open the time frame to encompass temporally remote past or future threats.

²⁰ Dressler, *supra* note 1, at 459–61 (quoting *State v. Norman*, 366 S.E.2d 586 (N.C. Ct. App. 1988)). It is important to note—as Dressler does not—that Judy Norman ultimately *lost* her appeal. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

Norman *in reality* represented an imminent threat to Judy Norman, as traditional law defines ‘imminence.’”²¹ Having rejected any possibility that her belief might have been accurate, Dressler then goes further: “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 . . . [i]t should suggest that there was something wrong with Judy Norman’s psychological connection to reality.”²² Thus, not only does Dressler deny any possibility that Judy Norman confronted an objectively imminent threat, he asserts that only a mentally incapacitated person could even *subjectively* believe such a threat existed—and in the criminal law, compassion for those suffering from psychological infirmities is the province of excuse, not justification. However, there are good reasons to question both the factual and philosophical bases for Dressler’s argument.

A. Imminence

Despite the long pedigree of self-defense, a surprising amount of confusion surrounds the key concept of “imminence.” As a preliminary matter, it is unclear whether imminence functions primarily as an empirical standard or as a normative one. The quoted definitions certainly suggest an empirical temporal question: we should simply look to the amount of time that elapsed between the decedent’s threat and the defendant’s response. Ongoing confrontations should suffice, while attacks on incapacitated (albeit previously violent) individuals should not. Yet case law suggests that this is not, in fact, how the concept of imminence often plays out.

The best research to date comes from a detailed study by Professor Victoria Nourse, who examined “imminence-relevant” trial and appellate opinions between 1979 and 1999.²³ Contrary to the conventional assumption that imminence is a legal barrier to self-defense only when there is a significant time lag between threat and response, Nourse found that the vast majority of cases in which imminence was at issue—both in general (84%) and for battered women in particular (70%)—involved facts that fit the model of a confrontation.²⁴ Nourse concluded that imminence was often used by judges as a proxy for other concepts relevant to culpability, such as the severity and probability of the threat, the possibility that the actor could have avoided the killing by retreating, the actor’s fear of (rather than

²¹ Dressler, *supra* note 1, at 463–64.

²² *Id.* at 464. Dressler has made this point even more forcefully elsewhere, characterizing such defendants as “unable to appreciate objective reality.” DRESSLER, *supra* note 5, at § 18.05[b][4], at 263.

²³ See Nourse, *supra* note 8, at 1249, 1252–55.

²⁴ Although cases involving battered women did constitute a higher percentage of nonconfrontational cases, nearly 40% of nonconfrontational cases involved male defendants. *Id.* at 1254.

malice toward) the decedent, and whether the decedent was the original aggressor. At first blush these results may be surprising, not only because they challenge the conventional wisdom regarding how imminence frames self-defense, but also because they raise the possibility that a supposedly temporal standard is determined instead by a host of non-empirical normative factors, some explicitly irrelevant to the legal inquiry. Perhaps the prime example concerns retreat: in a jurisdiction that does not require the actor to retreat before responding with deadly force, using imminence as a proxy for retreat would have the effect of imposing that legal requirement through a back door.²⁵

On second thought, however, perhaps the use of imminence as a proxy for other culpability factors is not unexpected. Indeed, for many commentators, “[t]he rationale underlying the imminence requirement is to ensure that the defendant’s use of defensive force was *necessary*.”²⁶ Of course, this raises another question: necessary for what? To this, Dressler has a ready answer: imminence functions to limit the types of violence that fall within self-defense, to assure 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.*”²⁷ Nourse characterizes this as the “pacifist” view of necessity, a moral principle demanding that the actor “avoid violence at all costs.”²⁸

While the pacifist approach to necessity may be compelling from a normative perspective, it is not the only theory of necessity historically used to support the doctrine of self-defense. As Nourse notes, if life preservation is the only value served by self-defense, we should expect to see jurisdictions uniformly require retreat before permitting the use of deadly force—a position at odds with current law.²⁹ In fact, under an equally compelling “libertarian” theory of self-defense, the genesis of the doctrine is found instead in the right of each individual citizen to take “self-help” measures in response to unlawful aggression.³⁰ From this

²⁵ See *id.* at 1259. Nourse found that battered women cases were more likely to invoke imminence as a proxy for the actor’s alternatives to killing, as well as for each party’s “relative responsibility” for the outcome. *Id.* at 1263, 1265.

²⁶ Kit Kinports, *Defending Battered Women’s Self-Defense Claims*, 67 OR. L. REV. 393, 424 (1988) (emphasis added). The Model Penal Code adopts this approach explicitly, requiring that the use of defensive force be “immediately necessary . . . on the present occasion.” MODEL PENAL CODE § 3.04(1) (2002). Indeed, some have suggested completely replacing the concept of imminence with that of necessity. See, e.g., Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 279 (2002).

²⁷ Dressler, *supra* note 1, at 466 (emphasis in original).

²⁸ Nourse, *supra* note 8, at 1271.

²⁹ *Id.* at 1272–73. See also DRESSLER, *supra* note 5, § 18.02[C], at 243–46 (noting that a “slim majority” of jurisdictions require no retreat by non-aggressors before they respond with deadly force, and that even jurisdictions with retreat rules generally recognize a “castle doctrine” exception when the attack occurs in the actor’s dwelling).

³⁰ Nourse, *supra* note 8, at 1274. Dressler has recognized the existence of competing and inconsistent bases for justification defenses, including the principle of moral forfeiture. See

alternative perspective, a battered woman who engages in self-help against her abuser, when all other measures have failed, might have a strong justification claim even under nonconfrontational circumstances.

Moreover, even a pacifist approach to necessity does not dictate that imminence function as the predominant criterion. Other elements of the doctrine—indeed, perhaps *all* of them—perform similarly life-affirming functions, yet they have not been treated as sacrosanct. Again, the example of retreat is instructive. In recent years, several jurisdictions that had required retreat before the use of defensive force have loosened that requirement, at least at the margins, by recognizing a “castle” exception in the defendant’s home or by revoking earlier exceptions that required retreat in the home if the assailant was a co-dweller.³¹ Despite clearly expanding the universe of legally permissible deaths, such marginal changes to retreat requirements have not been widely criticized as rocking the foundations of the doctrine. In fact, although far more controversial, several states recently have enacted so-called “shoot first” laws that permit the preemptive use of deadly force against intruders and extend the castle exception to virtually any location in which the defendant has a right to be present, thus abolishing retreat in many public places as well.³² Far from reinforcing the primacy of the pacifist approach, these efforts suggest that the libertarian basis for self-defense may well be the predominant one today—at least where battered women are not involved.

Furthermore, Dressler’s key factual assumption—that it is never reasonable (or even credible) for a battered woman to believe a sleeping abuser presents an imminent threat—is questionable. One of the conceptual problems with self-defense is that it asks an unanswerable question: what would have happened had the defendant not responded with deadly force? Dressler makes much of the fact that until the moment of attack is upon her, the battered woman cannot be certain of what will transpire—and the longer the gap between the active threat and her deadly response, the less certain it is that she would have been killed by her abuser, at least in the short term. As Dressler argues, “[t]o suggest that a battered woman should be able to kill *today* because sooner or later the batterer will inevitably kill

DRESSLER, *supra* note 5, § 17.02, at 222–25. Although rejected by Dressler, this common law principle would view the abuser as having forfeited his right to life due to his inhumane and unlawful actions against his victim.

³¹ See, e.g., DRESSLER, *supra* note 5, at 245–46 (explaining castle doctrine); *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999) (reversing prior Florida law by finding no duty to retreat from residence before resorting to self-defense against co-occupant).

³² See, e.g., FLA. STAT. ANN. § 776.013 (West 2005) (permitting broad use of self-defense, without retreat, in places where the defendant has a lawful right to be, and against persons who unlawfully and forcibly enter a dwelling, residence, or vehicle); Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1 (describing laws). Some defense lawyers characterize this as an “SOB needed killing” defense. Tresa Baldes, *‘Shoot First’ Laws Hit Courtrooms*, NAT. L.J., July 3, 2006, at 25 (quotation omitted).

her strikes me as unacceptable.”³³ By focusing the inquiry on the battered woman’s belief that her abuser is about to *kill* her, however, Dressler imposes a legal requirement beyond what the doctrine demands. While it is true that self-defense is appropriate only for one facing the unlawful exercise of “deadly force,” it is important to remember that such force includes attacks likely to cause either death or serious bodily harm.³⁴ Rather than asking whether the battered woman reasonably believes that she will be *killed*, then, the proper question is whether she reasonably believes she will suffer *serious bodily harm*. Her reasonable belief in imminent serious injury should be enough for her to be able to invoke self-defense, even if she does not believe the attack is likely to take her life.

There is ample literature to suggest that a battered woman may in fact be *accurate* in predicting an imminent threat of such harm from a sleeping abuser. According to this literature, out of sheer instinctual self-preservation a battered woman must become highly sensitive to her abuser’s behavior, and must learn to read the cues of an impending attack. Moreover, it is not quite accurate to say that a sleeping abuser poses *no* threat. Unless actually comatose, a sleeping abuser is merely seconds away from being an *awakened* abuser—and research demonstrates that abusers (particularly when intoxicated) tend to sleep lightly, demand that their partners be present when they awaken, and resume the abuse immediately.³⁵ Is it truly unreasonable for a woman who has repeatedly experienced the violent aftermath of her abuser’s naps to believe that the next severe attack is about to begin?³⁶

The wholesale refusal even to entertain the idea that the battered woman’s assessment of the threat might be accurate is particularly striking in light of evidence that the average person is not very good at predicting violence. As Dressler notes elsewhere, research suggests that even trained mental health professionals are apt to over-predict the future dangerousness of offenders, and the rate of false positives for untrained laypersons could well be much higher.³⁷ But

³³ Dressler, *supra* note 1, at 467.

³⁴ See LAFAVE, *supra* note 11, § 10.04 at 540–41.

³⁵ By way of loose analogy, as parents of infants well know, a sleeping baby is merely seconds away from being a screaming baby. Indeed, it would not be inaccurate to describe my daughter’s afternoon nap as an “imminent meltdown”—one that my husband and I may be uniquely qualified to predict.

³⁶ See Walker, *supra* note 15, at 525 (describing hypervigilance and dangers posed when abuser awakens). The facts of the *Norman* case fit this model: J.T. forced Judy Norman to lie on the floor while he slept on the bed, and she left his side only to make sure her granddaughter’s crying wouldn’t wake him. *State v. Norman*, 378 S.E.2d 8, 11 (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, 275 & n.84 (Stephen Shute & A.P. Simester eds., 2002). See also Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110–17 (1984) (describing studies); Jeremy Horder, *Killing the Passive Abuser: A Theoretical Defence*, in *CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART* 283, 293 (Stephen Shute & A.P. Simester eds., 2002) (discussing the “personal significance” of such predictions for battered women). Of course, it

these statistics do not take into account the fact that the battered woman is not a disinterested observer trying to assess her partner's predilection for violence in the abstract; she is simply trying, based on her own violent experiences, to predict whether or not she is in danger of serious injury. Although a full discussion of the social science evidence is beyond the scope of this Commentary, there may well be good reason to suspect that the battered woman's ability to predict *this* particular danger is far better than that of the average person (or indeed the average juror). At the very least, it should be clear that an irrebuttable presumption that her belief is always wrong is no more defensible than a presumption that she is always correct. In short, an analysis that asks the right question—whether this particular battered woman had a reasonable belief that she faced the imminent use of force by her abuser, capable of causing her serious bodily harm—may well come to a different conclusion than Dressler assumes.

B. Objectivity

Of course, assessment of the battered woman's belief in imminent harm is not performed in the abstract. The vast majority of jurisdictions require not simply the defendant's good faith belief that the use of defensive force was necessary, but also that an *objectively reasonable person* would have so believed. If the only person who could accurately predict the impending violence is another battered woman—or perhaps *this* battered woman, knowing all she does about *this* abuser—it would appear to be impossible to satisfy an objective standard. Once again, however, the battered woman who kills in nonconfrontational circumstances is not as far from the norm as may first appear.

An ample literature documents that the model of the “reasonable person” has never been quite as objective as its name suggests. In fact, the prevailing definition is significantly more contextual than many, including Dressler, are willing to credit. As Professor Kit Kinports notes, the reasonable person is neither an ethical ideal nor the lowest statistical common denominator of what most people would do under the circumstances. Instead, the concept is a normative “measure of culpability” used to determine whether “conduct does not conform to that which we can fairly demand of each other.”³⁸ To assess self-defense, even the most objective model of the reasonable person must incorporate some characteristics of the situation, including the parties' relative sizes, strength, age, and physical disabilities, as well as prior acts or threats of violence.³⁹ Rather than

does not take voluminous studies to tell most of us how bad we are at predicting violence: those of us who have ever known someone who turned out, to our surprise, to be a spousal or child abuser are familiar with the concept.

³⁸ See Kinports, *supra* note 26, at 412–13.

³⁹ See *id.* at 413–15 (discussing traditional admission of certain defendant traits under objective standard); LAFAVE, *supra* note 11, at § 10.04(b), 542 (same). As Nourse notes, “[i]t is an open secret that courts adopt a self-defense standard that is both objective and subjective; as a

undercutting the validity of the standard, these rules merely recognize that the reasonable person does not exist in a vacuum. In other words, the proverbial “man on the Clapham omnibus” is asked to make his determination not from the safe confines of his seat, but rather in the context of this altercation.⁴⁰

In nonconfrontational cases, a key obstacle to meeting this standard is the fact that evidence of the reasonableness of the defendant’s behavior has been framed as relevant only when viewed through the lens of BWS. Although useful in some cases, BWS has proven to be extremely problematic as an empirical, cultural, and political model. Indeed, it is not clear that BWS is in fact an accurate portrayal of many (let alone most) abused women. As critics have noted, Dr. Walker’s research consisted of interviews with a small group of racially homogeneous battered women, and did not analyze differences between women who killed their abusers and those who did not. From this, Walker generalized the three-stage cycle of violence and learned helplessness theories—creating a model that is culture-bound at best, and at worst may only reinforce stereotypes of female submissiveness.⁴¹

In fact, many argue that the entire premise of BWS is fatally flawed: we neither can nor should try to identify a single model of “the battered woman.” Women are abused across the spectrum of race, cultural, and financial status. Some are financially dependent on their abusers; some are financially independent job-holders; others, such as Judy Norman, are forced to support their abusers by engaging in degrading and illegal activities. Limiting expert testimony to women who fit an unrealistic model invites convictions on the basis that a defendant simply wasn’t a “good” battered woman—a particular risk in homicide cases, as the act of killing seems inconsistent with claims of helplessness.⁴²

doctrinal matter, then, there simply is no debate, except at the margins.” Nourse, *supra* note 8, at 1295; *see also* Burke, *supra* note 26, at 287–88, 291 (noting falsity of objective-subjective dichotomy and arguing in favor of a “contextualized” standard).

⁴⁰ Indeed, it sometimes appears that the objectively reasonable person is being conflated with the “reasonable bystander,” another concept used to illustrate these ideas. The idea of a third party such as a policeman, who comes upon the altercation and must make a decision as to which party to aid, is a powerful one used to illustrate the limits of justification defenses. *See, e.g.,* 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, 95–98 (1984) (analyzing third party’s right to intervene as derivative of the actor’s own justification). Unlike the bystander, however, the reasonable person need not be *unfamiliar* with the facts of the situation.

⁴¹ For particularly salient criticism of the BWS model, *see, e.g.,* Mary Becker, *Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL’Y 63, 68–72 (2003) (describing more recent research); Burke, *supra* note 26, at 232–47 (extensively criticizing BWS as applied to self-defense); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 70–87 (1994) (criticizing Walker’s “patriarchal” research); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 529–35 (1992) (criticizing “essentialism” of narrow definitions of battered women).

⁴² *See* Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 173–77 (2004) (noting that an “active

Moreover, the vision offered by BWS is one of dysfunction. Much of the problem may be due to the characterization of BWS as a “syndrome.” The invocation of a medical-psychological model may have hastened the acceptance of BWS expert testimony by judges, but it did so at the expense of women’s rationality: trapped by the cycle of violence, the BWS victim mistakenly believes that she is helpless to change her situation and thus fails to comprehend viable alternatives that would be obvious to the average person. While advocates argue that the syndrome functions merely as a short-hand mechanism to convey general characteristics to a judge or jury, critics charge that it instead “defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities . . . [who] lack[s] the psychological capacity to choose lawful means to extricate themselves from abusive mates.”⁴³ Viewed in this light, the woman suffering from BWS is, by definition, most assuredly *not* acting as a reasonable person. Where BWS exculpates, then, it does so only by playing on our sympathy for the battered woman’s situation—and as Dressler makes clear, compassion is not an adequate basis for justification.⁴⁴

In part, the difficulty may lie in conflating BWS with the battered woman, in confusing an analytical construct with the reality of an individual woman’s life. If the objectively reasonable person is inherently (albeit marginally) contextual, rather than purely abstract, the task facing the battered woman who kills under nonconfrontational circumstances should be simply to convince the jury that she acted *as a normal person would in this extreme situation*. As Professor Alafair Burke argues, battered women are “rational actors choosing among options that are limited by their factual circumstances.”⁴⁵ Factors that might be relevant to how a reasonable person would react to repeated abuse, for example, include: the extent of prior violence; threats of impending violence that give credence to the battered woman’s perception of imminent serious harm; prior unsuccessful attempts to seek assistance from family, friends, law enforcement, and government agencies; whether the defendant has a job or other financial resources; whether the defendant has children and, if so, any means to care for them; and whether the defendant has a safe place to go. Far from being specific to battered women, however, this basic information is relevant to “how *ordinary* people . . . tend to think and act in a certain kind of exceptional situation.”⁴⁶ None of these factors will be

survivor” theory offers a better explanation of why a battered woman is able to overcome her helplessness and kill her abuser).

⁴³ Coughlin, *supra* note 41, at 7.

⁴⁴ Dressler, *supra* note 1, at 464–66. Moreover, as a practical matter, relying on BWS testimony to defend against a homicide prosecution may have collateral disadvantages, particularly in custody decisions. See Schneider, *supra* note 41, at 556–57 (explaining how BWS evidence can be used to support a finding that a woman is incapable of caring for her children).

⁴⁵ Burke, *supra* note 26, at 266.

⁴⁶ Horder, *supra* note 37, at 295. See also Burke, *supra* note 26, at 266 (describing potentially relevant information); Nourse, *supra* note 8, at 1291 (urging that we rethink BWS “as a set of

determinative, and each juror may weigh them differently. But the key is to understand that this is the type of information that jurors frequently consider in assessing a defendant's actions and mental state. If this information is framed as traditionally admissible evidence about the circumstances of, and parties to, a crime, rather than special considerations that are relevant only when viewed in light of BWS, the objective-subjective debate loses much of its force. Battered women, it turns out, may be no more than average people facing horrific circumstances the rest of us pray we never encounter.

IV. DURESS AND THE ROLE OF THE JURY

Having rejected any possibility that a battered woman who kills in nonconfrontational circumstances might be acting as an objectively reasonable person would in a similar situation, Dressler offers a different solution to the problem based on the excuse of duress. In Dressler's view, what is needed is a way to explain that women like Judy Norman lack the "fair opportunity" to conform their actions to the law. Dressler proposes that this be accomplished through statutes similar to the MPC's duress defense, which applies:

if a person is coerced to commit a crime—including murder—as the result of prior use of unlawful force upon the person . . . 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.⁴⁷

Because defendants will be measured against the "person of reasonable firmness" rather than a helpless woman suffering from BWS, Dressler believes the jury should be able to apply its own normative standards, without the need for expert psychological testimony.⁴⁸

Dressler's proposal offers many advantages over the current approach. Characterizing the battered woman's claim as one based on a lack of fair opportunity allows us to reaffirm her rationality while still expressing our dismay at the resulting loss of life. By focusing on an external impediment to her free choice (i.e., the abuser), rather than the internalized dysfunction of learned helplessness, duress allows us to excuse the battered woman's actions without "pathologizing" her perceptions. Moreover, the doctrine permits us to acknowledge that society as a whole plays a role in denying battered women fair opportunities by failing to provide the law enforcement services, shelters, and

relatively innocuous and perhaps necessary normative propositions"). Dressler agrees that these questions are appropriate, but only in the context of an excuse. See Dressler, *supra* note 1, at 470.

⁴⁷ Dressler, *supra* note 1, at 470 (citing MODEL PENAL CODE § 2.09).

⁴⁸ *Id.* at 470.

financial assistance needed to enable victims to escape their situations.⁴⁹ A duress defense would force society to take responsibility for allowing the situation to escalate, and perhaps thereby spur the development of improved assistance programs.

Despite these advantages, however, Dressler's proposal suffers from serious flaws. The most obvious problem, as Dressler admits, is that such a defense is not recognized under current law. Few jurisdictions have followed the MPC: duress generally is limited to situations in which an innocent party is coerced into committing a crime against a third party, rather than striking back against the coercer, and the defense cannot be invoked for homicides. Thus, without significant alteration, it is unlikely that current duress law would assist a battered woman charged with killing her abuser.⁵⁰

A deeper problem, however, is that relying on duress might not avoid many of the problems raised by BWS. As Dressler has conceded elsewhere, the basic concept of an "excuse" is somewhat pejorative in nature.⁵¹ Moreover, duress is unusual even within the universe of legal excuses. Unlike a paradigmatic excuse such as insanity, where the defendant loses her ability to appreciate and/or control her conduct, the defendant who acts under duress unequivocally retains the ability to *choose* her course of action—and she chooses incorrectly, albeit for understandable reasons.⁵² Indeed, in his earlier writings Dressler criticized the drafters of the MPC for treating duress essentially as an incapacity defense, similar to insanity, by requiring that a person of reasonable firmness be *incapable* of resisting the coercion.⁵³ Given this inconsistent pedigree, it is not clear that a

⁴⁹ See, e.g., G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 102–06 (1999) (offering examples of systemic state failures to intervene in battering relationships). Because it does not rely on the battered woman's "sickness," but rather views her as "a person of reasonable firmness," duress might also counteract some of the negative repercussions for battered women in custody disputes. See *supra* note 44, and accompanying text.

⁵⁰ Dressler, *supra* note 1, at 470–71 & n.31. One response to this problem, of course, is to ask that attorneys advocate for changes to current law that would make this defense feasible, similar to successful efforts to admit BWS testimony. *Id.* at 471 n.33. But asking advocates to abandon current strategy for an untried theory—all to appease law professors—is unlikely to be a winning argument. Moreover, to the extent that even traditional duress cases have thus far been less hospitable to BWS testimony than self-defense cases, this might be a difficult battle. See Burke, *supra* note 26, at 247–66 (noting unsuccessful attempts to invoke BWS in duress cases, despite the better factual fit).

⁵¹ See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 672 (1988) (noting that excuse "says something less complimentary about the wrongdoer or, in some cases, about humanity in general"). See also Coughlin, *supra* note 41, at 14–15 (describing "disabilities" that give rise to excuse).

⁵² Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1360, 1365 (1989) (noting the unusual normative basis for duress).

⁵³ Dressler, *supra* note 51, at 708–10.

reconstructed duress defense would avoid implicating concepts of female incapacity and irrationality.

Moreover, I remain unconvinced that jurors, left to their own devices, can adequately assess such evidence. Because “reasonable firmness” functions as a normative standard, Dressler believes jurors will be able to make this assessment merely as laypersons: how much moral firmness could we truly expect of someone in this extreme situation?⁵⁴ As an initial matter, we must ask whether the “person of reasonable firmness” who acts under duress is significantly different from the “reasonable person” acting in self-defense. Indeed, it is unclear exactly what “reasonable firmness” means under the MPC. To the extent the jury is asked to compare the battered woman’s actions to those of a hypothetical “person of reasonable firmness,” this suggests an objective standard. The normative aspects of the defense, however, invite jurors to apply a gut-level sense of what they might do in a similar situation—suggesting the standard requires nothing more than a subjective “there but for the grace of God go I” assessment.⁵⁵ Moreover, to the extent the traditional reasonable person in self-defense is not as abstractly objective as would first appear, the gap between these standards narrows considerably. Jurors have *always* made assessments of reasonableness based on what they, personally, believe—that is, after all, the basis of using reasonable laypersons as fact-finders. To expect jurors to reach vastly different results under an even more nebulous approach to reasonableness may simply be asking too much.

Even if defined with precision, the “person of reasonable firmness” standard will not necessarily focus the jurors on the issues most relevant to assessing the battered woman’s culpability. To put it bluntly, if judges and jurors inherently were able to understand the exigencies of these situations, advocates would never have needed to introduce evidence of BWS in the first place. Indeed, the fact that the majority of failed self-defense claims by battered women involve killings that occur during traditional *confrontations*, rather than under nonconfrontational circumstances, suggests how difficult it is to move beyond longstanding assumptions about gender roles in violent relationships. As Professor Nourse notes, “[b]attered woman cases are in general not seen as ‘real fights’ . . . [and] courts and commentators have trouble seeing confrontational cases as confrontational because of their normative assumptions about what the parties’

⁵⁴ Dressler, *supra* note 52, at 1345.

⁵⁵ As Professor Markus Dubber notes, “Just what reasonable firmness is, and whether I displayed whatever it is, would be left up to the jury, the general receptacle of reasonableness in American criminal law.” MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE 257* (2002). Dressler suggests that most jurors would view themselves as surpassing the reasonable firmness standard, believing they would not have made the same choice as the defendant (although they would have understood the all-too-human temptation). Interestingly, one of my colleagues had the opposite reaction: she believed the standard refers to a person who is morally much *stronger* than most people, including most jurors, would believe themselves to be. This suggests that the definitional problem would need to be resolved before the standard would be viable in a courtroom.

relationship entails.”⁵⁶ For that reason alone, a standard that enshrines those assumptions anew should be avoided.

For a battered woman who kills her abuser, the most problematic assumption involves the question of why she remained in the abusive relationship. In other words, *why didn't she leave*—if not years earlier, at least before the violence escalated? Yet even in jurisdictions that require retreat prior to the use of deadly force, retreat only becomes necessary once a confrontation arises. There is no general duty under self-defense law to avoid altercations by “pre-retreating” from situations where violence may occur, whether the defendant is a woman who fears abuse or a shop-owner who runs a business in a dangerous neighborhood. But as Nourse’s research demonstrates, it has been extremely difficult to disabuse judges and jurors of this notion.⁵⁷

Rather than resolving the issue, it appears that a duress defense would accord this inquiry an even more central role. Applying the no-fair-opportunity standard to the *Norman* facts, Dressler notes that the central question for the jury would be whether Judy Norman could “have avoided the situation by walking out the door.”⁵⁸ To answer that, the jurors would have to ask themselves additional questions about her options, including what would have become of the Normans’ children had she left (unclear), where she would have gone (also unclear, because J.T. had terrorized her extended family), how she would have supported herself (other than as a prostitute, we assume), whether J.T. would nonetheless have found her (as he had on previous occasions), and whether she could have turned to the police for assistance (which she did, to no avail, several times in the days before the killing)—questions that even Dressler admits might well weigh in her favor.

The problem is that all of these questions are ones that advocates for battered women have been trying to get judges and juries to ask for years, a quest that was successful only with the introduction of expert testimony about BWS. In fact, the much-maligned theory of learned helplessness is only one explanation for why a woman doesn’t leave. Advocates have also documented the failure of law enforcement to offer assistance, the lack of shelters to house battered women who flee their homes (especially those with young children), and the lack of economic opportunities and legal assistance for women once they do leave.⁵⁹ Moreover, sociological research makes clear that leaving is often not a safe option. The woman’s attempt to break free from the relationship often spurs the abuser to escalate the level of violence, sometimes fatally—a documented phenomenon known as “separation assault.”⁶⁰ In short, there is abundant evidence of very good

⁵⁶ Nourse, *supra* note 8, at 1286.

⁵⁷ *Id.* at 1284 (discussing how imminence can be used as a proxy to require a woman to “pre-retreat” from the relationship).

⁵⁸ Dressler, *supra* note 1, at 470.

⁵⁹ See, e.g., Becker, *supra* note 41, at 73–83 (explaining challenges).

⁶⁰ See Burke, *supra* note 26, at 267–73 (noting dangers and explaining why the choice to stay may be a rational one); DIANE CRAVEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., SPECIAL

reasons—physical, financial, and psychological—why battered women remain in these relationships. Yet the mere fact that the question is still asked suggests that the results of this research are *not* intuitive. And the only way this information has been successfully conveyed to judges and juries has been through the use of expert testimony, which Dressler’s proposal would disallow.

By refusing to permit expert testimony about the context of the battering—not necessarily in the guise of BWS, but at least from someone with professional expertise—I fear we simply will invite jurors to rely on their inaccurate assumptions about battered women defendants. Perhaps the problem is that any attempt to define a defense that fits all battered women can be criticized as falling into the trap of essentialism. BWS certainly does so, recasting the woman’s identity as merely the sum of the abuse perpetrated upon her. By denying battered women rationality while seeking ways to absolve them of liability, however, Dressler’s proposal does much the same: it continues to conflate “the battered woman” as a theoretical construct with the facts of an individual case. I believe the best way to resolve this disagreement is not to create new syndromes or defenses, but simply to let those facts speak for themselves.

V. CONCLUSION

I share Professor Dressler’s concerns regarding the coarsening of our moral values regarding human life, and his reluctance to embrace ever-expanding concepts of self-defense. But I differ in how much of the blame I am willing to assign to battered women for the current state of affairs. The problems raised by nonconfrontational killings are not unique to battered women, but in truth are inherent in our fragmented approach to the use of deadly defensive force. The doctrine’s disparate and conflicting philosophical underpinnings—ranging from pacifist to libertarian to moral forfeiture—suggest that no moral imperative commands the battered woman to risk life and limb to give her abuser the ultimate benefit of the doubt. It is one thing for us to hope, as a moral matter, that a battered woman will turn the other cheek. For the law to require her to do so—literally upon pain of death—is quite another matter indeed.

Finally, I confess that the legal academy’s fascination with homicides by battered women has always been something of a mystery to me. Despite the prevalence (or recalcitrance) of domestic violence, the vast majority of battered women do *not* kill their abusers, and very few do so in nonconfrontational circumstances.⁶¹ Dressler suggests that these numbers may be higher, and perhaps

REPORT: SEX DIFFERENCES IN VIOLENT VICTIMIZATION, 1994, 4 (Sept. 1997) (noting “dramatically elevated” rate of violence against separated women).

⁶¹ Nor does it appear that the number of such killings is increasing—not even in Texas, where the late Ann Richards once quipped that “the price of gasoline has gotten so high that Texas women who want to run over their husbands have to carpool.” Molly Ivins, *Bucking the Texas Lockstep*, WASH. POST, May 15, 2003, at A29.

he is right. But if we believe these statistics to be underinclusive, we similarly might question recent estimates of the numbers of women who are killed by their partners. According to the Department of Justice, wives constituted an astounding 81% of all persons killed by their spouses in 2002, and girlfriends were 71% of all victims killed by a boyfriend or girlfriend.⁶² I do not mean to make light of the moral dangers of a criminal justice system that compassionately but incorrectly allows battered women to cloak vengeance in the guise of self-defense. But the fact that wives and girlfriends are killed by their husbands and boyfriends at a rate of roughly four to one—despite years of efforts to eradicate domestic violence—suggests to me a far greater problem with the moral state of the criminal law.

⁶² MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, FAMILY VIOLENCE STATISTICS INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 18 (June 2005). These numbers may well be low, as the relationship between victim and killer was ascertained in only 9,102 of the 16,204 non-negligent homicides that year.