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ON SELF-DEFENSE, IMMINENCE, AND WOMEN WHO KILL THEIR BATTERERS

RICHARD A. ROSEN*

The continuing reports of jury nullifications in prosecutions of battered women who kill their batterers, the exceptional number of grants of executive clemency to women who are convicted, and, in North Carolina, the case of Judy Norman, have provoked legal scholars to question the legal defenses available to these women. In this Article, Professor Richard A. Rosen considers whether an imminence requirement is essential to the underlying concerns of the law of self-defense and examines the consequences of modifying the requirement in the context of battered women cases. He analyzes the fundamental principles of self-defense—proportionality, fault, and necessity—in conjunction with the actions of battered women who kill their batterers in nonconfrontational settings. He postulates that the imminence of impending harm requirement serves merely as a “translator” for necessity, ensuring that the defensive force is indeed necessary. Therefore, when imminence conflicts with necessity, necessity must prevail. Professor Rosen examines the historical roots of the imminence requirement and concludes that it does not have an unquestioned historical lineage as a fundamental requirement for a finding of self defense.

He then describes the dilemma encountered by battered women in light of the dangers they face if, lacking a viable, non-lethal alternative, they remain in the relationship. Professor Rosen proposes modifying the imminence requirement to shift to the jury the determination whether the defendant’s use of deadly force was necessary: The judge will instruct the jury that imminence is a required element of self-defense unless the defendant is able to present evidence that she reasonably believed the killing was necessary even though the danger was not imminent. If the defendant meets this burden of production, the jury will be instructed solely on necessity. Professor Rosen concludes that the

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proposed modification would retain the imminence requirement in those cases in which it serves effectively as a translator of necessity, but lessen the law's reliance on it when this function is not met.

I. INTRODUCTION

The first thing that turned my attention to the subject of battered women, self-defense, and the imminence requirement was the case of Judy Norman. Tortured and beaten by her husband for years, threatened with death and mutilation if she attempted to escape or obtain outside help, she finally killed her sleeping husband. Denied a self-defense instruction, she was convicted of manslaughter and sentenced to six years imprisonment.¹

After reading the *Norman* decision, I was left with a firm belief that, had she not killed her husband, he would have inevitably killed or seriously harmed her, no matter what else she tried to do to change the situation, or even if she had continued her passive submission. This conclusion was reinforced by the second event which prodded me into examining this area. I happened to pick up a slim volume of the Advance Sheets of the North Carolina Supreme Court, a volume containing a number of cases in which spurned husbands or boyfriends returned to kill their former wives and lovers who had tried to leave them.² These

1. On appeal, the conviction was reversed by the North Carolina Court of Appeals, but the North Carolina Supreme Court then reversed the court of appeals and reinstated the conviction. *State v. Norman*, 324 N.C. 253, 266, 378 S.E.2d 8, 16 (1989). The facts in *Norman* are discussed more fully at *infra* notes 58-60 and accompanying text. The facts are also discussed extensively in B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169, 169-70; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 89-92 (1991); Kerry A. Shad, Note, *State v. Norman: Self-Defense Unavailable to Battered Women Who Kill Passive Abusers*, 68 N.C. L. REV. 1159, 1161-62 (1990).

2. See Advance Sheets of Cases Argued and Determined in the Supreme Court of North Carolina, Vol. 23, No. 25 (Sept. 4, 1990). Of the eight criminal cases reported in this volume, six were homicides where men killed women. Three of these homicides were perpetrated by ex-lovers or husbands of the victims. In *State v. Simpson*, 327 N.C. 178, 393 S.E.2d 771 (1990), the victim was killed by an ex-boyfriend whom she had refused to see after he stabbed her during an argument. He tracked her down months later at the apartment of her new boyfriend and blew her head off with a shotgun. *Id.* at 182, 393 S.E.2d at 774. In *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), the victim was attacked and stabbed to death by her estranged husband in the parking lot where she worked. *Id.* at 213-15, 393 S.E.2d at 312-14. In *State v. Stevenson*, 327 N.C. 259, 393 S.E.2d 527 (1990), the victim's possessive boyfriend waited in her apartment for her to return from a date with someone else and shot her in the back of the head as she ran away. *Id.* at 260-61, 393 S.E.2d 527-28. *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158 (1990), *cert. denied*, 111 S. Ct. 927 (1991), also involved a man's murder of his wife, but the killing in *Payne* was part of a plan to collect on his wife's insurance

cases gruesomely demonstrated the fate that potentially awaited Ms. Norman had she tried again to escape her tormentor. After reading these cases the question emerged: if, in fact, Ms. Norman could reasonably have expected to meet this same fate, why could she not claim that she acted in self-defense?

The reason for the trial court's refusal to permit Ms. Norman to raise a defense of self-defense, no matter how many threats her husband had made to maim and kill her, and no matter how many times he had indicated his ability and willingness to carry out the most extreme acts of brutality on her person, was that the danger of death or serious harm was not imminent when she killed her husband.³ The North Carolina Supreme Court agreed with the trial court's ruling. Following the traditional rule of self-defense in the state and this country,⁴ a majority of the

policy. *Id.* at 205-06, 394 S.E.2d at 164. See also *State v. Taylor*, 327 N.C. 147, 147-48, 393 S.E.2d 801, 803 (1990) (woman brutally murdered during an armed robbery); *State v. Franklin*, 327 N.C. 162, 166-68, 393 S.E.2d 781, 784-85 (1990) (woman murdered for stealing cocaine from defendant). In *Lynch* the court also cited several cases decided less than six months earlier in which women were murdered by their ex-lovers or husbands. *Lynch*, 327 N.C. at 222-23, 393 S.E.2d at 818-19. See *State v. Faucette*, 326 N.C. 676, 678-82, 392 S.E.2d 71, 72-74 (1990) (victim killed by ex-boyfriend); *State v. Cummings*, 326 N.C. 298, 304-05, 389 S.E.2d 66, 69-70 (1990) (victim killed by ex-lover who was father of her children).

3. *Norman*, 324 N.C. at 260, 378 S.E.2d at 12.

4. A requirement of imminence or immediacy of danger before defensive force can be used is firmly established in North Carolina law. See *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927) (requiring that the defendant reasonably believe he was "about to suffer" death or great bodily harm). For instance, in *State v. Mize*, 316 N.C. 48, 340 S.E.2d 439 (1986), a case cited extensively in *Norman*, the court upheld the refusal of a self-defense instruction to a defendant found not to be in "imminent" danger because the defendant had to wake the victim before the fatal assault, although the defendant had been pursued by the victim the entire day. *Id.* at 53, 340 S.E.2d at 442. Similarly, most states require that the defendant reasonably believe her adversary's violence to be "imminent," that is, "almost immediately forthcoming." WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.7(d) (2d ed. 1986). For a list of states permitting self-defense only in response to an "imminent" threat, see 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 131(b)(3) n.16 (1984). Robinson also provides a list of the few states which do not require "imminent" danger before allowing self-defense. *Id.* § 131(c)(2) n.27. He appears to be mistaken on several of those listed, as his list includes California, Delaware, New Mexico, and Oklahoma, all of which have required imminence in self-defense cases. See *People v. Aris*, 215 Cal. App. 3d 1178, 1186, 264 Cal. Rptr. 167, 172 (1989); *State v. Stevenson*, 38 Del. 105, 110, 188 A. 750, 752 (1936); *State v. Gallegos*, 104 N.M. 247, 249, 719 P.2d 1268, 1270 (1986); *Lary v. State*, 50 Okla. Crim. 111, 118, 296 P. 512, 514 (1931).

The Model Penal Code requires the force used by the defendant to be "immediately necessary for the purpose of protecting himself against the use of unlawful force . . . on the present occasion." MODEL PENAL CODE § 3.04(1) (1985). Most states, however, have not changed their law to follow this approach. *Id.*, cmt. 2(c), at 40. It is also unclear whether the MPC formulation is really any change from the traditional definition of "imminent." Compare Sarah B. Vandenbraak, Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. L.J. 643, 650-53 (1979) (finding little difference in the Model Penal Code formulation from traditional imminence formulation) with Nancy Fiora-Gormally, Case/

court held that because there was no *imminent* danger of serious physical abuse or death when Ms. Norman killed her husband, the trial judge's refusal to instruct the jury on self-defense was proper.⁵

Comment, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 159 (1978) (arguing that Model Penal Code formulation allows a defense for battered women that traditional approach would preclude).

5. *Norman*, 324 N.C. at 260, 266, 378 S.E.2d at 12, 16. According to the majority, because the imminence requirement is essential to ensure that necessity remain the basis of self-defense, it therefore must be narrowly interpreted and strictly adhered to. *Id.* at 260-61, 264-65, 378 S.E.2d at 13, 15. The court associated "imminent" with immediate and unavoidable danger and found no immediate threat to the defendant since Mr. Norman had been asleep for some time when he was killed. *Id.* at 261-62, 378 S.E.2d at 13. In its earlier opinion reversing the conviction, the court of appeals never directly mentioned the imminence requirement, but did assert that to require a battered woman to wait until she was being attacked to act in self-defense would "ignore the realities of the condition." *State v. Norman*, 89 N.C. App. 384, 393, 366 S.E.2d 586, 592, *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989). The court of appeals focused on the defendant's subjective belief in the necessity to kill to protect herself from death or serious bodily harm and the objective reasonableness of this belief based on the surrounding circumstances. *Id.* at 391-93, 366 S.E.2d at 590-91. The appellate court stressed the past abuse of Ms. Norman, her well-grounded beliefs that her husband would kill her and that escape was impossible, and the failure of her previous cries for help. *Id.* at 392-93, 366 S.E.2d at 591. The court held that since battered women are "immobilized by fear" during attacks by their husbands, the defendant simply exercised her right of self-preservation when she was able: during a "momentary hiatus in a continuous reign of terror." *Id.* at 393-94, 366 S.E.2d at 591-92. The majority of the North Carolina Supreme Court rejected this reasoning, holding that

[t]he relaxed requirements for perfect self-defense proposed by [the] Court of Appeals would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.

Norman, 324 N.C. at 265, 378 S.E.2d at 15.

In addition to relying on the lack of imminent danger, the majority also suggested that the threat to Ms. Norman was not serious enough to justify her use of force since "her husband had [n]ever inflicted any harm upon her that approached life-threatening injury." *Id.* It is hard to take this contention seriously, since Mr. Norman, among his other actions, actually threatened to kill his wife. *State v. Norman*, 89 N.C. App. 384, 387, 366 S.E.2d 586, 588, *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989). In any event, in North Carolina, as in other jurisdictions, the right to use lethal force in self-defense can be triggered by threats of great bodily harm as well as threats of death, and the amount of bodily harm Mr. Norman actually inflicted on his wife, as well as that threatened, easily meets this standard under prevailing North Carolina law. *See, e.g., State v. Norris*, 303 N.C. 526, 528-32, 279 S.E.2d 570, 571-74 (1981) (holding that constant threats and beatings are sufficient to allow the use of lethal force in self-defense); *State v. Spaulding*, 298 N.C. 149, 155, 257 S.E.2d 391, 395 (1979) (allowing self-defense based on previous attack and evidence that the victim had his hand "jammed" into his pocket when the killing occurred); *State v. Marsh*, 293 N.C. 353, 353-55, 237 S.E.2d 745, 746-47 (1977) (permitting self-defense where the defendant, who had been previously assaulted by victim, fired twice at the victim who approached the defendant with "hate in his eyes").

Interestingly, Ms. Norman's manslaughter conviction, reinstated by the North Carolina Supreme Court, seems itself to be unjustified under prevailing North Carolina law. North Carolina defines voluntary manslaughter as unlawful killing of a human being without malice,

On one level the view of the majority of the North Carolina Supreme Court is unassailable—the threat of death or great bodily harm was not imminent when Ms. Norman shot her husband, not, at least, by any reasonable interpretation of the word imminent.⁶ At the time she killed her husband, Ms. Norman had at least several hours of peace and safety before her, and even more if she chose to be absent when her husband awoke. Thus, to the extent the court was simply applying the settled law of North Carolina, its decision was surely correct. The attempt by the dissent to wrestle the facts of this case into the confines of the imminence requirement, while understandable and perhaps even laudable, was unpersuasive.⁷ Moreover, the decision by the North Carolina Supreme Court was consistent with the law of self-defense as it has developed and as it is most commonly applied throughout the country today. If harm is not looming at the moment defensive force is used, then force, and especially deadly force, in self-defense is not allowed.⁸

At a deeper level, however, the decision is disturbing. It is difficult to imagine that Ms. Norman had any choice but to act as she did in order to avoid a grave risk of death or serious harm at the hands of her husband. By relying on the imminence requirement, the North Carolina Supreme Court never answered the question whether it was *necessary* for

in the heat of passion as a result of legally sufficient provocation. *State v. Upright*, 72 N.C. App. 94, 101, 323 S.E.2d 479, 484-85 (1984), *disc. rev. denied*, 313 N.C. 513, *cert. denied*, 313 N.C. 610, 329 S.E.2d 400, 332 S.E.2d 82 (1985). In addition, state case law firmly establishes that where the defendant had time for a “cooling of the blood” there is no provocation as a matter of law. *State v. Highsmith*, 74 N.C. App. 96, 100-01, 327 S.E.2d 628, 631, *disc. rev. denied*, 314 N.C. 119, 332 S.E.2d 486 (1985). In previous cases, a lapse of 15 minutes between provocation and killing has been held to be a sufficient cooling time. *State v. Williams*, 141 N.C. 827, 827-28, 53 S.E. 823, 823 (1906); *see also Highsmith*, 74 N.C. App. at 97, 100-01, 327 S.E.2d at 629, 631 (holding that a 20 minute lapse was a sufficient cooling off period). In *Norman*, of course, Ms. Norman had several hours to “cool off” before she killed her sleeping husband.

6. BLACK'S LAW DICTIONARY 750 (6th ed. 1990), defines “imminent” as “[s]omething which is threatening to happen at once”; “something to happen upon the instant”; “something . . . on the point of happening.” Under the WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130 (1976) definition, “imminent” connotes something “ready to take place; near at hand; impending.” As these definitions indicate, and as courts have consistently found, *see supra* note 4, imminence unquestionably includes a temporal requirement.

7. Justice Martin asserted that allowing self-defense in *Norman* would require no expansion of the traditional self-defense requirements because these requirements, including imminence, were met on the facts of the case. *Norman*, 324 N.C. at 266-67, 378 S.E.2d at 16-17 (Martin, J., dissenting). He argued that because battered women never experience any momentary sense of safety, future attacks are imminent at all times. *Id.* at 270-71, 378 S.E.2d at 18-19 (Martin, J., dissenting). In his view, imminence “is not bounded merely by measurable time, but by all of the facts and circumstances.” *Id.* at 270, 378 S.E.2d at 18 (Martin, J., dissenting). The problem with this, of course, is that imminence does have, by definition, a temporal component. *See supra* notes 4 and 6.

8. *See supra* note 4.

Ms. Norman to kill her husband to avoid great bodily harm or death. And is not *this* the proper question that should be addressed in *Norman* and similar cases?

If it is true, as the evidence at trial tended to show, that either a call to the police or an attempt to run away would have resulted in a risk of death or further torture,⁹ then is it proper for society to brand Ms. Norman, and others similarly situated, as criminals? If waiting for her husband to attack her again would have put her at great risk, society should not require her to wait before acting.

This Article addresses whether an unbending imminence requirement is essential to satisfy the concerns underlying the law of homicide and self-defense. If it is indeed essential—if failing to require it in every self-defense case would distort or undermine the core values of substantive criminal law or if eliminating it would have a seriously negative impact on the administration of the law—then justice must be found elsewhere in a case like *Norman*. If, however, a rational and effective self-defense doctrine can exist without total adherence to the requirement of imminence, then a consideration of whether to modify this requirement is not only worthwhile, but essential.

There has been some limited discussion in the literature regarding the role of imminence in self-defense. Paul Robinson has suggested eliminating the imminence requirement for self-defense as part of an overall streamlining of the defense,¹⁰ and a few writers have discussed briefly the pros and cons of such a proposal in the context of cases involving bat-

9. Ms. Norman's previous attempts to escape had all resulted in episodes of extreme violence and/or death threats on the part of her husband. The evidence at trial was uncontradicted that when Ms. Norman had tried to leave home in the past, her husband had found her, forced her to return home, and had beaten her brutally. *Norman*, 324 N.C. at 257, 378 S.E.2d at 10-11. During the episode leading up to the killing, he had threatened to kill her when he got out of jail if she had him arrested. *State v. Norman*, 89 N.C. App. 384, 388, 366 S.E.2d 586, 589 (1988), *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989). When Ms. Norman told her husband that she was going to have him committed because of his drinking problem, he threatened to cut her throat. *Norman*, 324 N.C. at 257, 378 S.E.2d at 11.

10. ROBINSON, *supra* note 4, § 131(c)(1). Robinson rejects the traditional assumption that only imminent harm requires a response, *id.*, and asserts that if the necessity requirement is applied appropriately, no abuse of the justification defense will occur, even if danger to the victim is not imminent. *Id.* § 131(b)(3). He states:

If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be "necessary." The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self defense must permit him to act earlier—as early as is required to defend himself effectively.

Id. § 131(c)(1).

tered women.¹¹ No one, however, has fully examined the role of the imminence requirement in the law of self-defense nor discussed the possible ramifications of eliminating or modifying the requirement, either for women who kill their batterers or for others claiming self-defense.

This Article, therefore, will examine the imminence requirement and the consequences of modifying its use in self-defense cases. This is, undoubtedly, not an easy question. This country's legal system has long operated with a strong presumption against justifying or excusing a kill-

11. Some commentators advocate retaining the traditional imminence requirement, finding that its elimination or expansion would encourage self-help, unnecessary killings, and confusion in applying the self-defense privilege. For example, Cathryn Rosen states: "[T]he closer the courts adhere to . . . immediacy, the greater the certainty that some harm was sure to occur and that the defensive conduct constituted the least harmful alternative." Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 31, 32 (1986). Others, like the dissenting justice in *Norman*, would require a finding of imminence, but would eliminate or modify its temporal components. See, e.g., Loraine P. Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 928-29 (1981) (arguing that a battered wife's constant fear that she will be killed by her husband during a beating makes threat always "imminent"). One author advocates keeping the imminence requirement, but would not require that this belief be reasonable in cases in which women kill their batterers. Under this approach, so long as the defendant in such a case believes that the harm is imminent, no matter how objectively unreasonable that belief, self-defense is permitted. David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 643-47 (1986).

Other commentators focus on the need to allow testimony regarding Battered Women's Syndrome to establish the reasonableness of women's perception of an imminent threat. See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 128 (1985) (The task is to replace "the traditional doctrine with a theory that considers the realities of women as fully as those of men."); Anita L. Grant, Note, *The Battered Woman: When a Woman's "Place" is in the Courts*, 10 CRIM. JUST. J. 273, 286 (1988) ("It is crucial that the judge and jury understand that a woman may perceive imminent and mortal danger in circumstances where a man would not which may then justify her use of deadly force."); see also Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 634-35, 644-47 (1980) (arguing that the imminent danger rule "presupposes a one-time adversarial encounter," and that women are disadvantaged unless evidence of past abuse and expert testimony of Battered Woman's Syndrome is admitted in an individualized approach to each case).

Finally, agreeing with Robinson, Schulhofer strongly, albeit briefly, advocates the elimination of the imminence requirement:

[T]he traditional insistence on a literally "imminent" infliction of great bodily harm must be abandoned outright. Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence *per se*.

Stephen J. Schulhofer, *The Gender Question in Criminal Law*, SOC. PHIL. & POL'Y, 105, 127 (Spring 1990). Schulhofer cites the Model Penal Code formulation of "immediately necessary . . . on the present occasion," MODEL PENAL CODE § 3.04(1) (1985), as an appropriate standard to replace the imminence requirement, but does not explain how the two temporal requirements really differ. See Schulhofer, *supra*, at 127-28. See also Vandenbraak, *supra* note 4, at 652-53 (finding little difference between MPC formulation and traditional imminence requirement).

ing. Society is, and should be, reluctant to broaden a defense to the taking of life. Thus, in considering any expansion of the defense, one must carefully consider the rationale underlying the present policy of forcing Ms. Norman to wait until the next assault before responding in the only way that would truly guarantee her safety.

In this analysis, certain questions must be answered. Can the courts or legislatures modify the imminence requirement without moving too far from society's goal of limiting self-defense only to those who act out of the most dire necessity? Is the problem exemplified by Ms. Norman's plight sufficiently widespread to require tinkering with the norms of substantive criminal law, or are less drastic solutions available? The beginning point of this inquiry must be an understanding of the role the imminence requirement plays in the law of self-defense.

II. IMMINENCE, NECESSITY, AND SELF-DEFENSE

A. *Principles of Self-Defense*

Three fundamental principles underlie the doctrine of self-defense: proportionality, fault, and necessity. While different jurisdictions employ different rules to govern the defense, in every jurisdiction the rules used embody one of the three principles, or are a product of a balancing of these principles. To the extent that the rules differ between jurisdictions, they merely embody different judgments about the application of the three principles in a specific situation.¹²

Illustrative is the common formulation for self-defense to a homicide charge, which requires that the actor not be the aggressor and that she reasonably believe that fatal force is necessary to repel an imminent attack which will result in death or great bodily harm.¹³ Many jurisdic-

12. In fact, the three common principles underlie all of the defenses that permit an actor to commit what would otherwise be unlawful activity in order to protect a valid interest. For the most part, each of these interests is embodied in a different defense: self-defense, defense of others, defense of property and/or habitation, necessity (choice of evils), duress, during war and as part of law enforcement. See ROBINSON, *supra* note 4, § 131(a) (discussing the various interests protected). With the exception of the last two categories, which have little reference to the criminal law, each of the protective defenses constitutes a separate criminal law defense. While each of these defenses operates under its own rules, every rule appearing in every one of these defenses is based on one or more of the three fundamental principles: proportionality, necessity, and lack of fault. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.5 (1978) (treating all categories of defense under the classification, "necessary defense[s]"); LAFAVE & SCOTT, *supra* note 4, §§ 5.4, 5.8-5.10 (discussing the requirements of a defense based on necessity, defense of others, defense of property, and law enforcement); ROBINSON, *supra* note 4 §§ 131-35 (applying these principles to all defensive force justifications).

13. See MODEL PENAL CODE § 3.04 explanatory note at 32, cmt. 1 at 33-34 (1985); LAFAVE, *supra* note 4, § 5.7; ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1115 (3d ed. 1982); ROBINSON, *supra* note 4, §§ 131(a)-(d), at 132.

tions also require that under some circumstances the actor must retreat if it is possible to do so in safety.¹⁴ The fault principle underlies both the refusal to give the defense to an aggressor¹⁵ as well as its extension to those who are reasonably mistaken as to the presence of any of the other requirements.¹⁶ Requiring that lethal force only be used to repel like force is related to the proportionality requirement.¹⁷ Both imminence and, when used, retreat, are included to ensure that the defensive force is truly necessary.¹⁸

14. Most jurisdictions in this country do not require retreat, although there is a strong minority requiring an actor to retreat if she can do so in complete safety. LAFAVE & SCOTT, *supra* note 4, § 5.7(f), at 460-61. For further discussion of retreat in self-defense law, see Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 573-82 (1903) (discussing the history of the retreat rule and arguing that retreat be required before deadly force is used); Yolanda R. Mitchell, *Criminal Law—No Longer a Duty to Retreat—Chapter 696 of Mass. Acts of 1981*, 67 MASS. L. REV. 89, 89-90 (1982) (discussing Massachusetts' decision not to require retreat when using force in dwelling); Philip E. Mischke, Note, *Criminal Law—Homicide—Self-Defense—Duty to Retreat*, 48 TENN. L. REV. 1000, 1001-19 (1981) (tracing the development of the retreat rule in England and the United States, and discussing Tennessee's adoption of the retreat requirement); Recent Development, *State v. Charles: Oregon Self-Defense Limited by Duty to Retreat*, 19 WILLAMETTE L. REV. 166, 166-69 (1983) (explaining the necessity rationale for Oregon's adoption of the retreat rule).

15. See, e.g., FLETCHER, *supra* note 12, § 10.5.2, at 858 (stating that aggressor's culpability in starting the conflict results in the discounting of his interests); LAFAVE & SCOTT, *supra* note 4, § 5.7, at 459-60 ("[O]ne who provokes the use of force against himself for the purpose of causing serious bodily harm may not defend against the force he has provoked."). For a list of jurisdictions denying self-defense to the initial aggressor, see ROBINSON, *supra* note 4, § 132 n.5.

16. An actor is allowed to make a reasonable mistake because "[t]he unpredictable and confrontational nature of potentially justifying circumstances makes mistakes understandable, especially for defensive force justifications, where the actor's decision is frequently made under an impending threat of harm." ROBINSON, *supra* note 4, § 184(a), at 398; see also LAFAVE & SCOTT, *supra* note 4, § 5.7(c), at 457 (stating that self-defense is allowed where defendant reasonably believes in necessity of force, and quoting Justice Holmes: "'Detached reflection cannot be demanded in the presence of an uplifted knife.'" *Brown v. United States*, 256 U.S. 335, 343 (1921)).

17. See, e.g., FLETCHER, *supra* note 12, § 10.5.4 (D), at 870 (explaining that in using necessary force, only the minimal force required under the circumstances is permitted, and that the force used must be in proportion to the interest defended); LAFAVE & SCOTT, *supra* note 4, § 5.7(b), at 455 (stating that the law requires the amount of force used to be "reasonably related to the threatened harm which [defendant] seeks to avoid"); ROBINSON, *supra* note 4, § 131(d), at 81 ("[The] force used by an actor must be reasonable in relation to the harm threatened.").

18. See LAFAVE & SCOTT, *supra* note 4, § 5.7(d), at 458-59 (explaining that the rationale for the imminence requirement is that without imminence, alternatives to the use of force would be available and force would not be necessary); ROBINSON, *supra* note 4, § 131(c)(1), at 78 ("[The imminence requirement] . . . apparently reflects a determination that only imminent harm necessitates a response."); see *id.* § 131(c)(4) (explaining that the retreat rule is based on the rationale that if one may retreat in complete safety, defensive force is not necessary).

B. Imminence and Necessity

In self-defense, the concept of imminence has no significance independent of the notion of necessity. It is, in other words, a "translator" of the underlying principle of necessity, not the principle itself. Society does not require that the evil avoided be an imminent evil because it believes that an imminent evil is the only type of evil that should be avoided, nor because an imminent threatened harm is necessarily worse than a non-imminent one. Rather, imminence is required because, and only because, of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm.¹⁹ If the harm is not imminent then surely the actor can take steps that will alleviate the necessity for responding with fatal force.

At the trial level imminence operates as a condition precedent for a finding of necessity. The legislature, or in common-law jurisdictions, the appellate courts, have made an *a priori* decision that a killing to prevent a non-imminent threatened harm cannot in any case be a necessary killing, and the jury (or judge in a bench trial) must decide guilt or innocence in light of this determination.²⁰

Because imminence serves only to further the necessity principle, if there is a conflict between imminence and necessity, necessity must prevail. If action is *really* necessary to avert a threatened harm, society should allow the action, or at least not punish it, even if the harm is not imminent. Conversely, even if the harm is imminent, society should not permit defensive action if such action is not necessary.

While the criminal law in this country tends to follow the latter proposition, at least to some degree,²¹ it ignores the former. Thus, generally the law requires that a person avoid using force, especially lethal force, if an alternative to avoiding a threat is available, even if the threat poses an imminent danger.²² The law does not, however, allow a person

19. See *supra* notes 11 and 18; see also ROBINSON, *supra* note 4, § 131(b), at 76 ("[A]s a practical matter actions taken in the absence of an imminent threat may not be necessary."); *id.* at n.18 and accompanying text.

20. As Fletcher notes, the imminence requirement acts as a limitation on the ability of citizens to override legislative decisions regarding the balance of interests in society. FLETCHER, *supra* note 12, § 10.2.4, at 795.

21. The obvious exception, of course, arises in situations when the law does not require an actor to retreat before using force, even if the actor could retreat in complete safety. For a discussion of the history of the retreat rule, see *infra* notes 49-55 and accompanying text.

22. For instance, in some self-defense situations an actor must comply with a demand by an aggressor before deadly force may be used against the aggressor, so long as the compliance can be done safely. ROBINSON, *supra* note 4, § 131(d)(4), at 87. In certain jurisdictions, one must surrender property to another making a claim of right to the property in order to avoid using force, since injury could be avoided by giving up the property. *Id.* § 131(e)(4), at 92.

to use force of any degree to ward off a danger that is not deemed imminent, no matter how necessary the protective action may be.

On a theoretical level, this choice seems questionable. In cases where the principle, i.e., necessity, is present, and the translator, i.e., imminence, is not, this choice mandates ignoring the principle because of the absence of the translator. If imminence is required only to ensure necessity, how can the law discount necessity even when it presents itself without imminence? This course permits imminence to act as an inhibitor, interfering with the underlying norm instead of furthering it.

One can argue, of course, that lethal force can never be necessary unless the threatened harm is imminent, but it is not difficult to imagine situations in which this is not the case. For example, Robinson postulates the situation of a hostage who is told that he will be executed at some date in the future; in the interim he is kept in captivity in perfect safety. Although the threatened harm is not imminent, it is reasonably certain to happen. The hostage discovers an opportunity to escape, but can do so safely only by killing the captor.²³ Should the law brand the hostage a criminal if he kills his captor in order to escape? Robinson argues that it should not, and his position seems unassailable.²⁴ In this situation the captor is at fault, the killing is proportional to the harm threatened, and the killing is necessary to protect an innocent person's life. The escaped hostage easily could be considered a hero rather than a criminal. Clearly, then, a killing can be necessary even though the harm threatened is not imminent.

When a thief attempts to steal property, however, force may be used in protection of the property. See MODEL PENAL CODE § 3.04 cmt. (4)(d), at 59 (1985). The Model Penal Code states:

[N]or is [the use of deadly force] justifiable if: . . . (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take

Id. § 3.04(2)(b)(ii).

23. ROBINSON, *supra* note 4, § 131(c)(1), at 78. The captor promises to kill the hostage one week later. The hostage's only opportunity to escape occurs each day when his captor brings him food. *Id.*

24. Robinson acknowledges that the danger in his hypothetical is not "imminent" in the traditional sense, but argues that since a self-protective response is clearly necessary, the hostage should not be required to wait until his captor is standing over him with a knife before using deadly force. *Id.* In one edition of their casebook, Professors Kadish and Paulsen present a similar hypothetical: A man is held captive by his lover's husband, who threatens to kill him eventually. They ask the students whether the man can kill his captor any time during the imprisonment or if he must wait until he is about to be killed. SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 498-99 (3d ed. 1975).

C. *The Historical Perspective*

Considering the present pervasiveness of the imminence requirement, it is surprising that its historical pedigree is not completely clear. Modern self-defense has two historical roots in the early common law: First, the excuse of *se defendendo* and second, the justification of felony prevention.²⁵ Initially, imminence of impending harm was not a specific requirement in either situation.²⁶

It would be misleading, however, to place too much emphasis on the absence of specific imminence requirements in these early defenses, for neither defense was drawn to apply to what is now considered a generic self-defense situation—where a faultless defender uses fatal force to repel a murderous assault. *Se defendendo*, for instance, was limited in application to a specific category of cases—those in which the deaths resulted from a sudden brawl, or “chance medley.”²⁷ In the *se defendendo* paradigm, two men would meet, neither with any intention of harming the other. An argument would start, leading to the use of force, and one combatant would kill the other. If the defendant killed during this sudden quarrel without acting in self-defense, he was guilty of manslaughter, not murder.²⁸ If, however, the slayer could show that he killed only because his life was threatened by the other, and he could not retreat or otherwise avoid the use of lethal force, he was allowed the plea of *se*

25. FLETCHER, *supra* note 12, § 10.5.4(A), at 866. As will be explained below, when used as an excuse, *se defendendo* required forfeiture and a royal pardon, while felony prevention, when used as a justification, allowed a full acquittal. See *infra* notes 30 and 35.

26. These doctrines were based instead on a strict necessity requirement. See *infra* notes 31-34 and accompanying text.

27. PERKINS & BOYCE, *supra* note 13, at 1124 (“[I]t seems also to be confirmed by the general tenor of our law-books, which speaking of homicide *se defendendo*, suppose it to be done in some quarrel or affray.” (quoting William Hawkins, 1 HAWK. P.C. c. 28, § 24 (6th ed. by Leach 1788))); see also GARY A. LEWIS, DAFFY DUCK AND PORKY PIG IN DUCKS OF YORE 15-22 (1990) (telling story of two protagonists who meet and duel on a bridge in typical chance medley scenario); PERKINS & BOYCE, *supra* note 13, at 1121 (defining chance medley as an ordinary fist-fight or nondeadly encounter); Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 482 (1976) (applying *se defendendo* to homicides that “stemmed from a sudden or chance falling out” and not from malice aforethought).

28. See 4 WILLIAM BLACKSTONE, COMMENTARIES *184-85 (classifying a homicide as manslaughter if both parties are mutually engaged in combat at the time of the killing, but as murder if two parties plan beforehand to fight (as in a duel), or if one party pursues the other after the affray has ended); MATTHEW HALE, PLEAS OF THE CROWN 41-42 (photo. reprint 1972) (1678) (stating that if B assaults A in a chance-medley situation, and A mortally wounds B before retreating “to the Wall,” A is guilty of manslaughter); see also WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 75 (photo. reprint 1972) (1724-26) (“That if a Man strike another upon Malice Prepenſe, and then fly to the Wall, and there kill him in his own Defence, he is guilty of Murder.”).

defendendo.²⁹

Even if the jury found that the defendant acted *se defendendo*, however, it could not acquit the defendant. A verdict of *se defendendo* would excuse, but not justify, the killing. The defendant was committed to "gaol," his property subjected to forfeit, and his life spared only upon the King's pardon or excuse.³⁰

The medieval *se defendendo* rules required that the defendant kill only out of the most dire necessity to save his own life, and retreat was required if at all possible.³¹ Although in the early cases there was no mention of an imminence requirement, this omission can likely be explained by the fact that requiring imminence would have been redundant for a defense allowed only in a chance medley situation. Once the chance medley was ended and the danger no longer threatened, *se defendendo* was no longer available.³²

Although the common-law *se defendendo* rules were quite strict, the early rules permitting a defense based on felony prevention were far more lenient. Not only was there no requirement of imminent danger to life and limb, but the killing need not even have been committed to save a life. The defendant need show only that it was necessary to kill to pre-

29. "[B]ut if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence." BLACKSTONE, *supra* note 28, at *184; HALE, *supra* note 28, at 41-42 ("If A. be assaulted by B. and before a mortal wound given A. gives back till he come to the Wall, and then in his defence kills B. this is *Se defendendo*."); HAWKINS, *supra* note 28, at 75 (asserting that if a man gives no mortal wound until he retreats as far as possible, he is guilty of *se defendendo* only).

30. Forfeiture was originally required only of suspects who fled and refused to surrender. Green, *supra* note 27, at 425; see also NAOMI D. HURNARD, *THE KING'S PARDON FOR HOMICIDE* 147 (1969) ("[F]orfeiture of chattels was also the regular penalty for fleeing from justice Flight by anyone suspected of a crime or who thought he might be suspected was, then, an offence and this was the punishment for it."). Gradually forfeiture became an additional penalty in all cases of excusable homicide regardless of flight by the accused. *Id.*; 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 257 (1909); Green, *supra* note 27, at 425. The forfeiture and pardon requirements replaced the previous system of compensation to the victim's kin with a system of punishment by the Crown and compensation to the Crown. See generally HURNARD, *supra*, at 1-8 (discussing the earlier methods of dealing with homicides).

31. HURNARD, *supra* note 30, at 92 (asserting that at least by the end of the 16th century, in chance medley situations, juries were required to state that the killing had not been with malice aforethought and that the killer could not otherwise have escaped with his life); Beale, *supra* note 14, at 569 ("And if the killing were unnecessary not only could there be no acquittal, but there would not even be a pardon."); Green, *supra* note 27, at 420 ("By the early thirteenth century, [self-defense] had come to be defined as slaying out of literally vital necessity: the slayer, under mortal attack, had acted as a last resort to save his own life.").

32. See BLACKSTONE, *supra* note 28, at *185 ("[S]o is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defence.").

vent the felony or to effectuate an arrest or a capture of the felon.³³ The slayer did not have to retreat. In fact, at one time a person was allowed to pursue and kill the felon if he could not safely apprehend him.³⁴ Additionally, the defendant who proved this defense was considered to have acted in a justified, not an excused, manner, and thus was entitled to a full acquittal with no forfeiture or other penalty.³⁵

The purpose for the difference in treatment between the two defenses is somewhat unclear. One widely cited reason for the variations is the presumption that both parties to a chance medley were somewhat at fault, and thus the law should not acquit, and therefore condone, a killing by one who shares blame for the death.³⁶ In the felony prevention

33. From as early as the seventh century, killing a robber "caught in the act" who resisted arrest was justifiable if he could not be taken otherwise. Green, *supra* note 27, at 436-37 n.87. During the 14th century, courts began to acquit those who killed to prevent attempted robbery, breaking into a house at night, or arson of a house. *Id.* at 440 ("And in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to burgle his house, he may safely kill them if he cannot take them.") (quoting JUSTICE THORPE, 22 LE LIVRE DES ASSISES ET PLEAS DEL'CORONE EN TEMPS DU ROY EDWARD LE TIERS 55 (1349)); see also HALE, *supra* note 28, at 36-38 (describing killing in pursuit of a felon as justifiable homicide); HAWKINS, *supra* note 28, at 70 (stating that if felon or accused felon cannot be apprehended alive, a private citizen or official may kill him); Beale, *supra* note 14, at 572-73 ("Killing for which justification was allowed must be necessary; that is, it was permitted only when to refrain from killing the malefactor would necessarily leave him free to commit his crime and escape.").

34. HALE, *supra* note 28, at 36 (stating that one may pursue and kill a fleeing felon upon "Hue-and-Cry"). Beale notes that a man who chased an escaping felon and decapitated him as he ran was acquitted. Beale, *supra* note 14, at 568. The breadth of the felony prevention defense obviously stemmed from the notion that the apprehension of a felon was an act necessary for advancement of justice. See Green, *supra* note 27, at 437-39. Holdsworth noted that it was the duty of every citizen to help arrest a felon, with criminal proceedings as the penalty for failing to perform those duties. HOLDSWORTH, *supra* note 30, at 312; see also *Pond v. People*, 8 Mich. 149, 176 (1860) (holding that it is the "duty of every man who sees a felony to prevent it"); Beale, *supra* note 14, at 569 (stating that it was a dereliction of duty to retreat). It is also worth noting that at early common law *any* felon faced death as an ultimate punishment, see Green, *supra* note 27, at 418, so allowing or encouraging a citizen to kill a fleeing felon may not seem as harsh as it would today. Cf. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (finding unconstitutional the use of deadly force to apprehend a felon in the absence of evidence that felon was armed or dangerous).

35. "In these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame." BLACKSTONE, *supra* note 28, at *182; see, e.g., HALE, *supra* note 28, at 38; HAWKINS, *supra* note 28, at 70; Green, *supra* note 27, at 436.

36. [B]ut it seems also to be confirmed by the general Tenor of our Law-Books, . . . That where the Law judges a Man guilty of Homicide *se defendendo*, there must be some precedent Quarrel, in which both Parties always are . . . in some Fault, so that the Necessity, to which a Man is at length reduced to kill another, is in some Measure presumed to have been owing to himself: For it cannot be imagined That the Law which is founded on the highest Reason, will adjudge a Man to forfeit all his Goods, and [require a pardon] without some appearance of a Fault.

scenario, by contrast, only one party was at fault, and this was the person slain.³⁷

Although initially limited to killings of robbers, the right to kill a "manifest felon" was extended eventually to the killing of perpetrators of most forcible felonies.³⁸ Until at least 1532, and perhaps later, however, one glaring exception existed to this otherwise expansive doctrine—one could not justifiably kill another to prevent a murder.³⁹ Although the

HAWKINS, *supra* note 28, at 72. See FRANCIS BACON, THE ELEMENTS OF THE COMMON LAWES OF ENGLAND 33 (photo. reprint 1978) (1630) ("[Q]uarrels are not presumed to grow without some wrongs either in words or deedes on either part . . ."); PERKINS & BOYCE, *supra* note 13, at 1121 ("One who was the aggressor in a chance-medley . . . or who culpably entered into such an engagement . . . not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself.").

37. See *supra* note 35; BACON, *supra* note 36, at 33-34 (noting that where the aggressor is completely at fault, such as in robbery, assault, or rape, the victim kills without malice and, therefore, is justified); PERKINS & BOYCE, *supra* note 13, at 1121 ("One, entirely free from fault, is the victim of an assault which was murderous from the beginning.").

38. For the development of the law in this area, see *supra* note 33. See also Beale, *supra* note 14, at 569 (noting that the jury could acquit a defendant who killed a "felon[] in the act of a felony . . . who would not surrender peaceably"); Green, *supra* note 27, at 440-42 (noting the extension of the doctrine "to include slaying to prevent a felony").

39. 24 Hen. 8, ch. 5 (1532) (Eng.), illustrates the confusion:

Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common highway . . . or in their mansion . . . should happen in his or their being in their such felonious intent, to be slain by him or them, whom the said evil-doers should so attempt to rob or murder; . . . the said person . . . should for the death of the said evil disposed person forfeit or lose his goods and chattels for the same, as any other person should do that by chance-medley should happen to kill or slay any other person in his or their defence; . . . be it enacted . . . that if any person . . . be indicted or appealed of or for the death of any such evil disposed person . . . [he] shall not forfeit or lose any lands, tenements, goods, or chattels . . . but shall be thereof and for the same fully acquitted and discharged . . .

Id. There has been considerable conflict regarding interpretation of this statute. Beale, referring to Lord Coke, maintains that the statute was intended to cover only the slaying of thieves:

"If a thief offer to rob or murder B either abroad or in his own house, and thereupon assault him, and B defend himself without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything . . ."

Beale, *supra* note 14, at 572 (quoting Coke). Though he agrees that "[t]here seems no sufficient reason for distinguishing between killing a robber and killing a felon who is attempting murder or rape," Beale interprets the language of Coke as justifying a killing only where a thief demands, "Your money or your life," and the victim kills to prevent the robbery. *Id.*; see also HALE, *supra* note 28, at 39-40 (noting that killing to resist arson, rape, or robbery is justified, but not addressing murder).

Other authors disagree with this interpretation, and find instead that this statute did allow a victim to kill to protect himself from murder with "malice prepensed." PERKINS & BOYCE, *supra* note 13, at 1122 (analyzing the language of the statute and rejecting Beale's interpretation); Green, *supra* note 27, at 480 (asserting that the statute generally provided a defense against professional or planned killings). The writings of several 18th century authors support

rapist, robber, and burglar could all be slain even if they did not present an immediate danger to the slayer,⁴⁰ one who killed to prevent a slaying was in theory relegated to claiming *se defendendo*, with its strict rules, penalties, and requirement for a pardon, as well as its presumption that the killing took place during a brawl.⁴¹

Over time the distinctions between the two defenses began to blur: The requirements for forfeiture and a pardon in *se defendendo* cases began to be applied automatically and then gradually disappeared,⁴² and

this interpretation as well. *See, e.g.*, BLACKSTONE, *supra* note 28, at *181 ("For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting."); MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE CITY OF SURRY; AND OTHER CROWN CASES, TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF CROWN LAW 273 (London, E. & R. Brooke, 3d ed. 1792). Hawkins states:

I can see no Reason why a Person, who without Provocation is assaulted by another . . . in such a Manner as plainly shews an Intent to murder him, . . . may not justify killing such an Assailant, as much if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me?

HAWKINS, *supra* note 28, at 72. Both sides to this controversy agree that a killing in self-defense during a chance-medley (*se defendendo*) was not covered by the statute and thus was not justifiable homicide. *See* BLACKSTONE, *supra* note 28, at *183-84; HALE, *supra* note 28, at 41; HAWKINS, *supra* note 28, at 72; Green, *supra* note 27, at 482.

The confusion surrounding this issue was effectively ended by an 1828 statute dispensing with the pardon requirement and declaring that both the *se defendendo* and crime prevention defenses, if proved, merited an acquittal. *See* 9 Geo. 4, ch. 31, § 10 (1828) (Eng.); 3 HENRY J. STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 108 (photo. reprint 1979) (1841-45) ("[A]ll practical distinction between justifiable and excusable homicide is now at length wholly done away.").

40. *See supra* note 33. There is actually some question whether a woman could kill to prevent a rape, and Beale suggests that she could not. Beale, *supra* note 14, at 568. The majority of writers, however, reject this contention. *See, e.g.*, BACON, *supra* note 36, at 33-34 ("[I]f a woman kill him that assaileth her to ravish her it is justifiable without anie pardon."); BLACKSTONE, *supra* note 28, at *181 ("The English law likewise justifies a woman, killing one who attempts to ravish her."); HALE, *supra* note 28, at 39 (finding no felony when a woman kills one attempting to "ravish" her); HAWKINS, *supra* note 28, § 21, at 71 ("And the killing of a Wrong-doer . . . may be justified in many cases as where . . . a Woman kills one who attempts to ravish her.").

41. *See* Green, *supra* note 27, at 442. For a discussion of these penalties, see *supra* note 30 and accompanying text.

42. Pardons in cases of excusable homicide were a matter for the King's discretion until the end of the 13th century, when they became a matter of course. Green, *supra* note 27, at 426. By the reign of Edward III, the Chancellor began to issue pardons in place of the King. PERKINS & BOYCE, *supra* note 13, at 1123-24 ("As years went by the king issued pardons in these cases with such regularity that eventually they were issued by the Chancellor as a matter of course, without bothering the king with this detail."); Beale, *supra* note 14, at 570. The need for pardon was officially eliminated in England by 9 Geo. 4, ch. 31, § 10 (1828) (Eng.). The forfeiture requirement likewise had eroded by the 18th century. *See* BLACKSTONE, *supra* note 28, at *188 (noting that as early as our records will reach, a writ of restitution of goods came as a matter of course; and stating that since personal property had become more consid-

juries were permitted to acquit defendants who used fatal force to respond to a murderous assault.⁴³ By the nineteenth century, in most jurisdictions, the two defenses were combined into one—the defense of self-defense.⁴⁴ From its crime-prevention roots, the modern defense became broadly applicable to situations beyond chance medley as a justification defense entitling the defendant to a full acquittal. From *se defendendo*, the defense took the strict requirements for necessity, including the newly acquired requirement of imminence of impending harm.⁴⁵

The early history of the law of self-defense is relevant to this Article's thesis in several respects. First, it is apparent that the imminence requirement does not have an unquestioned historical lineage as a fundamental requirement for a finding of self-defense. In one of the two early roots of self-defense it was at most an implicit requirement; for the other, it explicitly was not required. What was required in all circumstances was that the killing be *necessary* for the accomplishment of the societal goals underlying the defense: in one situation, the preservation of life; in the other, the prevention of a felony or capture of a felon. Further, the imminence requirement was implied only in the situation where the law presumed that both parties to the homicidal act were somewhat at fault—the sudden brawl or chance medley.

Also relevant to the present inquiry is the proposition, for which some support exists, that mistrust of jurors by the Crown retarded the development of the law of self-defense. Early jurors, reluctant to impose the death penalty on neighbors and friends, apparently were all too willing to fabricate evidence and stretch the facts of cases to fit them within the boundaries of *se defendendo* and misadventure, i.e., accident, a practice that led to pardons, or even acquittal, of defendants in cases that did

erable, forfeiture was too severe, and in cases of self-defense, judges usually permitted, if not directed, acquittal). The distinction in punishment between justifiable and excusable homicide apparently never existed in the United States. FRANCIS WHARTON, *LAW OF HOMICIDE* 37 (1st ed. 1855); see *Pond v. People*, 8 Mich. 149, 175 (1860).

43. See *supra* note 39.

44. See WHARTON, *supra* note 42, at 211 ("As . . . the distinction between [chance medley] and justifiable homicide in this country no longer exists—in each case . . . acquittal [is] to be entered—the two branches will be considered together.").

45. An articulated imminence requirement began to appear in the late 18th century. See BLACKSTONE, *supra* note 28, at *184 (noting that right to act in self-defense exists only "in sudden and violent cases; when certain and *immediate* suffering would be the consequence of waiting for the assistance of the law") (emphasis added); see also WILLIAM O. RUSSELL, *A TREATISE ON CRIMES AND MISDEMEANORS* 668 (3d ed. 1845) (requiring imminence to establish the certainty of the felon's intent to "murder, ravish, or commit other felonies attended with force or surprise"); WHARTON, *supra* note 42, at 211-13 (articulating requirement of imminence).

not warrant acquittal under the formal rules.⁴⁶ Although the inequities in the laws governing defensive homicides were apparent, the Crown was unwilling to change the laws for fear of giving jurors even more leeway to free those charged with murder.⁴⁷ Similarly, whether one is willing to lessen the law's present adherence to the imminence doctrine depends in large measure on the trust one has in jurors to follow faithfully their instructions.⁴⁸

D. The Retreat Doctrine

Before concluding this discussion of necessity and imminence, it is worthwhile to examine briefly the requirement that a person must retreat from the conflict before using lethal force if it is possible to do so in safety. Like the imminence requirement, the retreat rule is used to guarantee that lethal force is used only when it is truly necessary.⁴⁹

Since the duty to retreat before using lethal force was an early component of the *se defendendo* defense, it actually has a more ancient lineage than the imminence requirement, although, like imminence, retreat

46. Juries consistently refused to cooperate with the King's system of capital punishment for all homicides, thinking it unjust to punish unpremeditated murder and manslaughter to the same degree as murder "by stealth." This resistance to the harshness of the King's law led to both acquittals and findings of *se defendendo* in unsuitable cases. Green, *supra* note 27, at 416-17, 430-32. In the medieval period, juries convicted only about 20% of all homicide defendants. Approximately 60-90% were acquitted and 10-40% received verdicts in *se defendendo*. *Id.* at 432. The jurors tended to shape their verdicts according to the law of the time. For instance, from the late 14th century until the 16th century, the pardon requirement for accidental homicide disappeared and instead these defendants were acquitted. *Id.* at 444-45. During this time, juries often held that the defendants were mere "accidental" slayers on whose weapons murderous assailants had, through their own fault, flung their bodies." *Id.* at 449.

The severity of the law and the jurors' perceived need for resistance were compounded by the fact that shock and infection often aggravated less serious injuries, producing death and resulting in homicide prosecutions based on minor brawls and minimal injuries. *Id.* at 415. Juries also were reluctant to comply with the King's law because no compensation was afforded to the kin of the victim. HURNARD, *supra* note 30, at 23.

47. See, e.g., HURNARD, *supra* note 30, at 23 (noting desire of Crown to restrict power of jurors to acquit or excuse because of distrust of jurors); Green, *supra* note 27, at 433-36 (stating that since the development of the common law depended mainly on the introduction of issues that the law had not previously addressed, the jury's tendency to pigeonhole cases into the few available categories obscured the need for change). Hurnard also suggests that the embellishment of the facts by juries to fit cases into the category of self-defense caused problems in the law of homicide to be overlooked. HURNARD, *supra* note 30, at 23-27.

48. See *infra* text accompanying notes 88-90.

49. ROBINSON, *supra* note 4, § 131(c)(4), at 81 (stating that retreat rule was "designed to prevent use of unnecessary force"); see *id.* § 131(d), at 85 (noting that states that adopt the retreat rule do so in order to protect society's interest in discouraging the escalation of violence). Proponents of the retreat rule assert that if an escape route is available, deadly force is not necessary to defend oneself. See LAFAYE & SCOTT, *supra* note 4, § 5.7(f), at 460.

was not required if one killed to prevent a felony.⁵⁰ Despite this history, retreat is not uniformly required in this country, and even in those jurisdictions that do require retreat, the rules governing the doctrine are riddled with exceptions.⁵¹

50. If jurors found that the slayer in a chance medley encounter could have "turned tail and outrun his assailant" instead of retaliating with force, the defendant was convicted of manslaughter. Green, *supra* note 27, at 428-29; *see also* Beale, *supra* note 14, at 569 (retreat required in chance medley); Mischke, *supra* note 14, at 1003-04 (if escape possible, no necessity); *cf.* Beale, *supra* note 14, at 574 (dereliction of duty to retreat or even to fail to pursue a felon); Green, *supra* note 27, at 436 n.85 (stating that one may pursue and justifiably slay " 'hand-having' thieves, notorious malefactors, and slayers attempting to escape from the 'hue and cry' raised against them").

51. The English law of self-defense was accepted immediately in the colonies, but the issue of retreat was much disputed. Beale, *supra* note 14, at 576; Mischke, *supra* note 14, at 1005. *Compare* Erwin v. State, 29 Ohio St. 186, 199-200, 23 Am. Rep. 733, 740 (1876) (holding that "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 or do him enormous bodily harm") and Runyan v. State, 57 Ind. 80, 84, 26 Am. Rep. 52, 55 (1877) (rejecting the retreat requirement) with Commonwealth v. Drum, 58 Pa. 9, 22 (1868) (holding that an aggressor's right to live outweighed the victim's right not to retreat). The South and the West rejected the retreat rule, finding it cowardly and dangerous. Beale, *supra* note 14, at 577; Mischke, *supra* note 14, at 1006-07. The United States Supreme Court's early pronouncements on the necessity of retreat reflected the American ambivalence. Mischke, *supra* note 14, at 1007-08. *Compare* Beard v. United States, 158 U.S. 550, 564 (1895) (holding that defendant had no duty to retreat since he was "where he had a right to be") with Allen v. United States, 164 U.S. 492, 498 (1896) (limiting Beard to the fact that Beard was on his own premises, and finding a duty to retreat in all other cases) and Brown v. United States, 256 U.S. 335, 344 (1921) (considering the failure to retreat as a factor in determining whether the defendant exceeded the bounds of reasonable self-defense).

The majority of jurisdictions today do not require retreat, but allow deadly force to be used by the defendant if he reasonably believes the aggressor will kill or seriously injure him. LAFAVE & SCOTT, *supra* note 4, § 5.7(f), at 460; *see, e.g.*, Johnson v. State, 253 Ga. 37, 39, 315 S.E.2d 871, 873 (1984) (reversing conviction for voluntary manslaughter because of failure to instruct the jury that there is no duty to retreat); Cook v. State, 467 So.2d 203, 210-11 (Miss. 1985) (allowing self-defense even though defendant did not retreat). A substantial minority of jurisdictions, as well as the Model Penal Code, require retreat in some circumstances before allowing the use of deadly force. LAFAVE & SCOTT, *supra* note 4, § 5.7(f), at 461; *see, e.g.*, MODEL PENAL CODE § 3.04, cmt. (4)(c), at 54-55 (1985); Mischke, *supra* note 14, at 1015-19 (analyzing the Tennessee Supreme Court's rejection of the "true man rule," which allowed one to stand his ground).

Exceptions and limitations to the retreat rule exist even in jurisdictions requiring retreat. Of course, a person is required to retreat only if she can do so in complete safety. LAFAVE & SCOTT, *supra* note 4, § 5.7(f), at 461; ROBINSON, *supra* note 4, § 131(c)(4), at 80 (explaining that the retreat rule does not require a person to increase the danger to herself); Beale, *supra* note 14, at 579 (emphasizing that retreat is not required if it would not diminish the danger). Even where retreat can be made safely, however, many jurisdictions will not require it where the victim is in his dwelling or place of business. LAFAVE & SCOTT, *supra* note 4, § 5.7(f), at 461; *see, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.02(3)(b), at 197-98 (1987) ("A non-aggressor need not retreat from or in his home. This exception is based on the early property law view that a man's home is his castle—a natural sanctuary from external aggression."); Beale, *supra* note 14, at 579 ("If one is assailed in his own dwelling-house, which is his castle, he is not obliged to withdraw therefrom and leave himself in that respect defense-

Several reasons have been advanced for society's reluctance to require retreat even when one can do so in safety. Some have cited the notion that requiring retreat would undeservedly reward the person at fault at the expense of an innocent individual;⁵² others suggest that retreat is an ignoble, unmanly, reaction.⁵³ The law almost never requires retreat in the home—the "castle" exception—because of society's recognition of the sanctity of the home.⁵⁴ Whatever the reasons, though, the failure to require retreat whenever retreat would prevent the loss of life weakens the argument that the law should only recognize killings as justified when they are committed under the "utmost real or apparent necessity."⁵⁵ Not requiring retreat even when it could be accomplished in complete safety permits the use of lethal force even though that force might not be necessary to prevent death or great bodily harm. In so doing, the law clearly considers values other than the sanctity of life in determining whether a defendant can claim self-defense.

III. IS A CHANCE IN SELF-DEFENSE REALLY REQUIRED?

Changing a rule of law designed to enhance the value of human life merely because law professors can dream up hypotheticals that defy the rule would be ill-advised. One cannot deny that, in most situations, the

less."); Mitchell, *supra* note 14, at 89-90 (discussing a Massachusetts statute providing that there is no duty to retreat from one's dwelling). Some courts have expanded this area beyond the dwelling to include the immediate vicinity of the dwelling or even the defendant's premises. Beale, *supra* note 14, at 579-80. In cases where the use of non-deadly force is at issue, almost all jurisdictions agree that no retreat is required. LAFAYE & SCOTT, *supra* note 4, § 5.7(f), at 460; ROBINSON, *supra* note 4, § 131(c)(4), at 81 (explaining that the aggressor's interest in being free from non-deadly force does not prevail when balanced against the defendant's interest in standing her ground).

52. See, e.g., *State v. Bartlett*, 170 Mo. 658, 668, 71 S.W. 148, 151 (1902) ("[T]he wrongful and violent act of one man shall not abolish or even temporarily suspend the lawful and constitutional right of his neighbor."); see also PERKINS & BOYCE, *supra* note 13, at 1128 ("One suggestion has been that liberty itself is threatened if a law-abiding citizen can be forced from a place where he has a right to be."); ROBINSON, *supra* note 4, § 131(c)(4), at 81 (noting that retreat might force an actor to relinquish a lawful right); Mischke, *supra* note 14, at 1007 ("[Once] no man could defend himself until . . . his back was to the wall; but this is not the law in free America. Here the wall is to every man's back. It is the wall of his rights; and when he is [assailed] at a place where he has a right to be, . . . he may stand and defend himself.") (quoting *Fowler v. State*, 8 Okla. Crim. 130, 135, 126 P. 831, 833 (1912)).

53. LAFAYE & SCOTT, *supra* note 4, § 5.7(f), at 460; ROBINSON, *supra* note 4, § 131(c)(4), at 81, 84 (citing both fault and honor rationales). But see, e.g., FLETCHER, *supra* note 12, § 10.5.4., at 865 ("[I]f the choice is between the actor's honor and the aggressor's life, contemporary sentiment would obviously favor saving the aggressor's life."); Beale, *supra* note 14, at 581 ("A really honorable man, . . . would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more . . . the thought that he had the blood of a fellow-being on his hands.").

54. See *supra* note 51.

55. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 13 (1989).

imminence requirement accurately translates the underlying necessity principle and therefore plays a useful role in self-defense. It helps to ensure, in most situations, that the necessity for protective action is real and that action, especially lethal action, reasonably appears to be unavoidable. To the extent an aberrational case arises in which the application of the rule works an injustice, the law provides a safety valve to correct the injustice—executive clemency—the mechanism that actually worked in the *Norman* case to effectuate Ms. Norman's release from prison after a few months.⁵⁶

This part of the Article thus returns to the phenomenon of women who kill their batterers, for it is in these cases that the argument is most often raised that it was necessary to kill in order to prevent a reasonably certain, but non-imminent, threat to life. Even if changes in self-defense are not limited to these cases, and they certainly should not be, it is primarily because of these cases that the need for change is perceived.

The batterer-killing cases raise a number of issues in the context of the imminence requirement. First is the question whether the defendants in these cases can possibly be correct in asserting the reasonableness of their belief that fatal force was necessary even if the threatened harm was not imminent. In *Norman*, for example, changing the defense to exculpate Ms. Norman's conduct would result in justifying the killing of a sleeping human being.

Second, even if one concludes that the defendant could have reasonably believed that the killing was necessary at the time it was committed, a question exists whether the defendant's responsibility for bringing about the situation in these cases should prevent the homicide from being justified. The third issue relates to whether there is evidence that in a significant number of cases imminence acts more as an inhibitor than as a translator. Even if a rule appears unjust in a particular case, if that case is but an aberration, the conclusion that it would be preferable to leave the law as it is, and to rely on executive clemency to correct the rare injustice, may seem appropriate.

The fourth issue raised by the cases in which women kill their batterers is whether it is possible to retain the imminence requirement for those cases in which it accurately translates the necessity principle, while at the same time eliminating or modifying it when it interferes with that principle. Finally, one must question whether, by allowing a defendant to claim that a killing to prevent non-imminent harm is a justified killing,

56. After Ms. Norman served only two months of her six year sentence, North Carolina Governor James T. Martin commuted her sentence to time already served. Mark Barrett, *Norman Set Free*, ASHEVILLE CITIZEN-TIMES, July 8, 1989, at 1.

an imprudent message will be conveyed that lethal self-help is a socially approved method of problem solving.

A. Did She Really Need To Kill?

The first reaction of many people to a non-confrontational killing of a batterer, as in *Norman*, is that the killing could not have been necessary because the defendant simply could have seized the opportunity to flee. Why alter the law of self-defense when the victim of the abuse could have merely walked out the door? Under this argument, the time lapse between the abuse and the killing, and the resulting lack of imminent danger, conclusively demonstrate that the killing was not necessary.⁵⁷

The obvious response to this argument is that a jury would certainly remain free, even without a strict imminence requirement, to decide that the killing was not really necessary and, therefore, could convict the defendant upon such a finding. Eliminating the imminence requirement in a specific case does not mandate a specific verdict, it merely permits the jury to make the decision on necessity without the interference (or assistance) of the imminence requirement. Nor does its elimination make the question of imminence irrelevant. Imminence remains, as do the other factors in the case, relevant to the jury's core inquiry: Was the killing necessary?

One cannot rest on this counterargument alone, however, because this objection does raise a subsidiary question about the consideration the law should give to the possibility of flight in a situation where the woman has an opportunity to flee. As discussed earlier, part of what first struck me about *Norman* was the conviction that Ms. Norman did not have a realistic alternative to her lethal action, that the only way she could really be safe was to kill her husband.

J.T. Norman's abuse of his wife was prolonged and vicious. Over the years, whenever he was drunk, he brutally beat her, often inflicting serious injuries. He used his fists, bottles, ashtrays, and even a baseball bat. Mr. Norman forced his wife to prostitute herself to support him. When she was pregnant he kicked her down the stairs, causing the premature birth of her child. When she ran away, he tracked her, caught

57. See, e.g., LENORE WALKER, *THE BATTERED WOMAN* 15-16 (1979) [hereinafter *BATTERED WOMAN*] (discussing phenomenon of why battered women remain in the home); Crocker, *supra* note 11, at 132-33 (citing prosecutorial arguments that the woman was at fault because she did not leave the abusive relationship); Grant, *supra* note 11, at 277 (noting that courts and law enforcement officers sometimes are reluctant to prosecute batterer because of woman's failure to leave); cf. *Norman*, 324 N.C. at 261-62, 378 S.E.2d at 13-14 (noting that defendant had ample opportunity to find non-homicidal solution to abuse).

her, and beat her. He frequently threatened to kill her.⁵⁸

In the days immediately preceding the killing, the abuse Ms. Norman suffered became more constant and vicious, and the threats to kill her became more frequent and, by all accounts, more believable. Ms. Norman called the police. The officers told her that she would have to take out a warrant, but she told them that her husband would kill her if she did. The officers left, but returned when they received a call that she had taken an overdose of pills. When the ambulance arrived, Mr. Norman tried to interfere, saying, "Let the bitch die . . . She ain't nothing but a dog . . . She don't deserve to live," and threatened to kill her, her mother, and her grandmother.⁵⁹

The day after she was released from the hospital, Ms. Norman sought help at a counseling center. When she returned home and told her husband that he must stop drinking or she would have him committed, he told her that he would cut her throat if he saw someone coming for him. During the day, he threatened twice to cut off her breast, and his threats to kill her continued until he took a nap late that afternoon, forcing her to lie on the floor by the bed.⁶⁰

The point of this grisly recitation is not to demonstrate that Mr. Norman deserved to be killed because of his past misdeeds, nor to provide substance for a "battered women's syndrome" defense, which would focus on the impact this abuse had on Ms. Norman's psyche.⁶¹ Rather,

58. *State v. Norman*, 89 N.C. App. 384, 386, 366 S.E.2d 586, 587, (1988), *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989). Ms. Norman was abused for twenty of the twenty-five years of her marriage. *Id.* at 385, 366 S.E.2d at 587. In addition to calling Ms. Norman a "dog," J.T. Norman treated her like an animal.

Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl. *Id.* at 386, 366 S.E.2d at 587.

59. *Id.* at 387, 366 S.E.2d at 588. Only with the intervention of law enforcement was Ms. Norman able to go to the Rutherford Hospital. On the advice of a counselor at the hospital, Ms. Norman spent the night at her grandmother's house instead of returning immediately home. *Id.*

60. *Id.* at 388, 366 S.E.2d at 588. Earlier that day, J.T. Norman poured beer on his wife's head and kicked her in the side of the head as she drove him and a friend to Spartanburg. *Id.* at 387, 366 S.E.2d at 588. According to witnesses, the beatings that day were angrier and more violent than usual and persisted throughout the day. *Id.* At trial, police officers testified that when they arrived after the shooting they found burns and bruises on Ms. Norman's body. *Id.* at 385, 366 S.E.2d at 587.

61. At trial the defense presented the testimony of two expert witnesses that Ms. Norman "fit and exceed[ed] the profile[] of an abused or battered spouse." *Id.* at 388, 366 S.E.2d at 589. According to one expert, Ms. Norman

could not leave her husband because she had gotten to the point where she had no belief whatsoever in herself and believed in the total invulnerability of her husband . . . Mrs. Norman didn't leave because she fully believed that [J.T. Norman] was

the narrative lends credence to the notion that, given this history, a reasonable person could have believed that the only way to stop Mr. Norman from killing or greatly harming his wife was to kill him.

Other than the use of lethal force, Ms. Norman's options were limited. One choice was to do nothing—to sleep on the floor as her husband commanded her and to await whatever lay ahead. Another option was to arm herself and wait until the next attack before killing her husband. Yet another was to call for help. Finally, she could have just fled into the night. Each of these choices carried a realistic chance of great harm or death to Ms. Norman. Given her husband's past behavior and threats, doing nothing offered an assurance that she would suffer at least great bodily harm during one of his drunken attacks.⁶²

Similarly, it does not strain the imagination to calculate the risk Ms. Norman would have taken had she decided to wait until the next attack before wielding her weapon. *Perhaps* she would have been able to extract the gun from its hiding place in time to protect herself. *Perhaps* she would have been able to shoot her husband before he reached her. *Perhaps* the first shot would have been effective enough to stop him. Unless all three of these conditions were met, however, she could easily have been a dead woman.

invulnerable to the law and to all social agencies that were available; that nobody could withstand his power. As a result there was no such thing as escape.

Id. at 389, 366 S.E.2d at 589. Of course, because the jury was not allowed to decide whether Ms. Norman acted in self-defense, this evidence, no matter how powerful, could not, absent jury nullification, produce an acquittal.

The battered woman syndrome describes the psychological responses of women trapped in a battering relationship. In 1979, Dr. Lenore Walker first described the syndrome in *The Battered Woman*. As defined by Dr. Walker,

[a] battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights [I]n order to be classified as a battered woman, the couple must go through the battering cycle at least twice.

BATTERED WOMAN, *supra* note 57, at xv. Two theories form the basis of Dr. Walker's analysis of the syndrome. The first is learned helplessness. When animals or humans are subjected to randomly administered negative stimuli that they are unable to avoid, they learn that nothing they do will alter the result. Eventually they make no effort to avoid the negative stimuli even if the means to do so are available. *Id.* at 45-47. The second theory is the cycle theory of violence, which posits that there are three phases to the battering cycle. The first phase, the tension building phase, includes minor battering incidents. Phase two, the acute battering incident, involves the uncontrollable discharge of the tensions built up during phase one. The final phase, the kindness and contrite loving behavior, results in the complete victimization of the woman. This is the calm after the storm. The woman is convinced by the batterer that the abuse will never happen again. *Id.* at 55-70.

62. The only other remotely realistic possibility would have been Mr. Norman's death from alcoholism or other natural (or unnatural) causes before the next attack. There are, of course, instantaneous religious conversions or other miracles that can affect behavior, but society usually does not shape its laws around the chances of these occurring.

As with her other options, calling for help or flight carried a serious risk of death or great bodily harm. Newspaper and television news reports are filled with stories of spurned men who often go to extraordinary lengths to pursue the women who reject them, who often hurt these women and sometimes kill them. The professional literature recently has developed evidence to support the contention that a woman who is already being battered by an abusive man, and who tries to leave or get help, is placing her life at risk. In fact, the time of most danger for the woman is when she attempts to leave; women are often killed when, and because, they attempt to escape.⁶³ Efforts to involve outside agencies, including the police, similarly escalate the risk to the woman.⁶⁴ Threats may turn into force, and non-deadly force into deadly force. As for Ms. Norman, her husband had told her explicitly that he would maim her or kill her if she tried to alter the situation, and can one honestly maintain that she was unreasonable in believing him?

Ms. Norman was not, of course, a total captive. In Robinson's hos-

63. As one writer recently noted, "[T]he most extreme violence [is] turned against women at separation." Mahoney, *supra* note 1, at 71-72. She explains that separation actually tends to increase the incidence of violence and that more than half the women who leave their husbands are violently harassed. *Id.* at 72 n.309. One study of men who killed their partners found that 57% were separated at the time. ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 144 (1987). Another study also found that over half of the killings by males of their partners were prompted by separation or the threat of separation. CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE* 150-52 (1989) (citing study by Dr. George Barnard); *see also* CHARLES P. EWING, *BATTERED WOMEN WHO KILL* 13 (1987) (finding frequent escalation of violence when women attempt to leave batterers); LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 144 (1984) [hereinafter *SYNDROME*] (citing link between abuse and killings of spouses and children); Grant, *supra* note 11, at 284 ("It is during a separation from the batterer that a battered woman and her children are most likely to be killed."); Lenore E. Walker, et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 12 ("Most of the batterers had warned the women that they would never let them leave alive, or that the batterers would find and punish them if they did escape. Many of these women [homicide defendants] had tried to leave and were badly beaten for it."); Marilyn H. Mitchell, Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1710 (1978) (stating that battered women may be pursued for years by their batterers); Ann Jones, *When Battered Women Fight Back*, BARRISTER, Fall 1982, at 14 (noting that it is common for batterers to pursue and kill estranged wives and girlfriends). For additional discussion of separation assault, see generally Mahoney, *supra* note 1, at 71-93.

64. This unsurprising phenomenon was documented in a 1976 study in Chicago of 132 incarcerated women, 40% of whom had killed an abusive mate. Angela Browne & Kirk Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female Perpetrated Homicides*, 23 L. & SOC'Y REV. 75, 77-78 (1989). In this study all of the women who had killed their batterers reported that they had sought help from outside sources, and most noted that the violence increased after their attempts to gain outside assistance. *Id.* at 78; *see also* GILLESPIE, *supra* note 63, at 139 (citing danger abused woman faces in calling for help, especially if batterer has warned against attempt to get assistance); Crocker, *supra* note 11, at 134 (explaining that when the police respond to a woman's call for help but do not arrest the batterer or help the woman leave, the batterer's rage increases after the police have gone).

tage example, discussed earlier in this Article,⁶⁵ the captive can only escape by killing the captor. Even if flight would have been risky for Ms. Norman, there was at least a chance that she could have crept out of town, masked her identity, and fled to Alaska to establish a new life. One could argue, therefore, that the killing of her husband was not absolutely necessary. The difficulty with such an argument is that it is based on an erroneous premise—that the law *always* requires absolute necessity before granting the privilege of self-defense. In fact, the law *never* requires the necessity to be absolute before allowing self-defense. The possibility always exists that a person attacking another with a gun will change his mind, or miss, or have a heart attack before pulling the trigger. If a reasonable person in the situation, however, would believe that deadly force was needed, the law permits the use of fatal defensive force. Similarly, the mere possibility of retreat is not determinative so long as a reasonable person would believe that the retreat would not provide safety.

Take the analysis one step further, however, and assume that Ms. Norman could have escaped safely from her house and fled to Alaska, where she could change her identity and live happily, and safely, ever after. If society required her to do this, the end result most likely would be one less dead body, a result not always possible when the aggressor is coming after the victim at the moment she kills in self-defense. The simple answer to this proposition is that society does not now, nor has it ever, required completely innocent people to behave in this fashion. No matter how clear it was to Gary Cooper that somebody would end up dead if he did not leave before the train carrying his enemy arrived at "High Noon," our culture allows him to stay in town and affords him the right to kill in self-defense when the bad guys come after him.⁶⁶ Even when retreat is required, which is not all that often, one must only physi-

65. See *supra* notes 23-24 and accompanying text.

66. HIGH NOON (United Artists 1952). I realize that I need to explain this reference to my younger readers. "High Noon" was a 1952 Oscar-winning western starring Gary Cooper as Will Kane and Grace Kelly as his wife Amy. As the movie opens, Gary and Grace have just gotten married, he has resigned his marshal's job, and they are getting ready to head out of Hadleyville. The news arrives that convicted (and pardoned) killer Frank Miller is coming in on the noon train to carry out his threat to kill Cooper, who put him away. The two lovebirds leave, but soon Cooper pulls in the reins, saying "They're making me run. I've never run from anybody before . . . We'd have to run again as long as we live." Sure enough, he returns to town, and, over the protests of the townspeople, puts the badge back on. When high noon comes, he meets the gunslings in the fatal showdown, helped only by his ex-pacifist wife, who shoots one of the bad guys in the back. Naturally, all four of the evildoers are slain, and as the movie ends, Gary throws his marshal's star into the dust and gets back into the carriage to leave town as Tex Ritter, croons, "I can't be leaving until I shoot Frank Miller dead."

cally move to a place of temporary safety. Renunciation of personal and family identity is not demanded.⁶⁷

There may come a time when society will develop mechanisms, in the criminal justice system or elsewhere, that would effectively guarantee women in Ms. Norman's position refuge and safety. When, or if, that occurs, society could, and should, require that women choose a non-lethal option by requiring either imminence of the threatened harm or a retreat/flight alternative. That time, however, certainly has not arrived.⁶⁸

67. See *supra* notes 49-55 and accompanying text. Traditionally, before claiming self-defense, one had to "flee to the wall." Beale, *supra* note 14, at 575; see also FLETCHER, *supra* note 12, § 5.1, at 353; PERKINS & BOYCE, *supra* note 13, at 1122-23. As Justice Cardozo has stated, one who retreats "is under no duty to take to the fields and the highways, a fugitive from [his] own home." *Id.* at 1137.

68. The complaints about the inadequacy of our present responses to domestic violence are legion. See, e.g., EWING, *supra* note 63, at 13-17 (detailing obstacles women encounter in looking for protection against batterers); Browne & Williams, *supra* note 64, at 78 (finding that all of the women studied who had killed abusive mates reported that they had called for police help at least five times before acting); Schneider, *supra* note 11, at 626 ("The reluctance of law enforcement officers to intervene and arrest has led a police commander in Detroit to acknowledge: 'You can readily understand . . . why the women ultimately take the law into their own hands or despair of finding relief at all.'"); see also *State v. Norman*, 89 N.C. App. 384, 388, 366 S.E.2d 586, 588 (1988), *rev'd*, 324 N.C. 253, 378 S.E.2d 8 (1989) (noting the testimony of Ms. Norman's daughters that the sheriff's department failed to respond to their call for assistance the day Ms. Norman killed her husband). See generally Eber, *supra* note 11, at 905-17 (discussing problems with alternatives to violent self-help); Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990) (arguing that the legal system has failed to launch any substantial response to the issue of battering).

The most recent approach to finding a solution to domestic violence is the "anti-stalking" law. According to one recent report, at least 28 states are considering anti-stalking laws or have already enacted them. Rosalind Resnick, *States Enact 'Stalking' Laws*, NAT'L L. J., May 11, 1992, at 3. In 1989, the shooting death of actress Rebecca Schaeffer, star of the TV sitcom "My Sister Sam," focused national attention on the problem. After five women were murdered in succession by former husbands or boyfriends, California passed the first anti-stalking law in 1990. *Id.* at 27; see also CAL. PENAL CODE § 646.9 (Supp. 1992). Florida recently passed one of the toughest anti-stalking laws in the country, making "willful, malicious, and repeated" following of another person a first degree misdemeanor punishable by up to a year in jail and a \$1000 fine. FLA. STAT. ch. 784.048 (1992). Aggravated stalking, which is harassment that includes threats of death or injury, would be a third degree felony with a maximum prison term of five years and a \$5000 fine. *Id.* For added protection, the Florida statute also allows the police to arrest a suspected stalker without obtaining a warrant or catching him or her in the act. *Id.* The North Carolina General Assembly passed an anti-stalking statute on June 30, 1992. N.C. GEN. STAT. § 14-277.3 (1992). Under the newly-enacted law, a person may be convicted of stalking if he establishes a pattern of willfully following another person without legal purpose and with the intent of causing emotional distress by placing that person in reasonable fear of death or bodily injury and continues this after reasonable warning or request to desist. *Id.* The initial penalty for conviction of this misdemeanor, however, is only up to six months imprisonment and/or a fine of up to \$1,000.00. *Id.* The statute does provide

B. Responsibility and Fault

Although the preceding section assumes that Ms. Norman was an innocent victim, some might disagree with that assumption. While a kidnapping victim presumably has no responsibility whatsoever for being kidnapped, some would argue that a woman who stays with an abusive man has contributed, at least in some tangential way, to the development of a life-threatening situation.⁶⁹ Under this view, even if flight carries an unacceptable risk of death at the time of the killing (or even for an appreciable period of time beforehand), there well may be some period of time when the woman could leave without risk of death or serious injury and should perceive that remaining in the relationship would be dangerous. Should not the law require that she leave at this point rather than allow her to kill at some later time?

One could dispute whether this window of knowledge and opportunity exists. Even assuming that it does, however, and even assuming further that there is an identifiable point in time when a "reasonable person" would recognize that window and act accordingly, there is no reason why that should deprive someone like Ms. Norman of the right to self-defense. To decide otherwise would be to confuse responsibility with fault. Gary Cooper certainly was responsible for the showdown at high noon. He had already resigned his marshall's job and was on his way out of town with his new wife. Aside from their threat to him, the desperadoes did not seem to present any present threat to others in the town. Cooper could have taken everyone's advice and just kept on going, but he did not, and four men ended up dead. As responsible as Cooper was, however, he was not at fault. He had a right to stay in town, to reclaim his marshall's badge for one more day, and no pardoned killer or his cohorts had the right to make him leave.

Fault involves culpability, blameworthiness. Was Ms. Norman culpable for staying to raise her kids and grandchildren? Should she have abandoned them to her husband? Did she not, like Marshall Kane, have people to protect and a job to do? Is she blameworthy for trying to make a marriage work, for trying to convince her husband to get help, for not running away? Certainly many women would leave at the first hint of

for an increased penalty of up to five years imprisonment if the defendant is convicted of stalking more than once in a five-year period. *Id.*

Only time will tell whether these statutes will do anything at all to prevent life-threatening situations from arising. It is certainly difficult to imagine that they would deter someone of Mr. Norman's ilk. Much of what he did to his wife was already against the law, and the threat of an additional misdemeanor or minor felony prosecution would seem unlikely to have deterred him.

69. See *supra* note 57.

physical abuse. Perhaps it can be said that one who does not choose this course has some responsibility for the ever-worsening situation. That does not, however, render culpable one who remains, whether for love or for lack of other options. A difficult choice among many difficult choices, even one that, in hindsight, turns out to be wrong, is not necessarily a culpable choice.⁷⁰

Comparison to the retreat doctrine is instructive here. Even in jurisdictions that generally require retreat, the law recognizes that necessity sometimes must be tempered by lack of fault and other policy considerations.⁷¹ The law does not require people to retreat in their homes, even if they can do so in complete safety, because they have a right to be there. This is a right that society does not allow an aggressor to usurp.⁷² Likewise Ms. Norman had a right to live in her house, in her town, and with her family.

C. *Are Things Really This Bad?*

Much more is known today than a few decades ago about the battering of women and about women who kill their batterers. Unfortunately, much of the current knowledge teaches that much of what Ms. Norman was forced to endure is all too common in this society.

Like Ms. Norman, other women who kill their batterers almost never kill in response to a single instance of battering; instead, they usually kill after a long history of physical abuse.⁷³ The batterers commonly

70. The most widely cited obstacle to a woman's leaving her batterer is fear. Batterers frequently threaten to harm the woman, her children, other family, or her friends if she leaves. Roberta K. Thyfault, Comment, *Battered Women Syndrome on Trial*, 20 CAL. W. L. REV. 485, 489 (1984). It is not unusual for the batterer to prevent the battered woman from leaving the house and to refuse to allow her to work or contact family members or friends. BROWNE, *supra* note 63, at 53; EWING, *supra* note 63, at 27; GILLESPIE, *supra* note 63, at 80, 128; Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 556 (1988); Schneider, *supra* note 11, at 627. The batterer enforces this isolation by threatening to kill or maim the woman, members of her family, or her friends. SYNDROME, *supra* note 63, at 42-43; see *supra* note 59 and accompanying text. The result of the batterer's effort is intimidation of the spouse, thus controlling her mentally as well as physically. Accordingly, in the classic battered woman situation, the batterer, not the battered spouse, is responsible for the psychological dependency that the wife feels and which forces her to remain with her abuser.

71. See *supra* notes 51-55 and accompanying text.

72. *Id.*

73. Mahoney, *supra* note 1, at 35 nn.141-42 (citing Angela Browne's study on women who kill their batterers). In Angela Browne's study of women who suffered abuse for years before killing their abusers, she reports that 40% of the women studied indicated that, by the time they killed their abusers, incidents of abuse were occurring more than once a week. BROWNE, *supra* note 63, at 68. Browne found also that the abuse had become progressively more severe as the relationship went on, *id.*, and that in 85-90% of the cases, the women had

use weapons as well as their fists and commonly cause serious injuries.⁷⁴ Alcohol is frequently involved.⁷⁵ The batterer often combines threats to kill or maim with other abuse.⁷⁶ Forced sex of one sort or another is

called the police for help at least once in the two-year period prior to the killing. *Id.* at 10; see also *supra* note 68 (discussing futile attempts by women to get protection from their batterers).

By definition, classification as a battered woman implies a history of abuse. According to Walker,

[b]attered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.

BATTERED WOMAN, *supra* note 57, at xv. Placing more emphasis on the incidents of assaults, Browne defines battered women as

those who have been struck repeatedly, often experiencing several different kinds of physically violent actions in one incident, and usually, by the time they are identified, having experienced a series of such incidents, each consisting of a cluster of violent acts.

BROWNE, *supra* note 63, at 13. For a detailed discussion of the types and duration of abuse suffered by women who kill their batterers, see EWING, *supra* note 63, at 24-33 (citing studies done by Lenore Walker, Angela Browne and Ann Jones). But see MILDRED DALEY PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCE 44 (1981) (defining battered woman through focus on control rather than incidents of violence and arguing that the woman's reaction to the primary battering incident is key to whether a secondary battering will occur).

74. BROWNE, *supra* note 63, at 58 (women in the homicide group reported being beaten with an object, threatened or injured with a weapon, scalded with hot liquid, or held under water); EWING, *supra* note 63, at 24, 27, 31 (weapons used included not only guns and knives but ordinary household items such as boiling water, mallets, tire irons, belts, dog chains, and baseball bats). In one study, 60 out of 144 persons who filed a domestic assault claim had been assaulted with a weapon in the prior assault. Mitchell, *supra* note 63, at 1708. The presence of weapons in the home appears to increase the chance that a lethal incident will occur. SYNDROME, *supra* note 63, at 42. Dr. Walker interviewed 50 women who killed their batterers; thirty-eight of the 50 women killed their batterer with a gun, and 29 of these had previously been threatened with the same weapon by their abusers. *Id.* at 40-42. Not surprisingly, the women subjected to the violence suffered a variety of serious injuries, including "bruises, cuts, black eyes, concussions, broken bones, and miscarriages caused by beatings, to permanent injuries such as damage to joints, partial loss of hearing or vision, and scars from burns, bites, or knife wounds." BROWNE, *supra* note 63, at 69; see also EWING, *supra* note 63, at 24-40 (summarizing the findings of Dr. Lenore Walker, Dr. Angela Browne, Ann Jones, and others); GILLESPIE, *supra* note 63, at 126-27 (noting that women who kill their batterers tend to have been injured more severely than those women who do not kill their batterers); Mather, *supra* note 70, at 555 (stating that bruises are the most common injury reported by abused women, "but broken bones and other severe injuries are far from rare"); Mitchell, *supra* note 63, at 1708 (reporting that a 1973 Detroit study of 144 domestic assault complaints revealed that more than 48% of the victims had suffered an injury requiring medical treatment as the result of a prior assault). Deflating the myth that physical attacks perpetrated by family members are not as severe as those by strangers, the 1980 National Crime Survey revealed that when the attacker was a stranger, 54% of the victims sustained injuries compared to 75% of the victims when the attacker was an intimate. BROWNE, *supra* note 63, at 5.

75. SYNDROME, *supra* note 63, at 67-71.

76. BROWNE, *supra* note 63, at 65-66; EWING, *supra* note 63, at 35 (citing Browne and

frequent, as are assaults during pregnancy.⁷⁷

When a woman kills her batterer, the abuse almost always will have escalated both in frequency and intensity in the period immediately preceding the killing.⁷⁸ Almost all of the women kill only after unsuccessfully seeking some other solution—escape, requests for assistance to the police or other outside agencies, or both.⁷⁹

All of the facts thus far recited clearly are relevant to a self-defense claim. Prior abuse, threats, and unsuccessful attempts to escape (retreat) or to get help all would support a claim of self-defense even under the existing law *as long as the woman killed the batterer while the attack was ongoing*. The problem for Ms. Norman was that only after her husband was asleep did she go to her mother's house, where she found her husband's gun in her mother's pocketbook (her mother had removed it from the Norman house earlier in the day because of Mr. Norman's threats). Instead of waiting for Mr. Norman to wake up and batter and threaten her again, she returned immediately to her own house with the gun and shot her sleeping husband three times, with the desired fatal result.

There is currently a debate about how frequently women kill their batterers in such "non-confrontational" situations, i.e., in situations where the woman is not responding to a present attack by the batterer. Until recently, the conventional wisdom was that women who killed

Walker studies); GILLESPIE, *supra* note 63, at 134-35 (arguing that threats to kill by husbands have to be taken seriously).

77. BROWNE, *supra* note 63, at 6-7; *see also* GILLESPIE, *supra* note 63, at 52 ("Walker and others have frequently noted the propensity of battering husbands to punch and kick their pregnant wives in the stomach, with resulting miscarriages and injuries to reproductive organs."); DEL MARTIN, *BATTERED WIVES* 60 (rev. ed. 1981) (reporting that many abusive husbands refuse to allow their wives to use contraceptives but then beat them while they are pregnant); SYNDROME, *supra* note 63, at 51 (The 403 battered women interviewed reported a high degree of battering while they were pregnant.).

78. It is this escalation that often convinces the woman finally to respond with lethal force even though the battering previously had gone on for an extended period. *See* BROWNE, *supra* note 63, at 129; EWING, *supra* note 63, at 29; Schneider, *supra* note 11, at 634.

79. BROWNE, *supra* note 63, at 10 (reporting a study of spousal homicides in Detroit and Kansas City revealing that in 85-90% of these homicides there had been at least one call to the police for help in the two-year period prior to the killing; in 54% of the cases there had been at least five calls to the police prior to the killing); GILLESPIE, *supra* note 63, at 138 (citing Kansas City study); Browne & Williams, *supra* note 64, at 78 (citing a 1976 study in Chicago of 132 incarcerated women revealing that every one of the 40 women who had killed an abusive partner had called the police for help at least five times prior to the killing); Jones, *supra* note 63, at 48 ("[I]n most spouse killings—whether the husband or the wife is the homicide victim—police have been called on the many previous occasions but have made no arrests."); Elizabeth H. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 152 n.39 (1978), reprinted in WOMEN'S SELF DEFENSE CASES 11 (1981) (citing the Detroit and Kansas City study results).

their batterers most often killed, as did Ms. Norman, during a lapse in the confrontation.⁸⁰ In a recent article, however, Professor Maguigan, relying on a survey of reported appellate decisions, argues that *most* women kill in response to a present, i.e., imminent attack.⁸¹

Entering this debate is not the purpose of this Article, for, even accepting Professor Maguigan's figures, it is apparent that *many* women, like Ms. Norman, kill their batterers at a time when the threatened harm is not imminent, instead of waiting for the next inevitable attack.⁸² This

80. See, e.g., EWING, *supra* note 63, at 48 (stating that most homicides committed by battered women take place outside any direct confrontation between the batterer and the woman); GILLESPIE, *supra* note 63, at 60, 69 (noting that the battered woman and the batterer seldom are equally matched physically and that it is not surprising that many women who kill their batterers do so when the man is sleeping or has his back turned); Rosen, *supra* note 11, at 14 nn. 15-16 (citing cases in which the defendant killed while the batterer was sleeping, resting, or not actually battering the woman); Schneider, *supra* note 11, at 634 (noting that killings by battered women frequently occur with a time lag); see also Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 382-89 (1991) (noting prevalence of view, but disagreeing with it).

81. Professor Maguigan divides the homicide/self-defense cases into "confrontational" and "nonconfrontational." Maguigan, *supra* note 80, at 390-91. Maguigan used "confrontation" to describe a "fact pattern that would entitle a defendant to a self-defense instruction under the law of most jurisdictions." *Id.* at 392. Thus, under her scheme, a confrontational battered woman case exists

if the defendant killed her spouse or lover and at trial evidence was offered on the record and discussed on appeal that (1) he had abused her in the past, (2) on the occasion of the homicide he behaved in a way that, according to her testimony, she interpreted as posing an imminent threat of death or serious bodily injury to her, (3) she did not provoke his behavior by unlawful actions and was not the initial aggressor, (4) she violated no duty to retreat and (5) the force she used was proportional to the threat she perceived.

Id. at 392-93. A nonconfrontational case exists if the killing occurred "while either (1) the man was asleep, (2) the man was awake, but the woman was the initial aggressor on the particular occasion, or (3) the woman hired or persuaded someone else to kill the man." *Id.* at 393.

82. Maguigan found 223 battered women's homicide cases reported. Of the 223 base cases, she classified 75% as confrontational and 20% as nonconfrontational cases. She was unable to categorize the remaining 5% because the appellate opinions did not include a sufficient discussion of the facts. *Id.* at 397.

There is no reason to doubt Professor Maguigan's figures. It is important, however, to understand the limitations of the numbers she reports. First, her figures do not, and do not claim to, describe the entire universe of criminal cases in which women have been convicted for killing their batterers, since her universe, by definition, excludes those cases resolved by plea bargains, as well as those in which verdicts are not appealed. Because over 90% of criminal cases are plea bargained, see, e.g., WAYNE R. LAFAYE & JERALD H. ISRAEL, *CRIMINAL PROCEDURE* § 21.1(c) (2d ed. 1992); FRANKLIN E. ZIMRING & RICHARD S. FRASE, *THE CRIMINAL JUSTICE SYSTEM* 494-96 (1980), we can assume that her universe of reported appellate cases represents only a fraction of cases with similar factual bases. More importantly, her reliance solely on reported appellate cases almost certainly skews the ratio of confrontational to nonconfrontational cases in favor of the former. The substantive law, after all, does have an effect on what lawyers and defendants do at the trial level. Consider under Maguigan's defini-

is the important point in this analysis: *Norman* is not the sort of isolated, aberrational incident—like shipwrecked sailors forced to eat their comrades to save their own lives⁸³—that can be relegated safely to executive clemency. Instead, dozens, perhaps hundreds of women enter the criminal justice system having killed their batterers in non-confrontational situations.⁸⁴ Because these women chose not to wait until they were attacked again to defend themselves, the law denies them the opportunity to argue that they acted to protect themselves. This is so even if a jury could conclude that it was in fact necessary for them to use lethal force.

Moreover, Maguigan's conclusion that we should ignore the injustices in nonconfrontational cases because of the higher number of reported confrontational cases is problematic.⁸⁵ Maguigan assumes that guilty verdicts in both categories of cases reflect equal measures of injustice. This cannot be so. It is one thing to have a defense rejected by a factfinder. It is another not to allow the defense even to be presented for the factfinder's consideration. In Maguigan's confrontational cases the jurors considered but rejected self-defense. Perhaps the jurors in these cases did not believe the evidence of battering. Perhaps they were presented evidence of a separate reason for the killing. They could, of course, have rejected the defense based on their prejudice against women who respond to battering with lethal force, but Maguigan presents no evidence to support such a conclusion. In the nonconfrontational cases,

tions two cases of women who kill their batterers—one confrontational and one nonconfrontational. Both women are charged with homicide, and, as is quite common, the prosecutors offer both women plea bargains to lesser offenses. As a defense attorney, I would be far more likely to advise the woman who killed in a nonconfrontational situation to accept the offer, since I know that, as the law now stands, I would not be able to argue for, or get an instruction on, self-defense at trial. Thus, the case in which the woman who kills during a confrontation is more likely to go to trial, and thus is more likely to be appealed and to be represented in Maguigan's figures.

83. See, e.g., *The Queen v. Dudley and Stephens*, 14 Q.B.D. 273 (1884). This famous cannibalism case may not be as aberrational as was once thought; there were apparently a number of cases in which shipwrecked sailors feasted on their brethren, although some of the unfastidious diners were never brought to trial because they, unlike Dudley and Stephens, gained their place at the table by way of a lottery with those who ended up as dinner. A. W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* 122-45 (1984).

84. Although Maguigan's study includes reported cases from as far back as 1857, the vast majority are recent. By my count, she found only 14 reported cases between 1857 and 1978 in which women killed their batterers, but 117 between 1979 and 1991, with 34 of these being in 1990 and 1991. Maguigan, *supra* note 80, at 461-78 (tabulating dates from cases in Table). And, as discussed *supra* note 81, these cases assuredly represent only a fraction of the criminal cases involving women killing their batterers, and, because of the present substantive criminal law, most likely underrepresent the ratio of nonconfrontational cases.

85. Maguigan, *supra* note 80, at 403-04 (deriding previous authors for focus on nonconfrontational cases).

by contrast, the jurors never had the opportunity to consider whether the killing was reasonably necessary to save the defendant's life. That, assuredly, is an injustice.

D. Imminence, Necessity, and the Jury

Using a necessity rule instead of an imminence rule imports no new norms into the law of self-defense; it merely changes the locus of decision making. Under the current criminal justice scheme, the legislature, or, in common-law jurisdictions, judges, already have decided that a killing to prevent a non-imminent threatened harm can never be a necessary killing.⁸⁶ In light of this predetermined conclusion jurors must then decide the case. Removing or modifying the imminence rule shifts the locus of decisionmaking to jurors, allowing them to weigh the evidence and make their own decision on necessity in a suitable case.⁸⁷

Such a shift is not without risks. One reasonable concern is that a jury would be encouraged to make *ad hoc* decisions based upon its estimation of the relative worth of the individuals involved. The danger also exists that increasing the discretion given to jurors will simultaneously increase the opportunity for bias, arbitrariness, or discrimination to influence the jurors' decision making. After all, it arguably was the Crown's distrust of jurors' proclivities in homicide cases that led to the medieval development of strict rules for self-defense.⁸⁸

Although there is no way to eliminate these risks, they do not appear to be overly troubling in cases of nonconfrontational killings of batterers. Aside from eliminating the imminence requirement, the law of self-defense would remain as it now stands. Jurors would still be instructed that the use of deadly defensive force is justified only in those situations in which such force reasonably appears to be necessary. Jurors would still be instructed on the proportionality principle: that deadly force can be used only in the face of a threat of serious bodily injury or death. Jurors would still be instructed on the fault principle: that the defendant must not be culpable in the creation of the life-threatening situation and that the defendant may use deadly force only if her belief in the necessity for its use is objectively reasonable. Jurors would still be instructed that the defendant must have acted out of fear, not revenge or spite, and that deadly force may be used only if the defendant reasonably

86. See *supra* note 4.

87. By "suitable" I mean a case in which the defendant can carry a burden of producing evidence that fatal force was necessary to protect the defendant from the threatened, albeit non-imminent, harm. See *infra* notes 91-92 and accompanying text.

88. See *supra* notes 46-47 and accompanying text.

believed, and the evidence supported the reasonableness of the belief, that the force was *necessary* to prevent the harm threatened.

In the final analysis, how one views these risks depends on the degree of trust one has in jurors to follow their instructions and objectively determine the cases before them. Today's jurors are not the same as the friends and neighbors who judged medieval defendants and displayed an understandable reluctance to see those in their community sacrifice life and/or property to a distant sovereign. Today's jurors are, hopefully in fact as well as in principle, objective and disinterested fact finders.

Increasing jury discretion in these cases, it should be noted, differs from a similar relaxation of rules in other areas. In a situation involving, for example, capital punishment, the danger that jurors may act discriminatorily or capriciously is sufficiently strong to militate against giving jurors total discretion to impose the death penalty.⁸⁹ By contrast, the situation of women who kill their batterers, or of other defendants who might raise self-defense in a nonconfrontational case, will not likely result in jurors' undue reliance on impermissible factors. Unlike the death penalty, nonconfrontational killings of this type do not carry the historical baggage of race and class discrimination.⁹⁰

Moreover, a readily available mechanism exists that could limit the possibility of an improper exercise of jury discretion. One need not replace imminence with necessity in every case in which self-defense is claimed, nor, for that matter, in every case in which a woman kills a batterer. Because imminence effectively translates the necessity principle in a significant number of cases, it is both useful and appropriate to continue to utilize it in those cases.

To accomplish this goal, the trial judge could instruct the jury that a killing in self-defense must be in response to an imminent danger unless the defendant is able to meet an initial burden of production by presenting substantial evidence that the killing was necessary even though the danger was not imminent. If, and only if, the defendant meets this burden of production would imminence be eliminated as a *sine qua non* for self-defense. Only then would the jury be instructed solely on necessity, with the imminence of the threat constituting only one factor among

89. The long history of discrimination and arbitrariness in the imposition of the death penalty in this country is discussed extensively in the five opinions of the concurring majority justices in *Furman v. Georgia*, 408 U.S. 238 (1972). For a further discussion, see CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE passim* (2d ed. 1981).

90. For evidence of the continuation of arbitrariness and discrimination in capital punishment in the United States, see *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), where a majority of the Supreme Court responded to irrefutable evidence with a collective shrug of their shoulders.

many to be considered. This procedure would retain the imminence requirement in those cases in which it is a translator of the necessity principle, but would remove it when it acts as a potential inhibitor.⁹¹

This approach would serve several functions. On the theoretical side, the use of the unmodified necessity principle where appropriate would allow for a degree of individual justice without diluting the overall integrity of society's notions of self-defense. On the practical side, most self-defense cases will remain unchanged. In nonconfrontational situations outside of the battered woman scenario, society usually provides other reasonably feasible alternatives to homicidal self-help. Thus, even though the changes in self-defense law this Article advocates are not limited theoretically to cases in which women kill their batterers, few defendants in generic self-defense cases could meet even a minimal burden of production on a claim that self-defense was warranted even though the danger threatened was not imminent.⁹²

91. This manner of allocating burdens of persuasion and proof is used in a number of different contexts in the criminal law. For example, in North Carolina, although the state must always carry the burden of persuasion on the issues of premeditation and deliberation in a first degree murder case, a defendant is entitled to an instruction on intoxication when he can produce "substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). The question of whether the defendant has produced such "substantial evidence" is a question of law to be determined first by the trial judge, and then by the appellate court, considering the evidence in the light most favorable to the defendant. *Id.* at 348, 372 S.E.2d at 537. Similarly, under the Model Penal Code, even though the prosecution always bears the burden of proving an essential element of the offense, the defendant sometimes is required to meet a burden of production to raise an affirmative defense to one of the elements. See MODEL PENAL CODE § 1.12(2) (1985). In other words, as to some defenses the burden of persuasion remains with the prosecution even though a burden of producing at least some evidence supporting the defense is placed on the defendant. The Code suggests that this placement of the burdens is appropriate when the defense "involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence." *Id.* § 1.12(3)(c).

In North Carolina a similar procedure also is used with regard to the presumption of malice, long used in murder prosecutions, that arises from the intentional use of a deadly weapon in a killing. When the killing has been caused by the intentional use of a deadly weapon, the prosecution is entitled to rely on this presumption unless the defendant produces some evidence that the killing was not committed with malice aforethought, i.e., that the defendant acted in the heat of passion. Once this evidence is produced, the presumption is removed from the case and the jury is instructed to consider the issue of malice based on all of the evidence, including the use of a deadly weapon. See *Davis v. Allsbrooks*, 778 F.2d 168, 177-83 (4th Cir. 1985) (Phillips, J., specially concurring) (describing operation of North Carolina law).

92. It is possible, however, to envision other cases which might fit this category. For instance, there may be cases in which a prison inmate, having committed a nonconfrontational killing of another inmate, might be able to produce evidence that his attempts to find another way to protect himself were not successful. Of course, in this day and age it is certainly not beyond the realm of feasibility to imagine Robinson's kidnab scenario played out in real life.

Even the impact on trials in which the defendant successfully meets the initial burden of production should not be overwhelming. Most courts, as the trial court did in *Norman*, already admit evidence about prior abuse and threats, as well as testimony about battered women's syndrome. Replacing imminence with necessity in an appropriate case should not alter this. Rather, it would permit the jury to consider this evidence not only in the context of why the woman did not leave, but also in determining whether the abuse and threats produced a reasonable fear of death.

One further change, however, is needed. In appropriate cases, the jury should be allowed to consider evidence of the availability and efficacy of alternatives to the use of lethal force to kill a batterer in a non-confrontational setting as well as the woman's knowledge of these alternatives. Because, in a case involving a nonconfrontational killing, in which a woman has the *time* to avoid the harm, evidence about whether she had a realistic *chance* to avoid death or serious physical abuse without killing (or without obliterating her identity) and whether society had provided her with information about these alternatives, is indisputably relevant. The jury cannot make an informed decision on this issue without being informed of the defendant's alternatives. Assuming that the fate awaiting Ms. Norman (and others similarly situated) was reasonably certain death or grave bodily harm had she not acted as she did, the jury should know that society presently provides her with no reasonable alternatives that would even minimally protect her for more than a brief time.⁹³

E. *What Message Are We Sending?*

Much has been written of the status of self-defense as a justification defense⁹⁴ and the limitations that this status supposedly imposes on the

See *supra* notes 23-24. Nonetheless, it is a rare defendant outside of these contexts who cannot gain a reasonable measure of protection by a call to the police once a threat has been made.

93. See *supra* note 68 and accompanying text. Further, requiring those who are responsible for providing alternatives to homicidal self-help to explain their efforts before a jury will act as an incentive for society to provide non-homicidal escape from this dilemma.

94. An act that otherwise meets the elements of a crime may be justified by the circumstances surrounding the act or by a balancing of the interests at stake. Jerome E. Bickenbach, *The Defence of Necessity*, 13 CAN. J. PHIL. 79, 87-88 (1983) (noting that the circumstances of a voluntary choice justify a wrongful action); B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289, 1290 (1987); Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 WAKE FOREST L. REV. 707, 723 (1990) ("[T]he injury to the right does not constitute a violation of the right, because the defendant's conduct was necessary to protect a competing right of superior or equal value."). Because of these considerations, the wrongfulness of the act is negated. See *id.*

ability to change the defense. Some commentators argue that when a defense is a justification, not only does society not punish the actor when the terms of the defense are met, it actually gives a societal stamp of approval to the action. Under this reasoning, by not branding Ms. Norman and others like her as murderers, society actually is encouraging the use of lethal self-help by all women in that situation, and this is not appropriate unless the death of the batterer is viewed as a social gain.⁹⁵ This theoretical dilemma has led one author to advocate solving the problems of the availability of self-defense for women who kill their batterers by changing self-defense from a justification defense to an excuse defense.⁹⁶

Some argue, however, that this is much ado about very little,⁹⁷ and, at least in the context of self-defense, they appear to have the better of the argument. Neither jurors nor putative defendants are aware of the subtle distinctions between a justification and excuse, and from my experiences it is clear that few judges could explain the difference. There is not even any agreement among commentators whether self-defense as it is presently configured is an excuse or a justification, or a combination of both,⁹⁸ so it is difficult to perceive that changing it nominally from one

95. See Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 274 (1975) ("Justified behavior is correct behavior and therefore is not only tolerated but encouraged."); Rosen, *supra* note 11, at 31, 42-43 (arguing that justification theory requires social approval of an act before it can be justified).

96. Rosen, *supra* note 11, at 43-45, 56. Rosen believes that classifying self-defense as an excuse will allow society to avoid unfairly punishing an actor who responded to a lack of alternatives, while discouraging self-help and valuing human life. *Id.* at 45-46, 55.

97. Perhaps the strongest proponent of this view is Professor Greenawalt. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). He argues that several factors limit the importance of the justification and excuse categories in real life and that the distinction is largely academic. *Id.* at 1898-99. Greenawalt notes that there are no simple and clear criteria for discriminating between justification and excuse, *id.* at 1903-04, and demonstrates that the general verdict given by juries makes this distinction pointless as a practical matter. *Id.* at 1900-01. Greenawalt states: "A fully comprehensive system *could* divide up all instances of justification and excuse, but it could do so only by distorting ordinary concepts or by employing some complicated subcategories reflecting significant policy judgments." *Id.* at 1927; see also Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465, 467 (1991) (advocating abandoning the distinction).

98. There is even confusion about what makes something an excuse instead of a justification. Some authors have defined "excuse" with a focus on the culpability of the actor rather than the wrongfulness of the act. See Byrd, *supra* note 94, at 1290 (explaining that an excuse "focuses on the blame we may fairly attribute to the actor"). Sendor finds that an excuse defense is appropriate when a response meets the elements of a crime, but no disrespect for rights is involved because the actor "lacks either the capacity or [a] fair opportunity to conform to deterrent factors to avoid violating a right." Sendor, *supra* note 94, at 743. Rosen defines excused conduct as criminal acts that confer no societal benefit, but for which the actor

to the other would, as a practical matter, make any difference.⁹⁹

Moreover, calling an action justified does not necessarily compel the conclusion that society encourages the action, including lethal action, as a course of conduct. While the criminal law does send out moral and, possibly, utilitarian messages, it is concerned primarily with determining fault after the fact. Thus, one can reasonably say that an action is justified if it is an action that the law does not choose to punish.¹⁰⁰ In order to be justified, the choice the actor makes need not be the best of all possible choices, or even the one choice that society prefers. It merely must be one that society believes should not be punished under the circumstances of the case.¹⁰¹

is not "morally blameworthy" due to internal or external pressure. Rosen, *supra* note 11, at 22.

Rosen further notes that most American jurisdictions classify self-defense as a justification, when in fact the principles of excuse and justification have merged. *Id.* at 45. Robinson supports this view as well. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 236 (1982) ("In most modern codifications, self-defense is appropriately treated . . . as a pure justification. It . . . properly accounts for the aggressive conduct of the attacker when weighing the propriety of taking the attacker's life for the protection of the defendant."). Still others argue that self-defense, as with any necessity defense, is really two defenses: excuse and justification. See Glanville Williams, *The Theory of Excuses*, CRIM. L. REV. 732, 740 (1982) ("The justification is where the required facts are present; the excuse is where they are mistakenly believed to be present."). Greenawalt also notes that both theories of justification and of excuse are utilized in self-defense. Greenawalt, *supra* note 97, at 1897. Sendor presents a view of the justification/excuse distinction that renders the issue moot. His dual-wrongfulness theory of criminal wrongdoing has two components: (a) violation of a right and (b) expression of disrespect for a violated right. Sendor, *supra* note 94, at 768. According to Sendor, a justification defense negates the wrongfulness of an act, while an excuse defense negates an actor's responsibility for the act. *Id.* He argues, however, that an actor's lack of capacity or responsibility for actions negates the wrongfulness of those actions as well. *Id.* at 768, 782. Thus, in both justification and excuse, the actor's behavior was not wrongful. *Id.* at 768.

99. Almost everybody, including the foremost proponents of the excuse/justification dichotomy, agree that in practical terms the distinction means little today. Robinson, *supra* note 95, at 276 ("The early common law distinction between justification and excuse exists today only in theory."); see George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985). Fletcher also notes in *Rights and Excuses*, 3 CRIM. JUST. ETHICS, 17, 18 (1984), that "these traditional categories receive little notice in a criminal law bent primarily on deterring harmful behavior and encouraging socially useful acts." See also Greenawalt, *supra* note 97, at 1897 (stating that there remains a distinction of excuse/justification in Anglo-American law but acknowledging that there is no systematic difference recognized).

100. See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 675 (1988) ("[J]ustified conduct is right, desirable, warranted, permissible, or, at least, tolerable conduct."); Williams, *supra* note 98, at 735 (defining a justified act as one that, because of surrounding circumstances, is "socially approved or [a] matter[] about which society is neutral").

101. George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 306 (1975) ("Self-defense appears to be better conceived as a necessary evil rather than as the bringing about of a state of affairs that is affirmatively desirable.");

If one views self-defense as a justification defense, this conception of justification certainly makes sense. Outside the realm of law enforcement or war, a dead body is *never* desirable. Society *always* prefers that no person be killed. Under certain circumstances of necessity, fault, and proportionality, however, society is willing to justify the act that produces the dead body. Although the law attempts to restrict this to situations in which the alternative definitely would lead to the death of an innocent, it is willing to retreat from the requirement of absolute necessity when the defender acts without culpability. Indeed, in most cases, one really *cannot* know whether defensive force was absolutely necessary at the time it was used. All one can do, after the fact, is try to determine whether the defendant's actions reasonably appeared necessary.

Ultimately, a judgment on the appropriateness of self-defense is a determination of who must bear the risks attendant upon a violent situation. The message of this Article is that it is the person who creates the violent situation, and who escalates it to a life-threatening level, who should bear that risk.

IV. CONCLUSION

What this Article has attempted to do is to focus on the role of the imminence requirement and examine the possibility of lessening the law's reliance on it in order to further the values embodied in the doctrine of self-defense. If the premises of this Article are correct—that the imminence requirement works against these values in enough cases to warrant change, and that in appropriate cases the imminence requirement can be eliminated without undermining the basic fabric of the self-defense laws—then the time has come for legislatures and courts to begin to make these modifications.

The continuing reports of jury nullifications in cases of women who kill those who batter them,¹⁰² as well as the recent spate of executive clemencies in such cases,¹⁰³ may signal that the present law of self-de-

Robinson, *supra* note 95, at 284 ("In self-defense, society does not encourage the resulting death, . . . but merely tolerates it; no benefit occurs . . .").

102. A number of authors have noted the relatively frequent accounts of jury nullifications in these cases. See Sunny Graff, *Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law*, 10 LOY. L.A. INT'L & COMP. L.J. 1, 23 (1988); Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1725 & n.314 (citing empirical data supporting claim that nullifications are relatively common in nonconfrontational batterer-killing cases).

103. In February of 1991 the governor of Maryland commuted the prison terms of eight women who had been convicted of killing or assaulting their batterers. NEWS & OBSERVER (Raleigh, N.C.), Feb. 21, 1991, at 6A. In December of 1990 the governor of Ohio released 25 women who had been similarly imprisoned. Sue Osthoff, *Clemency for Battered Women*,

fense has been outstripped by society's changing morality. It is no longer considered moral or legal for a man to beat his wife or girlfriend or to forcibly rape her. Perhaps society no longer considers it a moral imperative that a woman delay taking defensive action until a man who has already threatened to kill her begins to demonstrate again that he meant what he said.

The development and acceptance of the "battered women's syndrome" defense assuredly is one response to this evolution in society's values.¹⁰⁴ This defense, however, seeks to solve the problem of women who kill their batterers by focusing on the psychological inadequacies of those who kill,¹⁰⁵ and does nothing to help those who kill in non-confrontational situations. This Article suggests that if Judy Norman reasonably believed that she needed to kill her torturer in order to protect herself, it was not because she had acquired a psychological disability—although psychological scars would be an understandable product of the abuse she endured—but because her husband had created the conditions that made such a belief at least reasonable, if not absolutely correct.

Perhaps Judy Norman best answered all the arguments about necessity when she spoke to a newspaper reporter after being informed that the North Carolina Supreme Court had reinstated her conviction and that she would have to return to prison as a convicted felon.

I was always scared of him. I was scared to leave. I was scared to call the law. I was scared he'd kill me, and I was scared when he got up that night, it would start all over again, and I never knew when that man would hit me enough to kill me . . . I have no worries . . . I can lie down and sleep well . . .¹⁰⁶

Unless her fear was unreasonable, or unless society had provided some viable alternatives which would have protected her, her decision to act on that fear was certainly reasonable, certainly moral. And her ensuing act should not be criminal.

DOUBLE-TIME (Nat'l Clearinghouse for the Def. of Battered Women, Phila., Pa.), Oct. 1990, at 1. In the spring of 1991 the governor of Texas signed legislation ordering a review of old murder cases that might have involved women killing their batterers. Sue Osthoff, *Clemency Update*, DOUBLE-TIME (Nat'l Clearinghouse for the Def. of Battered Women, Phila., Pa.) Oct. 1990, at 5.

104. See *supra* note 61 and accompanying text.

105. See, e.g., Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 38-42 (describing and disputing vision of "helplessness" of women who kill their batterers).

106. Jane Ruffin, *Slaying by Abused Wife Raises Self-Defense Issue*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 10, 1989, at 4A.

