

victory briefs topic analysis www.victorybriefs.com

LINCOLN-DOUGLAS | January/February 2012

Resolved: It is morally permissible for victims to use deadly force as a deliberate response to repeated domestic violence.

Victory Briefs Topic Analysis Book: Lincoln-Douglas January/February 2012 – 11NFL3-Domestic Violence
© 2011 Victory Briefs, LLC

Victory Briefs Topic Analysis Books are published by:
Victory Briefs, LLC
925 North Norman Place
Los Angeles, California 90049

Publisher: Victor Jih | **Managing Editor:** Adam Torson | **Editor:** Adam Torson | **Topic Analysis Writers:** Stephen Babb, Erik Legried, Jeff Liu, Christian Tarsney, Adam Torson | **Evidence:** Erik Legried, Adam Torson

For customer support, please email help@victorybriefs.com or call 310.472.6364.

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TOPIC ANALYSIS BY STEPHEN BABB	9
TOPIC ANALYSIS BY ERIK LEGRIED	20
TOPIC ANALYSIS BY JEFF LIU	29
TOPIC ANALYSIS BY CHRISTIAN TARSNEY	44
TOPIC ANALYSIS BY ADAM TORSON	58
FRAMEWORK EVIDENCE	73
THE NUMBER OF CHILDREN WHO SUFFER FROM OR ARE KILLED BY ABUSE IS SHOCKINGLY HIGH	73
A LARGE PROPORTION OF WOMEN WILL EXPERIENCE SOME FORM OF DOMESTIC ABUSE	74
THE NUMBER OF VICTIMS WHO KILL THEIR ABUSERS REMAINS LOW, BUT THE ISSUE IMPLICATES GENDER EQUALITY ISSUES	75
<i>THE NATURE OF DOMESTIC ABUSE</i>	76
BATTERED CHILD SYNDROME MAY REFER EITHER TO INJURIES SUSTAINED BY YOUNG CHILDREN BECAUSE OF ABUSE OR THE PSYCHOLOGICAL CYCLE OF ABUSE EXPERIENCED BY OLDER CHILDREN	76
DOMESTIC ABUSE CAN BE PHYSICAL, SEXUAL, AND EMOTION, AND FOLLOW A DISTINCTIVE CYCLE OF TENSION BUILDING, ACCUTE EXPLOSION, AND CONTRITION	77
BATTERED WOMEN GENERALLY EXPERIENCE MULTIPLE KINDS AND INCIDENTS OF DOMESTIC ABUSE	78
<i>COURT TREATMENT OF ABUSE VICTIMS</i>	79
STATES TAKES A VARIETY OF APPROACHES TO BATTERED WOMAN'S SYNDROME	79
COURTS DIFFER IN THEIR TREATMENT OF CONFRONTATIONAL VERSUS NON-CONFRONTATIONAL KILLINGS BY VICTIMS OF ABUSE	80
LEGAL ELEMENTS OF SELF-DEFENSE	81
<i>JUSTIFICATION VERSUS EXCUSE</i>	82
JUSTIFICATION DEFENSES CLAIM THAT AN OTHERWISE CRIMINAL ACT WAS FULLY WARRANTED OR PRAISEWORTHY IN THE PARTICULAR CASE, WHEREAS EXCUSE DEFENSES MAINTAIN THAT THE ACT WAS STILL WRONGFUL BUT THE PERSON CANNOT BE BLAMED FOR DOING IT	82
THE JUSTIFICATION-EXCUSE DISTINCTION RESOLVES SCENARIOS THAT WOULD OTHERWISE RESULT IN MORAL PARADOX #1 -	83
THE FOLLOWING HYPOTHETICAL IS #1 – 303	84
ONLY THE JUSTIFICATION-EXCUSE DISTINCTION RESOLVES THE PARADOX IN HYPOTHETICAL #1 – 305	85
THE FOLLOWING HYPOTHETICAL IS #2	86
AGAIN, THE EXCUSE-JUSTIFICATION DISTINCTION IS NECESSARY TO RESOLVE THE PARADOX ..	87
USING JUST JUSTIFICATION RESULTS IN A REDUCTION AD ABSURDUM OF TWO RIGHTS MAKE TWO WRONGS MAKE TWO RIGHTS, ETC. -	88

SELF-DEFENSE IS TRADITIONALLY A JUSTIFICATION DEFENSE, NOT MERELY AN EXCUSE89

AFFIRMATIVE EVIDENCE 90

MORAL RIGHT TO SELF-DEFENSE..... 90

THE RIGHT TO SELF-DEFENSE IS A LAW OF NATURE.....90

THE RIGHT TO SELF-DEFENSE COMES FROM THE BASIC LOGIC OF JUSTICE91

SELF-DEFENSE CANNOT BE JUSTIFIED SIMPLY BY BALANCING THE INTERESTS OF THE PARTIES;
CULPABILITY MUST BE A RELEVANT FACTOR92

SELF-DEFENSE IS NOT JUSTIFIED BY BALANCING THE PARTIES' INTERESTS, BECAUSE IT
PERMITS THE USE OF LETHAL FORCE WHEN LESSER HARM IS THREATENED93

THE RIGHT TO SELF-DEFENSE IS NOT MITIGATED BY THE FACT THAT IT WOULD PRODUCE A NET
REDUCTION IN UTILITY, AND THEREFORE IT IS NOT BASED ON THE BALANCING OF INTERESTS.94

SELF-DEFENSE PROTECTS THE VALUES OF LIFE AND AUTONOMY AND MAKES IT POSSIBLE TO
LIVE IN A SOCIETY95

THE RIGHT TO SELF-DEFENSE IS BASED ON THE AGGRESSOR FORCING THE VICTIM TO CHOOSE
BETWEEN LIVES, NOT SOME RETRIBUTIVE PRINCIPLE.....96

SELF-DEFENSE IS JUSTIFIED BECAUSE THE AGGRESSOR SHOULD BEAR THE COSTS
ASSOCIATED WITH FORCING A CHOICE BETWEEN LIVES97

SELF-DEFENSE IS JUSTIFIED EVEN WHEN THE AGGRESSOR IS NOT CULPABLE OR NOT AN
AGENT, BECAUSE THE VICTIM HAS DONE NO WRONG AND HAS BEEN FORCED TO CHOOSE
BETWEEN LIVES98

INDIVIDUALS DO NOT SURRENDER THEIR INNATE RIGHT TO KILL AN AGGRESSOR TO THE STATE
AS PART OF THE SOCIAL CONTRACT99

SELF-DEFENSE IS A PRE-POLITICAL, MORAL RIGHT.....100

THE STATE IS ILLEGITIMATE IF IT FAILS TO RECOGNIZE THE RIGHT TO SELF-DEFENSE101

PSYCHOLOGICAL AND STRUCTURAL BARRIERS TO ESCAPING ABUSIVE RELATIONSHIPS 102

VICTIMS OFTEN FEEL THAT THE ONLY WAY OUT OF THE PSYCHOLOGICAL TRAP OF DOMESTIC
ABUSE IS TO KILL THEIR ABUSERS; MANY DO SO102

THERE ARE A PLETHORA OF REASONS VICTIMS STAY IN BATTERING RELATIONSHIPS.....103

THE GOVERNMENT IS PERCEIVED TO BE AND ACTUALLY UNHELPFUL IN PREVENTING ABUSE -
.....104

CRIMINAL JUSTICE SYSTEM ACTORS APPROACH INTERVENTION WITH DIFFERENT GOALS THAN
VICTIMS: THIS DISCREPANCY IS PROBLEMATIC-105

THE COURTS FOCUS ON PAST JUSTICE IS NOT IN LINE WITH THE VICTIMS FOCUS ON FUTURE
CARE – DECREASES THE LIKELIHOOD THEY VIEW THE SYSTEM AS AN ALTERNATIVE.....106

WHEN THE STATE ASSERTS COERCIVE CONTROL OVER THE VICTIM THEY MIRROR THE ABUSIVE
RELATIONSHIP -107

TRADITIONAL PERSPECTIVES OF IMMINENCE DO NOT CAPTURE THE COMPLEXITIES OF
DOMESTIC VIOLENCE -108

MEDIATION IS AN UNSUCCESSFUL TACTIC WITH DOMESTIC VIOLENCE COUPLES -109

WOMEN FEEL LIKE THERE ARE NO OPTIONS NOW THAT THERE ARE MANDATORY ARREST LAWS
– THEY WON'T EVEN CALL FOR HELP110

RURAL WOMAN FACE PARTICULARLY STRONG BARRIERS TO ESCAPING ABUSIVE
RELATIONSHIPS111

PARENTAL KIDNAPPING LAWS ARE A BARRIER TO ABUSE VICTIMS EFFECTIVELY FLEEING THEIR
ABUSERS.....112

WOMEN WHO FLEE FROM ABUSE WITH THEIR CHILDREN RISK LOSING CUSTODY	113
THE PUBLIC IS SHAMEFULLY APATHETIC ABOUT DOMESTIC VIOLENCE	114
SUICIDAL PARTNERS AND BELIEF IN THE SANCTITY OF MARRIAGE PREVENTS VICTIMS FROM LEAVING – IT IS RATIONAL FROM THEIR PERSPECTIVE –	115
<i>BATTERED WOMAN SYNDROME, BATTERED PERSON SYNDROME, AND DOMESTIC ABUSE SYNDROME</i>	<i>116</i>
SUMMARY OF BATTERED WOMAN SYNDROME	116
SUMMARY OF LEARNED HELPLESSNESS.....	117
BATTERED WOMANS SYNDROME DESCRIBES A PSYCHOLOGICAL CYCLE EXPERIENCED BY VICTIMS OF ABUSE WHICH MAKES THEM FEEL THEY CANNOT ESCAPE ABUSIVE RELATIONSHIPS	118
WITHOUT THE ABILITY TO PRESENT EVIDENCE ABOUT DOMESTIC ABUSE SYNDROME, VICTIMS ARE UNABLE TO DEMONSTRATE THAT THEIR USE OF LETHAL FORCE WAS REASONABLE UNDER THE CIRCUMSTANCES.....	119
BATTERED WOMAN SYNDROME IS ACCEPTED TO VARYING DEGREES AS PART OF SELF-DEFENSE LAW IN VIRTUALLY EVERY AMERICAN JURISDICTION	120
BEFORE RECOGNITION OF BATTERED WOMAN SYNDROME AS A PART OF SELF-DEFENSE LAW, VICTIMS WHO KILLED THEIR ABUSERS GENERALLY PLEAD INSANITY, WHICH IN TURN REFLECTS SEXIST ASSUMPTIONS	121
BATTERED WOMAN'S SYNDROME EXPLAINS A VICTIM'S OMNIPRESENT FEAR OF VIOLENCE	122
MOST WOMEN DO NOT NEED BWS TO EXPLAIN THEIR SCENARIO – MOST KILL IN THE SITUATION OF IMMINENCE	123
CHILDREN OF ABUSIVE FAMILIES ARE VICTIMIZED, BUT COURTS HAVE BEEN SLOWER TO RECOGNIZE DOMESTIC ABUSE SYNDROME AS A VALID DEFENSE FOR THEM	124
COURTS FAIL TO RECOGNIZE DOMESTIC ABUSE SYNDROME FOR CHILDREN EVEN THOUGH THE PSYCHOLOGICAL EFFECTS OF ABUSE ARE THE SAME AS FOR ADULT WOMEN	125
TRAUMATIC BONDING THEORY IS BOTH DIFFERENT AND PREFERABLE TO BWS -	126
TRAUMATIC BONDING AND HOSTAGE THEORY ARE PREFERABLE TO BWS -	127
<i>SELF-DEFENSE LAW</i>	<i>128</i>
IN A MAJORITY OF JURISDICTIONS, VICTIMS WHO KILL THEIR ABUSERS WHILE THE ABUSER IS ASLEEP CANNOT RAISE A SELF-DEFENSE CLAIM.....	128
VICTIMS OF ABUSE HAVE A DIFFICULT TIME MAKING A TRADITIONAL SELF-DEFENSE CLAIM	129
IMMINENCY STANDARDS DO NOT CAPTURE THE NECESSITY THAT THEY MEAN TO–	130
IMMINENT THREAT REQUIREMENTS ARE SUPPOSED TO PROTECT FROM VIGILANTISM, BUT NECESSITY REQUIREMENTS DO THIS BETTER–	131
THE RATIONAL ACTOR MODEL JUSTIFIES VICTIMS OF REPEATED DOMESTIC VIOLENCE TO USE DEADLY FORCE–	132
MANY VICTIMS WHO KILL THEIR ABUSERS IN THEIR SLEEP RECEIVE EXECUTIVE CLEMENCY, SUGGESTING WIDESPREAD DISSATISFACTION WITH THE APPROACH OF MOST JURISDICTIONS TO SELF-DEFENSE IN THESE CASES	133
JURY NULLIFICATION IN CASES WHERE VICTIMS KILL THEIR ABUSERS IN A NON-CONFRONTATIONAL SETTING SUGGEST INCONSISTENCY BETWEEN CURRENT LEGAL APPROACHES AND SOCIAL NORMS	134
THE PROVOCATION DEFENSE IN AMERICAN LAW IS CURRENTLY INADEQUATE FOR VICTIMS WHO KILL THEIR ABUSERS IN A NON-CONFRONTATIONAL SITUATION	135
VICTIMS CAN ACCURATELY PREDICT BATTERERS' FUTURE BEHAVIOR -	136
<i>DOMESTIC ABUSE IN HOMOSEXUAL RELATIONSHIPS</i>	<i>137</i>

GAY VICTIMS ARE PARTICULARLY SUSCEPTIBLE TO SELF-DEFENSE LAWS THAT REINFORCE MISCONCEPTIONS ABOUT FAIR FIGHTS -	137
IT IS A MYTH THAT IT IS EASIER FOR GAY VICTIMS TO LEAVE THEIR ABUSERS -	138
<i>IMPACT OF DOMESTIC VIOLENCE</i>	139
CHILDREN EXPERIENCE VARIOUS KINDS OF ABUSE WITH MYRIAD NEGATIVE PSYCHOLOGICAL CONSEQUENCES	139
<i>A2 PACIFISM</i>	140
PACIFISM FAILS TO ACCOUNT FOR THE FACT THAT SOMETIMES VIOLENCE IS REQUIRED TO RESPECT OUR OWN STATUS AS HUMAN BEINGS	140
<u>NEGATIVE EVIDENCE</u>	141
<i>A2 SELF-DEFENSE</i>	141
THE MORAL FORFEITURE THEORY OF SELF-DEFENSE CANNOT EXPLAIN THE BASIC LIMITS OF SELF-DEFENSE	141
THE THEORY OF LESSER HARM CANNOT JUSTIFY SELF-DEFENSE	142
RULE UTILITARIANISM CANNOT SAVE THE LESSER HARM THEORY OF SELF-DEFENSE	143
THE CONCEPT OF MORAL FORFEITURE IS INSUFFICIENT TO JUSTIFY KILLING IN SELF-DEFENSE	144
KADISH’S CLAIM THAT THE RIGHT TO SELF-DEFENSE IS ABOUT THE RELATIONSHIP BETWEEN AN INDIVIDUAL AND THE STATE IS NOT SUFFICIENT TO JUSTIFY SELF-DEFENSE	145
MORAL FORFEITURE CANNOT EXPLAIN THE SCOPE OF THE RIGHT TO SELF-DEFENSE	146
EVEN IF AN AGGRESSOR FORFEITS HIS RIGHT TO LIFE, IT DOES NOT FOLLOW THAT THE VICTIM IS THE AGENT WHICH MAY ACT ON THAT FORFEITURE.....	147
THE “CAUSER-PAYS” PRINCIPLE IS NOT SUFFICIENT TO JUSTIFY KILLING IN SELF-DEFENSE	148
<i>NARROW INTERPRETATIONS OF SELF DEFENSE PREFERABLE</i>	149
SELF-DEFENSE IS TRADITIONALLY A VERY NARROW CONCEPT, WITH SOME EXCEPTIONS	149
ALLOWING ‘PRE-EMPTIVE’ SELF-DEFENSE WITHOUT THE REQUIREMENT THAT THE DANGER BE IMMEDIATE ALLOWS THE USE OF DEADLY FORCE WHEN IT IS NOT A LAST RESORT	150
REMOVING THE IMMEDIACY REQUIREMENT FOR SELF-DEFENSE ALLOWS IT TO BECOME A VEHICLE FOR SIMPLE REVENGE	151
REMOVING THE IMMEDIACY REQUIREMENT FROM SELF-DEFENSE BLURS THE LINE BETWEEN AGGRESSOR AND DEFENDER.....	152
ABOLISHING THE IMMEDIACY REQUIREMENT FOR SELF-DEFENSE THREATENS THE RULE OF LAW	153
THE IMMINENCE REQUIREMENT FOR SELF-DEFENSE EXPRESSES THE LIMITS OF GOVERNMENT COMPETENCE, NOT A MORAL RIGHT TO IGNORE THE RULE OF LAW.....	154
THE USE OF DEADLY FORCE IS INDEFENSIBLE IF NONVIOLENT SOLUTIONS ARE AVAILABLE – THE PREMISE OF SELF-DEFENSE IS THAT ALL LIVES MATTER -	155
THE IMMINENCY REQUIREMENT PREVENTS VICTIMS FROM HAVING A BLANK CHECK TO MURDER AFTER UNREASONABLE TIME-SPANS -	156
RELAXING THE IMMINENCE AND ALTERNATIVES STANDARDS IN CASES OF DOMESTIC VIOLENCE ENHANCES THE RISK THAT DEADLY FORCE WAS UNNECESSARY -	157
THERE ARE NON-FORSEEABLE EVENTS THAT CANNOT BE ACCOUNTED FOR IF WE RELAX THE IMMINENCY REQUIREMENT – INFINITELY JUSTIFIED PREEMPTIVE FORCE WILL UNDERMINE THE SANCTITY OF LIFE AND INNOCENCE.....	158

RELAXING SELF-DEFENSE REQUIREMENTS FOR VICTIMS OF DOMESTIC VIOLENCE GIVES THEM AN UNFAIR ADVANTAGE AND REMOVES OBJECTIVE STANDARDS TO PREVENT ERROR.....159

THE ELIMINATION OF THE IMMINENCE REQUIREMENT CATEGORICALLY JUSTIFIES THE TAKING OF UNNECESSARY LIVES – IT ENDORSES MURDER AND ENCOURAGES SELF-HELP160

THE IMMINENCE RULE IS DISTINCT FROM THE NECESSITY RULE AND REFLECTS THE IMPOSSIBILITY THAT THE STATE ALWAYS EXERCISES ITS MONOPOLY ON VIOLENCE -161

THE STATE MUST RESERVE THE MONOPOLY ON COERCIVE FORCE; THE ONLY JUSTIFIED EXCEPTION IS OBJECTIVE IMMINENCE -162

EXEMPTIONS FROM THE IMMINENCY STANDARD CAN ONLY BE GRANTED IN SITUATIONS WHERE THE INDIVIDUAL CAN CLAIM AN OBJECTIVE INCAPACITY TO BE PROTECTED BY THE LAW.....163

BATTERED WOMEN, ALTHOUGH SUBJUGATED, DO NOT MEET THE THRESHOLD TO BE EXEMPT FORM THE IMMINENCY REQUIREMENT SINCE THE STATE IS EFFECTIVE ENOUGH TO MAINTAIN ITS MONOPOLY ON COERCIVE FORCE -164

A BATTERED WOMAN WOULD HAVE TO PROVE NOT ONLY THAT SHE IS SUBJECTIVELY STUCK IN THE OPPRESSIVE RELATIONSHIP, BUT THAT SHE IS ACTUALLY A HOSTAGE -165

Non-Violence and the Affirmation of Human Life 166

FAITH IN THE IDEA THAT WE CAN KILL IN ORDER TO SAVE ENTRENCHES A CYCLE OF VIOLENCE BY JUSTIFYING THE VERY ACTIONS THAT MORAL SYSTEMS ATTEMPT TO PREVENT166

MAKING NON-VIOLENCE NECESSARY CRITERIA FOR MORALITY DISMANTLES THE CYCLE OF VIOLENCE.....167

RIGHTS THEORY IS INSUFFICIENT TO REJECT PACIFISM.....168

PACIFICISM IS THE MANIFESTATION OF A REFUSAL TO CREATE MORAL DISTANCE BETWEEN ONESELF AND OTHERS WHO THE LANGUAGE OF “JUSTICE” SAYS WE CAN KILL.....169

KILLING EVEN IN REVOLT AGAINST CRUELTY CONTRADICTS THE BASIC AFFIRMATION OF HUMAN DIGNITY AND SOLIDARITY AT THE HEART OF REBELLION.....170

MURDER EVEN TO REJECT OPPRESSION UNDERMINES THE HUMAN SOLIDARITY ON WHICH THE REVOLT IS BASED171

Excuse versus Justification 172

KILLING IN SELF-DEFENSE IS MERELY EXCUSABLE, NOT MORALLY PERMISSIBLE IN THE SENSE THAT IT IS A POSITIVE MORAL GOOD172

THE DEFENSE OF VICTIMS WHO KILL THEIR ABUSERS SHOULD BE BASED ON AN EXCUSE DEFENSE, NOT A JUSTIFICATION DEFENSE.....173

BWS CANNOT JUSTIFY THE ACTION OF DEADLY FORCE, IT CAN MERELY EXCUSE ACTORS WHO USE IT –174

BWS IS NOT A JUSTIFICATION FOR SELF-DEFENSE BUT RATHER AN INSANITY DEFENSE – IT CONFLATES BATTERED WOMEN WITH MENTAL INCAPACITIES175

ACTORS THAT ARE MORALLY EXCUSED ARE STILL USING IMPERMISSIBLE DEADLY FORCE – ...176

FLETCHER’S VIEWS ON JUSTIFICATION INCLUDE MORALLY PERMISSIBLE ACTIONS –177

THE COMMON SENSE DISTINCTION BETWEEN COURAGE AND COWARDICE IS SUFFICIENT TO WARRANT THE DISTINCTION BETWEEN JUSTIFIED AND EXCUSED -178

FLETCHER’S VIEW OF JUSTIFICATION CANNOT ACCOUNT FOR EXCUSABLE OR PERMISSIBLE ACTIONS AND THEREFOR EFAILS TO BE CONSISTENT WITH HOW WE USE LANGUAGE –179

A2 Battered Woman Syndrome..... 180

BATTERED WOMAN SYNDROME REINSCRIBES THE LABEL THAT ABUSE VICTIMS LACK THE MENTAL CAPACITY TO CHOOSE RATHER THAN EMPHASIZING THE REASONABLENESS OF THEIR CHOICES.....180

THE STEREOTYPES UNDERLYING BATTERED WOMAN SYNDROME CAN UNFAIRLY HARM DEFENDANTS.....181

BATTERED WOMAN SYNDROME EFFECTS THE WAY THE IMMINENCE AND REASONABLENESS REQUIREMENTS FOR A TRADITIONAL SELF-DEFENSE CLAIM ARE EVALUATED, BUT FAILING TO ACCOUNT FOR THE SPECIAL CIRCUMSTANCES OF ABUSE IS ALSO UNACCEPTABLE.....182

ALLOWING BATTERED WOMAN SYNDROME TO SUBJECTIVIZE TRADITIONAL SELF-DEFENSE REQUIREMENTS UNDERMINES THE AUTONOMY OF VICTIMS BY PORTRAYING THEM AS NOTHING MORE THAN A PATHOLOGY.....183

BWS HAS BECOME SYNONYMOUS WITH DISORDER, IT HURTS RATHER THAN HELPS SELF-DEFENSE WORK -.....184

BWS EXCLUDES THOSE WHO DON'T FIT THE MOLD OF THE BATTERED WOMAN -185

BWS EXCLUDES AFRICAN-AMERICANS-186

BWS EXCLUDES LESBIANS AND POOR WOMEN-.....187

THE USE OF BWS IN COURT CAN PREVENT WOMEN FROM GAINING CUSTODY LATER – DISINCENTIVIZING GOING TO COURT AT ALL188

THE DEGREE TO WHICH SELF-DEFENSE LAW IS INFORMED BY A MALE-CENTRIC PERSPECTIVE IS OVERSTATED.....189

BATTERED WOMAN SYNDROME DEFINES VICTIMS IN TERMS OF A SEXIST PATHOLOGY.....190

BATTERED WOMANS SYNDROME IS A MISLEADING LEGAL CONCEPT BECAUSE THERE IS NO ONE PROFILE OF RESPONSE FOR VICTIMS OF ABUSE.....191

THE TERM 'BATTERED WOMAN SYNDROME' IS VAGUE AND MISLEADING.....192

BWS IS OFTEN CONCEPTUALIZED AS A FORM OF POST-TRAUMATIC STRESS DISORDER, BUT THIS CONDITION IS NO MORE RELEVANT TO THE LEGAL UNDERSTANDING OF REACTIONS TO ABUSE THAN OTHER TYPES OF PSYCHOLOGICAL REACTIONS193

BWS OVEREMPHASIZES THE ROLE OF PSYCHOLOGICAL REACTION TO ABUSE TO THE EXCLUSION OF OTHER IMPORTANT CONSIDERATIONS.....194

WALKER'S EMPIRICAL EVIDENCE IS TERRIBLE – IT RELIES ON A POOR SAMPLE.....195

WALKER'S EMPIRICAL RESEARCH IS FALSE – THE VARIABLES SHE IDENTIFIES DON'T ADD TO LEARNED HELPLESSNESS.....196

THERE ARE FIVE PROBLEMS WITH THE INTERVIEWS USED TO SUPPORT BWS -.....197

BWS IS FAR TOO DEPENDENT ON TIMELINESS – IT HAS A POOR CONNECTION TO SELF-DEFENSE198

BWS FOCUSES ON INDIVIDUALIZED SUBJECTIVE STANDARDS OF REASONABLENESS – THIS DEFENSE IS EXTENDABLE TO PARAMOID SCHIZOPHRENICS KILLING INNOCENT PEOPLE -199

BWS CANNOT EXPLAIN ITS MOST IMPORTANT PREMISE – WHY A BATTERED WOMAN WOULD KILL HER OPPRESSOR:.....200

WALKER'S THEORY IS CONTRADICTORY – IT RELIES ON LEARNED HELPLESSNESS IN PERIODS OF THE CYCLE WEHRE THE VICTIM SUPPOSEDLY DOES NOT HAVE IT.....201

BWS PATHOLOGIZES THE VICTIM SO THAT SELF-DEFENSE IS IMPOSSIBLE – THE ACTOR MUST BE IRRATIONAL202

BWS THEORY HAS SEVERAL CRITICAL FLAWS –203

BWS EVIDENCE ALLOWS SELF-DEFENSE BASED MERELY ON THE WORD OF THE BATTERED WOMAN. THIS IS INACCURATE AND MERELY EXCUSES THE ACTOR -.....204

PROVOCATION DEFENSES ARE PREFERABLE TO SELF-DEFENSE..... 205

PROVOCATION ACCEPTS BUT DOES NOT ENCOURAGE HUMAN FAILURE – MORAL EXCUSES ARE PREFERABLE TO BWS BLINDLY JUSTIFYING THINGS -205

THE PROVOCATION DEFENSE PRESERVES THE IMPORTANCE OF RETRIBUTIVE PUNISHMENT
AGAINST THE VICTIM WHO TOOK THE LAW INTO HER OWN HANDS -.....206

Topic Analysis by Stephen Babb

More Proof the Wording Committee is Trying to Ruin My Life

Two words: 'moral permissibility'. I don't even know where to start. I don't really know why this topic happened, but I suspect it is primarily to do either with uninformed decision-makers or dogma so stubborn it would sacrifice meaningful and productive debates for archaic principles. Pardon this initial rant: it may not help you debate this topic in general, but it will certainly help you debate it if I have your ballot in the back of room (and perhaps those who vote for topics now or in the future will feel some solidarity). Those only interested in substantive recommendations for debating this topic should skip to the next section.

I understand that there remains an irrational and embarrassing commitment to save LD from the "pitfalls" of Policy Debate, to protect our sacred status as value debate and so on. A few news flashes (busy news day, I know...):

News Flash #1: It's too late, and people running "plans" or weighing "advantages" should be the least of our worries. The real threat to LD isn't spreading or having debates about what the government should do in the real world (unless educational itself is a "threat" to LD's identity). The real threats are the same ones faced by any competitive debate format: the deliberate use of obfuscation and the intellectually dishonest appropriation of literature in front of judges too scared to do anything about it.

News Flash #2: YOU CAN'T HAVE A GOOD DEBATE ABOUT MORALITY IN 45 MINUTES. You just can't. It didn't happen in 1997, and it's not happening now. It hasn't happened of national circuits, and it hasn't happened on local circuits. Could you have a good, non-competitive conversation about morality in 45 minutes? Sure, and have fun with that. But, when was the last time you saw a dense, philosophy-heavy debate that really made your life better in any conceivable way? I can honestly say I've learned a lot from being part of this activity. I've learned a lot about the world by researching some of these topics and watching some great debates. The economic sanctions topic was one of the most educational experiences I've had as a judge and coach, and the debate on sanctioning Iran is as pertinent now as it was then. In about 15 years of involvement with this activity, I can also honestly say the most valuable things I've learned about morality are: (1) It is far too vacuous and disputed a concept to consistently leverage as a meaningful normative arbiter; (2) Debaters absolutely butcher the literature, intentionally or otherwise; and (3) we would be much better off using words that are more normatively open-ended (e.g. "SHOULD"...). If there is an obvious and persuasive reason for

moral perspectives to infiltrate a particular normative discussion, so be it. But, it should be the onus of particular debaters to make that case. They should not be able to simply blame the topic for having to go there. Morality is dead, and we should be tired of watching utterly indifferent sophists attempting to reanimate its foul, decomposing body. If I wanted to re-live *Weekend at Bernie's*, I'd build a masochistic time machine with no inhibitions. LET THIS ONE REST IN PEACE.

News Flash #3: There is not a single Lincoln Douglas (no dash) debater who will ever go on to re-write the laws of morality. Unless the Second Coming happens to be enrolled at VBI this summer, the best any of us can hope to do is change actual, codified, real-life laws that we live by (and even that's questionable). This topic asks us to engage in patronizing speculation about what's *moral* for individuals placed in extreme circumstances. The pedagogical opportunity cost is even more staggering than a topic overview preoccupied with railing against the topic. We could at the very least debate what the law should say about domestic violence victims using deadly force. If someone goes to jail for killing his or her abuser, there's not much solace in knowing the finest debaters in the world still thought it was 'morally permissible'. Let's talk about things that can actually be changed and stop quibbling over the imaginary contours of morality and its magical mystery tour through the Lincoln Douglas (no dash) circuits of America.

SO... My **New Year's Resolution** (a Topic Specific Judging Paradigm): When judging this topic, I will have an absolutely *minimal* expectation that debaters value or otherwise pay homage to morality. If your strategy is predicated entirely on convoluted commentary on meta-ethics, be warned. I won't proactively intervene against these strategies, but criticisms thereof will be held to an unusually low threshold. I've grown to detest generic kritiks or otherwise skeptical accounts of normativity. I'd rather see productive, forward-looking debates. But, too many 1ACs have abandoned that vision of debate and have come to repeatedly embody the obverse of the kritik. They have proven that intellectual obscurantism and misdirection are not at all limited to continental theory or critical literature. They have their properly Western embodiment in detached academics making spurious assumptions about the morally legitimate behaviors of imaginary, rational agents. So, to even the playing field, I will giddily listen to kritiks that give us any excuse to reject, ignore, or otherwise emasculate morality and its ironically nihilistic champions. Someone has to show some love to the original butcher of philosophy: the K debater. Have a field day. I'd rather watch people debate the scheduling of municipal lawn-watering hours than see another debate about why morality is 100% deontological. Now for some *slightly* more useful thoughts...

Deliberate or Pre-Meditated

The use of the word "deliberate" can be a bit misleading. Many will interpret it according to one of two extreme formulations: (1) as a *mere* indicator that the use of deadly force was intentional and not accidental or (2) as a suggestion that the use of deadly force is pre-meditated and given extensive prior consideration. I think both of these interpretations are too strong, and that the best debate will fall somewhere in the middle. On the one hand, it is extremely difficult to defend a 100% elective (chosen, unnecessary) use of deadly force. The notion of a battered spouse spending weeks or months plotting the death of an abusive partner is difficult to excuse morally. On the flip side, "deliberate" implies more forethought than would using the word "intentional" here. If the wording committee were merely interested in excluding accidental instances of deadly force, it should have used the word "intentional" (and perhaps should have). But, the wording being what it is, Affirmative debaters should be prepared to defend deadly force that involved at least *some* prior deliberation. As a judge, though, I would personally have no problem with a flexible interpretation of what that deliberation entails. For example, a victim of repeated domestic violence may reason, "If he does it again, I'll kill him," or "If I feel as though my own life is threatened, I'll defend myself by any means necessary." This kind of pre-meditation is indeed deliberate, but it is also conditional. It frames the expected use of deadly force as justifiable *given certain conditions*. I think this kind of forethought is more defensible than plotting to kill an abusive person in his or her sleep, but it is still very clearly a "deliberate" action.

Self-Defense

The fundamental task of Affirmative debaters should be to redefine the notion of self-defense. Just as the "Bush doctrine" attempted to challenge the previously accepted contours of self-defense in our national security policy, this topic takes up a very basic question about what people do for the sake of their most basic interests. One of the traditional tenets of self-defense doctrine suggests that a person may use deadly force when he or she faces an immanent threat and lacks alternative courses of action. Affirmative debaters should set about taking on both of these presumed tenets and arguing for a more expansive conception of self-defense. Some observers will even suggest that this topic isn't about self-defense, since the topic specifies a "deliberate" use of deadly force. On first glance, to say that an action is "deliberate" is to further suggest that it is "elective" and that alternative courses of action were available for deliberation. This is precisely the charge leveled by many critics of the Iraq War and its underlying Bush Doctrine: we didn't *have* to go to war. There were other options. How, then, can we rearticulate the concept of self-defense to include instances in which the "victim" has the opportunity to *think through* other options? I think there are good reasons to seriously re-think the traditional requirements for force to be considered self-defense. Affirmative positions very ably

contend that these traditional interpretations do a poor job of accommodating the unique scenarios people face in today's world. These positions should also take solace in the fact that they must only provide a *moral* account of self-defense. Our legal understandings may remain a practical necessity, but this should in no way refute a more progressive spin on what is morally acceptable in the name of self-defense.

In summary, traditional accounts of self-defense maintain that force is acceptable as defense when at least 2 conditions are met: (1) the threat we're countering must be imminent and (2) alternative solutions must have been exhausted within reason. The logic closely resembles "just war doctrine" that attempts to establish parameters for when one nation may take up arms against another. If the 1AC can demonstrate that repeated domestic violence meets these conditions, then the use of deadly force reasons to be morally permissible. 1ACs should also be prepared for additional requirements (like proving that deadly force isn't an excessive use of force).

Imminent Threats: Ordinarily, we take an imminent threat to be one that immediately threatens its victim(s). The conventional logic is that we have an opportunity to otherwise prevent or escape threats that pose a *less* immediate threat. An assailant lunging at you with a knife may be an imminent threat, while simply living in the same house with as a violent person and a kitchen full of knives is only a hypothetical threat (however probable it may become). To be sure, there are good reasons for establishing these kinds of safeguards against overzealous claims of self-defense. In a world where every potential victim had the right to preemptively incapacitate or attack every potential aggressor, it soon becomes far less than clear who the victims and aggressors are in the first place. This is especially true when crafting law: should "self-defense" become a *carte blanche* justification for preempting any range of foreseeable threats, it would become very difficult to deter wildly excessive and unnecessary uses of "preventive" force.

The 1AC should not waste its time mitigating the importance of an "imminence requirement." Rather, it should argue that we should have a more expansive understanding of imminent threats, especially from a moral perspective. Victims of "repeated domestic violence" face a threat that is imminent in unique ways and for unique reasons. They face a threat that is neither rational nor predictable. There is no warning shot and no rules of combat. Whereas conventional assailants are usually recognizable as such by virtue of an enemy uniform, a ski mask, or raised weapon, perpetrators of domestic violence do not announce their intentions quite so overtly. They are at one and the same time a husband, wife, or domestic partner on the one hand... and monsters on the other. Just as terrorist threats are unpredictable, non-negotiable, and existential in scope, domestic violence is a risk that cannot be tolerated according to the typical continuum with which

we might evaluate threats. A perfectly ordinary day could quickly become a struggle between life and death, and no one should be forced to wait until it's too late.

Alternative Courses of Action: I think it's important for the 1AC to make a distinction between the existence of alternative actions and the extent to which those actions are realistic, perceived, and effective. There are going to be some very extensive argument dumps claiming that victims have 100 different alternatives. When this topic happened in a past life (or was it a mere 5 years ago?), there were some real gems. Negative strategies came replete with suggestions like Tasers, pepper spray, and poisoned darts along with the always nifty restraining orders. These strategies likewise employed idealized conceptions of the courts and ignore empirical evidence that police officers and social workers have often been reluctant (or legally unable) to do what's needed in domestic abuse cases. There are at least a couple of reasons we should be skeptical of all these other great ideas.

First, victims are almost by definition subject to a multi-faceted power differential that limits their perceived options in ways that may not be obvious at first. It doesn't make a lot of sense to hold victims of repeated domestic violence to the same standards we hold others when it comes to exhausting alternatives. People who repeatedly endure violent attacks may experience a wide range of debilitating psychological effects (fear, anxiety, depression, apathy, feeling helpless, etc.). Victims may also feel compelled to remain in the relationship because they come to blame themselves for the situation, still have emotional attachments to the abuser, or feel otherwise pressured by religious or cultural expectations.

Second, if there are in fact alternative courses of action, we should scrutinize the practicability of those options exhaustively before condemning someone resorting to deadly force. Separation from an abuser can often increase the risk of even more violent episodes. The abuser's experience of loss can trigger even more threatening behavior. It should go without saying that legal solutions like restraining orders can only have so much success as *preventative* measures. From the perspective of people fearing for their lives or the lives of their children, there may be only one solution that is 100% effective and permanent. Physical and legal barriers may change a domestic abuser into a stalker seeking retribution, and there seems little doubt that in some circumstances, we should not value the lives of aggressors who cannot otherwise be deterred or incapacitated.

Perhaps the most compelling argument in favor of deadly force as self-defense is that *nothing else will stop some abusers*. They are the 'Energizer Bunnies' of the criminal world and may be so completely irrational that no set of legal measures short of *very* long-term imprisonment can

stop them. Assuming there's even sufficient evidence to put an abusive partner in prison, there's a considerable risk they will leave prison with a score to settle. When children are involved, these risks become even more acute. Far too many domestic disputes have ended in unnecessary bloodshed precisely because of these kinds of triggers. No one should have to live in permanent fear for their own safety or that of a child. And yet, as long as some assailants are alive, some victims are forced to do exactly that.

Duty of Protection

One variant on the traditional self-defense story is an argument that re-centers the debate on the welfare of a 3rd party: children. There are, of course, emotive advantages to this approach. Even if someone truly believes a victim should put his or her own life at risk before deliberating taking someone else's, it would be hard to argue they must also put their children's life at risk. Whatever alternatives a spouse may have, children have far fewer. The crucial step here in terms of argumentation is to establish why parents have a unique and special duty to protect their children. Indeed, we do things on behalf of our children's welfare they we ordinarily wouldn't do (even, if not especially, for our *own* welfare). These additional precautions are a huge part of what it means to be responsible for someone who is vulnerable and defenseless.

Note: I don't think this needs to be an entirely separate position. In fact, I think it is a useful complement to the notion of self-defense. Remember, the thrust of the self-defense position has to be that *these kinds of situations are different*. There is perhaps no better way to highlight how exceptional domestic violence conditions are than to discuss the ongoing risk to children.

The Vigilante-Style Justice Defense of Retribution

Thus far, we have considered deadly force as a primarily preventative or preemptive measure. According to the self-defense account, it is morally justified as a means of preventing further harm to the victim. What if there really were no further risk to the victim (a possibility more hypothetical than it is at all likely...)? Put another way: is there ever a world in which deadly force is justified regardless of one's interest in self-defense (or the defense of children, etc.)? Yes, and that world is Texas, a place I happen to know a thing or two about. In Texas, this is a very easy topic to affirm. Fortunately (for most Texans, I suppose), the state government is thorough enough in its punishments that most people don't feel a need to pile on. But, whoever happens to be pulling the switch, the archetypal Texan has a deep-seated sense of cold, merciless justice. No need to make a Kantian defense of retribution. No need to appeal to some argument about expressing

community norms. The department of corrections can't correct some things, and when inhuman crimes deeply offend the most fundamental of civilized laws, only a permanent correction will do.

Clearly, to pull a position like this off, we'll need a little more than "Be like Texas!" There is any number of reasonable justifications for individuals taking justice into their own hands. The first set of reasons can be traced to the Lockean interpretation of government as an agency that can only maintain a monopoly on the use of force under certain conditions. If and when the government egregiously fails to do its job or otherwise violates its social contract with citizens, that government ceases to be legitimate. Of course, Locke recommends steps like revolution in such an event, but realistically, our options in the face of modern-day failed government are more limited. And, as a result, they appear all the more reasonable in comparison to all-out revolution. If the State has failed to prevent or punish domestic abuse, recourse to vigilante justice seems like a mild reclamation of power. This position need not argue that a government that has failed in these kinds of circumstances is now 100% illegitimate. The point is that in this particular instance of governance, the State no longer deserves a monopoly on force. It has failed to earn that right in this particular instance, and thus (in this particular instance) power should return to the citizens to settle their own affairs accordingly. In short, if the State is impotent in the face of domestic violence, then that domestic sphere has devolved into a "state of war" for all intents and purposes. And you know what that means...

Separately, one could justify *deadly* force in particular by demonstrating that repeated domestic violence is a crime worthy of death (i.e. that it is an offense itself worse than murder). I think there's a good case to be made that some situations are that bad. The more difficult task will be defending retribution in the first place. It's a necessary step in the argument, and it is far less intuitive than positions predicated on self-defense.

The Quest for Quality Negative Ground

If this topic has any merit, it is that it is hard to negate on face. Surely there are *some* circumstances where the deliberate use of deadly force is morally justified. Perhaps repeated domestic violence doesn't meet some moral threshold, but it is hard to believe that it never does. Unfortunately, this will make it difficult to have a straight-up debate and create all sorts of incentive for Negative positions to stray into peripheral questions. It will no doubt trigger all sorts of theoretical allegations attempting to carve out more advantageous ground for the NC.

There is something to be said for emphasizing the universal and rule-based nature of moral permissibility (or the 1AC's burden in general). This topic becomes far more difficult to affirm if

we read it as a generalized justification for deadly force given *any* instance of repeated domestic violence. Not all situations are the same, and not all abuse is equally threatening. My problem with this kind of NC is that it really penalizes the 1AC for a poorly written topic. As long as topics maintain a shroud of ambiguity around the scenario faced by our hypothetical victim, it will of course be difficult to craft any kind of general moral rule. If we had more information, it might be much easier. These Negative arguments, therefore, aren't necessarily saying it's impossible to create a moral rule permitting the use of deadly force; rather, they're *really* saying we just don't have enough information to endorse that rule. If we knew, for example, that the domestic abuser was indeed life threatening, maybe that would change the equation. If we knew the abuse had continued for years, was rapidly escalating, or continued in spite of legal injunction... perhaps we could support a moral rule. But, the failure to make these assumptions is a flaw in the topic (and our activity's confusion in situating each side's respective burdens). So, I'm very sensitive to 1NCs that ultimately take this path, but I'm also weary of the position in which this puts 1ACs.

The Limits of Self-Defense or Pacifism

Short of more experimental tangents, there are really two positions the NC can adopt. The first option is to accept the basic premise of self-defense while arguing for a variation that's more restrictive than the 1AC's. The second is to adopt an uncompromising defense of non-violence. I think it is incredibly difficult to defend just about any variation of pacifism, especially when the question is one of *permissibility*. I'm sure that victims who manage to solve their predicaments without recourse to deadly force have done a very good thing. However, the NC's burden in this exchange is to go a step further and demonstrate that deadly force is *never* morally permissible. It's worth mentioning the position, because it is probably one of the more consistent, substantive positions available. But, I find the justifications for categorical non-violence so completely fanciful that I'll stick to discussing the first position.

As I said in my discussion of Affirmative positions, the 1AC really has to *re-define* self-defense for it to be a viable defense on this topic. Conversely, the 1NC should insist on a stricter conception of self-defense requirements. If a threat isn't immediate, there are alternative ways to handle it. This is the fundamental difference between deadly force being *necessary* or *elective*. The NC should frame any story to the contrary as pure argumentative gymnastics. Sure, every threat is unique. That does not give us license to wildly reinterpret what it means to act in the name of self-defense. It's worth asking: If someone isn't an immediate threat to your life, then what kind of threat are they?

Along these lines, I think it would be wise for 1NCs to avoid some of the more asinine suggestions of alternatives (the Tasers and the like discussed previously). BUT, they should insist that victims should explore a wide range of alternative options before ever resorting to lethal force. While any one of these alternatives may be insufficient alone, a persistent pursuit of alternatives should prove effective. And, of course, we would never know if the alternatives work in a particular circumstance or not unless the victim tries to use them. Some 1ACs will maintain that if the domestic violence is "repeated," then it is safe to assume alternatives have been exhausted. In reality, this is a pretty tenuous assumption, and 1NCs should say as much.

Let's Get Real

At some point, Negative debaters should be honest with themselves about this topic. They run a serious risk of appearing insensitive or politically incorrect. They may even deserve that label at times. There's a lot of persuasion involved with this topic. The last time it was debated, narrative elements were not at all unusual, and they packed a punch that felt more authentic than it sometimes does on other topics. It is difficult to provide a coherent moral account for these kinds of situations, and for many of us, our attitudes toward the subject are driven more by emotion and intuition than any careful moral calculation. And, even for those of us who fancy ourselves moral philosophers in the making, an honest self-assessment would probably reveal similarly intuited origins. If you really believe in a deontological commitment to non-violent action at any cost, then it will be hard to affirm. It is, however, just as difficult for me to work my head around negating the topic. As debaters, you should not pretend these kinds of dispositions go away when the timer starts. I don't think most judges will look to actively intervene; if anything, they may become even more aware of their respective biases than usual. But, that doesn't mean the playing field will as be as equal and unequivocally analytic as it should be. The implicit thresholds that judges attach to particular arguments will still be there, albeit often unannounced. I don't think this is something about which we must be especially alarmist. It may be as valuable as it is inevitable. After all, a benchmark often invoked by the law and ethics alike is: what would we expect of a reasonable person? Of course, some will view this as a gross oversimplification of ethics. Even if that's the case, it is probably also the case that most people implicitly rely upon oversimplified ethics, and it would be a mistake to pretend your judges come with ethical presumptions that are all that more sophisticated.

Victimization

I think there is very good, albeit probably controversial, critical ground on this topic. Explicit use of the word "victim" should more or less *scream* out to K debaters for a good, thorough re-

thinking. Links to a "Victimization K" won't be hard to come by, but what do we mean by this, and why is it an idea worth pursuing?

Our starting point should be what Alain Badiou describes as an "ethics of victimization"¹ at the core of Western, humanitarian ethics. Our preoccupation with solving the plights of the "weak" may itself foreclose the possibility of meaningful empowerment or liberation for those on whose behalf we speak. Of course, Badiou's formulation of the argument is a bit more complex, but the basic premise is that ethics predicated upon the figure of the "victim" should be suspect. This topic, in particular, asks for thousands of students (many with no direct experience of domestic violence) to affirm or reject the ways in which very real human beings choose to address very real threats and hardships. Perhaps those people think of themselves as victims, but perhaps they do not. Use of the rhetoric in the topic may be innocuous enough. I'm sure that some will misinterpret any questioning of the term whatsoever as *prima facie* affront to all that is politically correct and holy ("How dare we think of victims as anything other than victims? Surely, they are not *blame!*"). But the point really isn't that controversial: if we want to solve these problems, we need to make sure we are thinking and talking about them in the right way. Like it or not, the way we talk and think about "victims" has consequences. We often think of victims as powerless and without choices. They evoke the pity of others, sometimes even public hysteria. It is quite possible that reliance of "victim" as a category for describing people in fact has dangerous consequences for how we and others go on to conceptualize those people:

Exoneration from responsibility accompanies victimization. The essence of being a "victim" resides in a person's perceived lack of control over the harm that he or she has experienced. Thus to "victimize" someone instructs others to understand the person as a rather *passive*, indeed *helpless*, recipient of injury or injustice. While this can be situationally useful, it may also convey a general and undesired understanding of persons. In a sense, "victimizing" a person "disables" that person to the extent that victim status appropriates one's personal identity as a competent efficacious actor. Thus, describing a person as "victim" can "debilitate" that person in the minds of others as they interpret ongoing activities through the "victim" framework.²

I think there is a risk in making these kinds of arguments that a very real person is lost in a hell storm of academic jargon and "theory." K debaters should accordingly be careful. I don't think there's any sense in making these kinds of arguments halfway or for purely strategic gain. But, I

¹ See *Ethics: An Essay on the Understanding of Evil*, by Alain Badiou (2002)

² Holstein, James A. and Gale Miller. "Rethinking Victimization: An Interactional Approach to Victimology." *Symbolic Interaction*, vol. 13. 1990. pp. 103-122.

do think there is a persuasive case to be made that we are better avoiding "victim" rhetoric for any number of reasons. Beyond its affect persons described as "victims," it also forces us into a potentially inaccurate and unproductive dichotomization (victim/abuser). One criticism made by some feminist authors is that construction of victimhood opens the door conceptually to "masculine" modes of protection (a violent one in this case, no less).

At the end of the day, let me be honest. I think these arguments are academically interesting, but probably little more. I think running this kind of position well would be *incredibly* difficult, although potentially very rewarding as well. I would look at these kinds of arguments as real personal challenges, and take them seriously. Don't think of them as just parts of a game.

Topic Analysis by Erik Legried

Definitional Issues: I will begin my analysis with the words of the topic. I think the following terms are the most strategically important and/or susceptible to debate.

Morally Permissible –

On the surface this term is relatively simple. The resolution is asking if an action, deadly force, is morally permissible in a certain context. In general, actions are considered morally permissible if they are not prohibited.

This should give the affirmative an immediate strategic advantage by lowering their burden of proof from what prior resolutions have expected (especially compared to the last time this topic area was debated in 2006 – “Resolved: A victim’s deliberate use of deadly force is a just response to repeated domestic violence.”) It is not necessary for the affirmative to prove that it is obligatory for the victim to use deadly force - merely that it is not prohibited for them to do so. Moreover, this wording should not prevent the affirmative from arguing that deadly force is morally obligatory, since morally obligatory actions are de facto permissible. Most moral theorists would agree that all obligatory actions are permissible, even though not all permissible actions are obligatory.

Affirmatives would be wise to take advantage of this definition, since it was almost certainly included in the topic for their sake. One strategic way to take advantage of this definition is to layer your constructive so that it is simultaneously setting up proof of deadly force as both obligatory and permissible. Strategic use of layering obligatory and permissibility arguments should be sure to make its way into all of your blocks and frontlines as well.

Although I believe this phrase was included to make affirming easier, I can foresee two possible ways the negative can leverage this phrase to their advantage:

First, negatives can argue that the affirmative ethical theory does not have, as a category, morally permissible actions. If you can successfully argue that the ethical theory the affirmative advocates does not even label actions as morally permissible, you have likely won a negative ballot. For example, many ends-based theories do not make room for permissible actions. The morally obligatory action, by definition, is the one that maximizes the good consequences. All other actions are prohibited. Under this theory it would not make sense to regard deadly force as morally permissible, since no actions are morally permissible. I imagine many negatives will be able to take advantage of affirmatives that haven’t thought this through sufficiently.

Second, negatives can argue that another ethical theory is both better than the affirmative's and does not include morally permissible actions. This is comparable to the first strategy except it doesn't rely on what the affirmative says. In the first approach, the negative hijacks the affirmative ethical framework by saying it justifies a negative ballot by virtue of the fact that it would judge NO action as morally permissible. The second approach requires two steps – first, prove an ethical theory true; second, prove that that theory doesn't have room for permissibility. For example, a negative case that employed this strategy might go something like this – Part 1: Utilitarianism is true, Part 2: No actions are morally permissible under utilitarianism, Part 3: If no actions are morally permissible, you must negate.

Both of these approaches offer an interesting path to the negative ballot – they do not prove it morally impermissible/prohibited to use deadly force, merely that it is *not* morally permissible. This will necessarily, and justifiably, prompt debates about what the negative must do to win the ballot. Being ready for those debates, whether affirmative or negative, may prove important on this topic.

All in all, moral permissibility is a double-edged sword for affirmatives and negatives alike. It should open up strategic avenues for affirmation and negation, many of which can become complex. I would encourage you not to gloss over this phrase in your cases, nor to ignore it in your research. Knowing what it means, how it operates, and what ethical theories make use of it will be vital to success on the topic.

Deliberate Response –

This is another seemingly intuitive phrase with some foreseeable complexities. Although the nuances differ, most definitions of deliberate just point to synonyms like premeditated, thought-ought, intended, etc. These definitions are, in many ways, unhelpful. They fail to answer the foundational question of what exactly those synonyms means in the context of victims of domestic violence.

Ultimately this definition will present competing incentives for the affirmative and the negative. Affirmatives may want to stretch the definition to include responses to domestic violence that are hardly pre-meditated in order to enhance their capacity to argue for deadly force as self-defense and as morally excusable. Affirmatives will be benefitted if the deliberate use of deadly force describes scenarios where the victim acted in an intended, but nonetheless immediate, and necessary way. The negative, on the other hand, will want to exclude as many of these scenarios as possible. If executed perfectly, the negative will push the debate to discussing victims who

have deliberately and meticulously planned the death of their assailant, the scenarios farthest from traditional self-defense and excuse theory as possible.

Altogether, I think deliberate is the word most susceptible to quality-definition debates on this topic. If students invest time researching this word, as they should, then I foresee quality definition debates comparing and analyzing the varying dictionary, psychological, legal, and moral definitions of deliberate. This analysis will be even further coupled with a variety of social-scientific research connecting domestic violence victims to this definition. My personal research has yet to arrive at a compellingly specific use of deliberate in the context of domestic violence. I'm sure further inquiry will find some relation between the two.

In General –

I outlined some specific thoughts on two of many possible definition debates that will arise on this topic. However, only time will tell how these debates will play out. Moreover, early on the topic debaters love to take advantage of opponents with incomplete preparation. The easiest way to do this is to roll into rounds with some shabby definition that makes it impossible to affirm/negate – don't let these attempts throw you off guard. In preparing for the unknown, I encourage all of you to prepare for the initial tournaments on this topic with two things.

First, have tons of definitions – just because the definition of victims seems obvious doesn't mean debaters will let it be. It's better to be prepared then caught off guard. Second, have cases that are strategically diverse enough to lose the definitions – If the definition of deliberate is an easily contestable word then don't set up your entire case to rely on it. Think like your opponent – don't give them easy opportunities to take out your case.

Interpretational Issues: As important as defining the words that are in the topic are the interpretational issues about the words that are not. The lack of context in the topic is curious and potentially worrisome. Debates about context rarely get developed thoroughly in debate rounds. They often show up in the occasional defensive arguments: “but that evidence/argument is US specific” or “that's only true in the status quo, but the resolution is non-temporal”. Here are my thoughts on what I regard as the two most common ways to approach the lack of context in the resolution.

Approach 1: The resolution is an abstract moral statement –

The resolution, as it stands, lacks a temporal or geographical context. Based merely on the words of the resolution, it would be improper to assume that it refers to domestic violence in the status quo, let alone the United States. Embracing the lack of context, debaters might approach the

resolution as a truly abstract moral question and this view is most in line with the exact text of the resolution. Appeals to the primacy and predictability of the text of the resolution will support this interpretation.

The strategic advantage of this perspective is that it excludes tons of arguments. It is my opinion that negatives have the most to gain from this abstract approach since it would exclude arguments about the failings of current and country-specific criminal justice systems. This often works to undermine self-defense arguments since it's hard to disprove "alternatives" in an abstract sense – only in an empirical sense. The largest obstacle a debater faces with this approach is in setting up a precise delineation between the abstract moral statement and context to be excluded. This difficulty will become very apparent in the following section.

Approach 2: The resolution is interpreted within the context of the US in the status quo –
Although this perspective seems fully inconsistent with the wording of the resolution, I am convinced by its plausibility.

The resolution lacks a lot of context – that much is obvious. I would argue that it lacks too much context if viewed solely as an abstract statement. Let's assume for a moment there is no geographical or temporal context. Taken to the extreme, this would prohibit debaters from appealing to an 'on-balance' victim of repeated domestic violence, his or her psychological condition, and any facts or statistics about their context-dependent scenario. Moreover, debaters consistent with their abstract interpretation cannot give 'on-balance' attributes to the assailant since these are contextually dependent on a time and place. We cannot know how many victims or assailants there are, their propensity to exist, their propensity to commit the crime, escape the crime, etc. We cannot discuss the history of patriarchy or sexism since these too are geographically and temporally dependent. We cannot discuss the availability or absence of alternatives since we know nothing about the existence, capacities, or failings of the criminal justice system in the abstract scenario. We cannot appeal to success stories or failings since these, too, are context-dependent. In fact, taken to the extreme, we know hardly anything about the scenario and society we are discussing. I would contend that abstracted this far, the resolution becomes both non-evaluable and uninteresting.

As such, I find it to be obvious that additional context is necessary – the only remaining question is what context to give it. You can fill in the missing context in the broadest way possible – to describe the world over a period of time. This, although better than true abstraction, still seems morally non-evaluable. The vast majority of research I have encountered on domestic violence has been country and time-specific. Moreover, I think this topic is interesting precisely because it

gains additional complexity when interpreted in a context-specific manner. In a very abstract sense, the resolution is asking if the pre-meditated vigilante killing of another is morally permissible. Without any additional context this seems obviously immoral. However, as we add specificity we find the issue to be more complex. Rather than requiring the abstract endorsement of pre-meditated vigilante killing, the topic is asking deep questions that touch on the inadequacies of the legal system and criminal justice system, the apathy of bystanders, the psychology of violence, victimization, and oppression. It is my opinion that the resolution needs context, and that context is best given by appealing to the US in the status quo.

Even if you disagree with me that adding context is necessary, I would encourage you to think about its desirability. The vast majority of articles, research, and authors take the US and status quo to be starting points. Further, it seems far more predictable to pick right now than any other time in the infinite time continuum from now backwards or forwards. Finally, the vast majority of us live in the US, right now. Whether directly or indirectly this topic affects all of us. I would much rather discuss the real world than be constantly drawing artificial lines between the abstract resolution and the context-dependent one.

Conclusion –

Interpretational issues are important to framing exactly what we are debating about. I have thus far outlined, only superficially, just one of the countless interpretational debates under this resolution. You should not enter your first tournament without having thought about how to interpret *this* resolution. A generic theory file and some framework spikes are not enough. If you want to be successful throughout this topic you need to thoroughly analyze from multiple perspectives the multiple interpretational issues relevant to this topic.

Although I won't analyze them in depth I will quickly discuss a couple that come to mind – consider whether affirmatives should be able to parametricized specific advocacies on this topic? If they can, what is the predictable limitation preventing them from arguing just one person? What's the deal with the layered permissibility/obligation burden for the affirmative? Is there a reciprocal advantage the negative can claim? Does the negative need an advantage? Can the negative run counter-advocacies? If so, which ones? This topic dives into the heart of countless interpretational questions, all of which should have specific answers.

Affirmative Positions: With interpretations and definitions behind us, I'd like to outline some affirmative ideas on the topic.

Self-Defense AC –

I think a self-defense affirmative is one of the best stock arguments on the topic. With sufficient research it can easily handle even the most prepared of negatives.

The first portion of the case needs to make the connection between moral permissibility and self-defense. I won't spend too long elaborating the options here merely because the quantity of them is overwhelming. Theories of self-defense permeate virtually every branch of philosophy – utilitarianism, deontology, contractarianism, egoism, existentialism, virtue ethics, feminist ethics, etc. Moreover, I would argue that it is possible to on your own defend the importance of self-defense. A reliance on grandiose ethical theories is not necessary if you, in fewer and more precise words, can sum up analytically and defensibly why all ethical theories should accommodate some amount of self-defense.

The second portion of the case needs to explain why the resolution, on balance, describes a situation of self-defense. To make this connection you need to, minimally, answer three foundational questions.

Q1: How can there be self-defense when the attack is repeated? Why doesn't the victim just leave?

Q2: How can there be deliberate self-defense?

Q3: Why is killing appropriate? Why not less than deadly force?

There are a couple of things on your side in attempting to answer these questions.

First – Psychological theories. A significant amount of psychological research has attempted to answer these exact questions. Battered woman's syndrome, traumatic bonding theory, hostage theory, rational model theory, and many others all attempt to answer why the victim stays in the abusive relationship. These theories also help to clarify why standards of imminence should be relaxed in situations of repeated abuse.

Second – The perceived and real lack of alternatives. There are harsh critiques of virtually every element of the US legal system as applied to domestic violence situations. Critics argue that the criminal justice fails to understand or address the complex issue, that enforcement is biased and apathetic, that attempts to reform the system make it worse, all coupled with psychological theories explaining why the victim views the criminal justice system as undesirable or impossible.

Third – The specificity of the topic. Use the topic to your advantage. Victims of repeated oppression on-balance cannot or do not think they can defeat their oppressor in a face-to-face confrontation. This, and the psychological theories mentioned earlier, help relax notions of self-

defense to include the resolution. Take advantage of the fact that the resolution is describing a very precise situation and use its peculiarities to your advantage. This means looking for amazingly specific research that, if acquired, can win you every affirmative round on the topic.

Moral Excuse AC –

In the law there is a distinction between an action being excused and justified. Although discussions over excuse vs justification have adopted a stupid amount of complexity in their scholarly form, the premise is that an action is justified if it is usually wrong but is right in certain circumstances. An action is excused if the action was indeed wrong, but the agent is not blameworthy.

Although it's possible to make an entire affirmative out of moral excuse theory, I think it is far more strategic to introduce it as a way of layering your cases. As I mentioned earlier, on the affirmative it is desirable to get the most out of the topics wording. If you can prove that an excusable action is permissible, then you merely must show that victims of self-defense, even if objectively wrong about their action, were excusable. Most moral excuse theories deal with the individual's subjective perspective of the events.

Combined with a self-defense AC your syllogism would look something like this:

First, self-defense is morally permissible. Second, the resolution is a situation of self-defense. Third, moral excuses are morally permissible. Fourth, even if its not self-defense, the actor thought it was, and therefore it's excusable.

Moral Tragedy AC –

This argument again relies on the inclusion of moral permissibility in the resolution. Moral tragedies are situations where all options are morally prohibited and consequently, all actions are morally permissible. A deontological example I have seen in the literatures goes as follows – it is morally prohibited to commit domestic violence against someone, it is morally prohibited to allow domestic violence to be committed against oneself, and it is morally prohibited to lie or use force. The victim of repeated domestic violence has few options in this situation – escape and staying are morally prohibited. This constitutes a moral tragedy since there are no moral options available to the actor and therefore, any action is permissible, including the use of deliberate deadly force.

Narratives –

This topic seems ripe for narratives. Feminist ethics have often been in the forefront of theories that emphasize the importance of individualized and narrative attention. This is especially true of domestic violence stories, where statistics and summaries don't capture the grief, hopelessness,

and tragedy of the situation. In addition to being a fascinating topic to research, narratives, if employed correctly, have significant strategic advantages.

Negative Positions: Below are some thoughts on different possible negatives on the topic.

Self-Defense NC –

If approached correctly, the self-defense negative can be very strong. Although generic self-defense doctrine will likely side with the negative, the smart negative will use arguments capable of holding up to the specificity of affirmative scrutiny. A lazy debater can easily pull together some cards on self-defense theory and explain why the affirmative doesn't meet it. This case will not hold up to close scrutiny, however, since every affirmative article ever published will be directly responsive to it. Don't skirt around the topic literature; embrace it. Look for articles that address standards of self-defense as applied to the topic. Generic cards about imminence, proportionality, necessity, and alternatives will not hold up to specifics. Finally, be careful about running necessary but insufficient standards – consider giving your arguments artificial sufficiency so that the affirmative cannot cry abuse OR be ready to engage in a debate over the merit of your strategy.

Pacifism NC–

The trick to running the pacifism negative is to avoid shallow appeals to non-violence. Summarizing your position in CX should add up to more than a reiterated assertion that 'violence is bad, mokay?'. I would highly suggest finding authors who find issue with *calling* violence morally permissible. Although the distinction has substantive and theoretical concerns, it might be wise to run a negative that argues that however necessary, we should always *consider* violence impermissible. In other words, you agree that the victim of repeated domestic violence needs to use deadly force but you refuse to morally endorse it. It might be easiest to find advocates of this seemingly contradictory position in existentialism, where affirmation of ambiguity is often critical, as opposed to detrimental to the ethical theory.

Vigilantism NC—

One seemingly troubling aspect of the resolution is that the victim is taking force into his or her own hands. A significant amount of moral and political theory has been devoted to the roles of private and public actors in society. Most would agree that, barring extreme circumstances, the role of coercive force ought to be left to the government. You have two options with this negative – either take a firm state-endorsing view that only the government can use coercive force OR argue that the resolution does not qualify as the "extreme circumstances" where some authors endorse private action. This argument will be much more successful if you can defend the

efficacy of the system. That task, however difficult, is not impossible and with the right evidence I think this is a very plausible and strategic negative.

Conclusion – On the whole, I really like this topic. I think the subject area is interesting and engaging. The topic literature does not seem disturbingly skewed towards one side, and I don't foresee debates going unequally one or another way.

Last two notes –

1. Keep researching – This is one of the narrower topics of recent LD history. Narrow topics can give students the false impression that having researched “all” of the positions on the topic that they can settle down. The narrowed breadth of this topic is a double-edged sword, perhaps there are fewer issues, but you have no excuse not to be deep on those issues. The debaters winning tournaments come January, February, and May will be students who didn't stop researching after reading a couple articles of after finishing a couple blocks. Go deep and be creative.

2. Be nice, sincere, and sensitive – It is impossible to deny that this topic will strike close to home for members of the community. I encourage all those involved in the activity to be sensitive to this fact and to be thoughtful about what and how you say things. Although the competitive elements are often highlighted, I hope students remember that they are surrounded by their peers while debating this topic, and recognize the possibility that anyone is affected.

I know this topic is important to a large portion of the debate community as many students use it to debate at their state, national qualifier, and TOC-qualifier tournaments in addition to the NDCA and the TOC. I wish you all the best of luck!

Topic Analysis by Jeff Liu

Introduction

The resolution asks a moral question about what kinds of responses are justified in the face of repeated domestic violence but could also be conceivably interpreted as a challenge to current laws regarding domestic abuse. While the resolution is not particularly broad, there is a wealth of philosophical and legal literature on self-defense for debaters to mine from. Because there are simply not a vast number of shock value positions to choose from, the debaters with the deepest understanding of the core issues in the literature will succeed on this topic.

My analysis will be divided into three sections: definitions, general interpretational questions, and common affirmative and negative arguments.

Definitions

1. “morally permissible”—This is the evaluative term in the resolution, so the value for most affirmative and negative constructives should be morality. This renders questions of legality irrelevant, although I suppose arguments could be made for why legal considerations also constitute moral ones. Evaluations of morals are generally divided into three categories: morally obligatory, morally permissible, and morally impermissible, with the category of “morally permissible” actions accounting for the neutral category between right and wrong, obligatory and forbidden. A “morally permissible” action is usually defined as one neither prohibited nor required.
2. “deadly force”—The definition of deadly force is largely uncontroversial and is defined by most sources as force that is likely to cause serious bodily injury or death.
3. “deliberate response”— I assume the intent of the framers of the resolution in appending the modifier “deliberate” to “response” is to clarify that the death of the abuser is not a product of a spontaneous act of violence (a crime of passion). “Deliberate” implies an **intention** to kill or seriously harm. Deontological arguments may rely on such an interpretation, as some modern Kantian authors³ argue that actions are not morally wrong if they do not express an agent’s maxim *intending* harm.

³Barbara Herman [Herman, Barbara. *The Practice of Moral Judgment*. Harvard University Press, 1993. p. 113]: “Many acts of violence are spontaneous. Since Kant’s ethics assesses actions as the agent’s maxim satisfies the Categorical Imperative, a norm of rational willing, such violent actions would not involve maxims of violence—they would not be willed actions—and so could not be judged immoral. While this may be true for some violent actions (jealous rage, perhaps), it is

4. “domestic violence”—There are many types of domestic violence, categorized in a typology by researcher Michael P. Johnson, a typology that has been supported by subsequent research. His five main categories⁴ of domestic violence are **common couple violence**, “a single argument where one or both partners physically lash out at the other”; **intimate terrorism**, “one element in a general pattern of control by one partner over the other... more common than common couple violence, more likely to escalate over time, not as likely to be mutual, and more likely to involve serious injury... may also involve emotional and psychological abuse”; **violent resistance**, “violence perpetrated usually by women against their abusive partners”; **mutual violent control**, “rare type of intimate partner violence [that] occurs when both partners act in a violent manner, battling for control”; and **situational couple violence**, “which arises out of conflicts that escalate to arguments and then to violence...not connected to a general pattern of control”. The crux of the resolution seems to be whether violent resistance is a justified response to intimate terrorism. Violent resistance is often thought of in legal terms as self-defense, but Johnson argues that such a reading is too narrow, and violent resistance is often the product of a number of different motives.

As an alternative, broader definition of “domestic violence,” Medline Plus⁵ defines “domestic violence” as “a type of abuse [that] involves injuring someone, usually a spouse or partner, but it can also be a parent, child or other family member.” Negatives wishing to garner a greater array of turn ground will want to adopt this more-inclusive definition.

Interpretational Questions

What follows is a discussion about questions to consider when crafting an AC or NC. Most of these are open questions, and I do not think there are sure answers to most of them.

- What is the scope of the affirmative’s burden? What percentage of cases and which groups of battered individuals should the affirmative have to defend in order to “affirm on balance”? What of cases in which women repeatedly assault their husbands (a major consideration in the topic literature)? Affirmative debaters must ask whether the

not true of all of them. All too many acts of violence are planned. Surely a moral theory must contain an account of the wrong involved in intentionally harming or taking a life.”

⁴Princeton Wordnet. *Extended Definition: Domestic Violence*. Webster’s Online Dictionary. 2006. <<http://www.websters-online-dictionary.org/definitions/Domestic%20Violence>>

⁵*Domestic Violence*. MedLine Plus [MedlinePlus is the National Institute of Health’s Web site]. December 1, 2011. <http://www.nlm.nih.gov/medlineplus/domesticviolence.html>

arguments they choose to deploy in the AC would account for both men and women (and children too, depending on the definition of domestic violence). Do these “non-standard” cases of domestic violence present us with a distinct set of moral questions, and if so, why?

- What degree of aff parametricization is reasonable? The obvious reply seems to be that the affirmative must defend the topic “on balance,” but that merely begs the question of what it means to affirm on balance. In my opinion, any aff interpretation that defends violent resistance (violence perpetrated usually by women against their abusive partners) as a justified response to intimate terrorism meets the criterion of reasonability. This advocacy would clearly defend a significant chunk of the topic area, would maintain fair limits while not excluding much negative ground, and would address the core conflict of the resolution. Alternatively, the AC could mention only a particular set of individuals (women, for example), but remain open to defending against disadvantages the neg would read against other groups of people (men and children). An open interpretation would solve many of the neg’s abuse claims against parametricization because this interpretation excludes no arguments on face.
- Are plans a viable option for the aff (and are counterplans a viable option for the neg)? Plans seem intuitively implausible because the resolution questions the moral permissibility of an individual choice, not a government action. The resolution also does not claim that victims of repeated domestic violence ought to or should act in a certain way, nor does it provide a context like the United States. These considerations provide evidence in favor of viewing the resolution as a general moral question.

However, the answer to the question of plans may also hinge upon the theoretical paradigm of how we should interpret the resolution. Under a truth-testing paradigm, the aff fiats nothing and merely defends the resolution as a statement of truth—a moral judgment, as opposed to a mandate of action. Advocates of a “comparing worlds” paradigm, on the other hand, argue that the aff must defend an action; the aff must defend the desirability of everyone acting as if the resolution were true. It could be argued that in such a world, a change in laws or policy regarding the justifiability of deadly force would follow as a logical consequence of everyone adopting this moral rule.

I do not think this conclusion follows. The most a comparing worlds advocate could coherently argue for would be that everyone should internalize this rule as a part of their moral code; to argue that a law be passed *as a result of* everyone internalizing the

resolutional principle would be effects-topical. My views on this question are, of course, open for debate.

As an aside, the question of comparing worlds vs. truth-testing probably impacts more debates than most judges might initially believe. I think this is worth mentioning because of its potential to impact debates, especially on this topic, given debaters' insistence on running policy-style positions in spite of the topic's wording as a moral judgment.

Consider the following two examples:

1. On this year's November-December topic, Resolved: Individuals have a moral obligation to assist people in need, negatives would read counterplans claiming that individuals should donate their money to X or Y other charity or group (one CP I heard claimed that the money should go to funding NASA's space exploration program) instead of the poor (whatever the affirmative case talked about). Affirmatives would reply that these CPs still affirmed because they merely prove that the poor were not the group in need but did not deny that individuals have a moral obligation to assist people in need. This answer is strongly truth-testing in flavor. It assumes that the affirmative must prove the resolution true rather than defend some stable advocacy throughout the entire debate. Debaters reading CPs, on the other hand, assumed a comparing worlds paradigm; they believed that what the affirmative was defending functioned as their advocacy, and that the negative burden was to prove the comparative desirability of doing CP instead of the AC. Without arguments in favor of truth-testing or comparing worlds, the question of whether CPs affirmed or negated on that topic became irresolvable; the arguments were based on different foundational assumptions.
2. On this topic, suppose the affirmative reads a case about domestic abuse and children. The AC contains an argument that says something along the lines of "I will be open to accepting possible negative T interpretations and affirming under that interpretation." This line of argumentation clearly presupposes a *truth-testing* paradigm. If the negative reads topicality and truth-testing is the shared understanding for evaluating the debate, then the argument "I told you I would concede possible negative interpretations" becomes a convincing "I meet" argument on T if the affirmative only extends arguments from the AC that are not specific to children.

Under a comparing worlds paradigm, the aff must *advocate* a particular action throughout the entire debate. A 1AR shift in interpretation would itself constitute grounds for an abuse claim because comparing worlds assumes the affirmative defends an action against which the negative can defend an alternative. Given this kind of assumption, a 1AR shift to meet the negative's interpretation could nullify a significant portion of the negative's offense functioning under the interpretation presented in the 1AC. The usually-unresolved question of truth-testing vs. comparing worlds is probably one of the main reasons that topicality is such a murky issue in LD debate.

- Does proving a moral obligation affirm or negate? I can see this consideration mattering mostly in cases of debaters choosing a utilitarian standard, under which victims would be *obliged* to use deadly force if this would produce greater utility overall, and perhaps with deontological self-defense affirmatives. For instance, consider the following passage by Barbara Herman⁶ on why agents are morally required, and not just permitted, to act in self-defense:

So, first, why may I kill to resist aggression? What reasons could I offer to rebut the presumption against violence? It is not that I may kill in order to keep myself from becoming dead—something I do not want to happen. Death is part of the fate of human agents. The kind of value or moral standing I have as an agent is not lost or compromised in dying. What a maxim of aggression or violence involves, morally speaking, is the discounting of my agency. The aggressor would use me (take my life) for his purposes. This is what I resist and claim moral title to refuse. Just as I cannot agree to become someone's slave, so I *must* not assent to be the victim of aggression. *This gives more than permission for an act of self-defense when that is necessary to resist the aggression; it imposes a requirement that aggression be resisted.* (Emphasis added)

The resolution claims only that "it is morally permissible" for victims to use deadly force, so are arguments like Herman's proving deadly force to be morally obligatory negative ground? Negatives will argue that there are three *distinct* categories of action: obligatory, permissible, and prohibited. Under such a view, the category of obligatory is entirely distinct and mutually exclusive with the category of permissible actions, rendering "obligation" negative ground. I think this view is deeply counter-intuitive and that there are strong common usage arguments against viewing the category of obligatory as distinct

⁶Herman, Barbara. *The Practice of Moral Judgment*. Harvard University Press, 1993. p. 129.

from the category of permissible. It seems that all obligatory actions must also count as permissible actions, as one cannot be obligated to do something if he is simultaneously prohibited from taking the same action. I could certainly be wrong; I have not read the literature on this debate.

As a separate but related question, are arguments proving deadly force to be morally obligatory *extra-topical* for the affirmative?

Extra-topicality in policy debate claims that the affirmative plan contains planks that are not topical. For instance, on the 2010 Jan/Feb LD topic, Resolved: Economic sanctions ought not be used to achieve foreign policy objectives, an affirmative plan implementing a nuclear weapon free zone in Northeast Asia would certainly include the lifting of economic sanctions, but it would also include non-topical planks like negative security measures. That plan is extra-topical.

With this understanding of extra-topicality, our previous question now becomes, “Does proving the existence of a moral obligation, as opposed to mere permissibility, entail adding non-resolutional ‘planks’ to the affirmative ‘advocacy’?” Let’s bring our earlier discussion of truth-testing and comparing worlds to bear on this issue.

If we assume truth-testing, then proving the existence of a moral obligation to use deadly force would clearly affirm, for the reason discussed earlier: all morally obligatory actions must also be morally permissible. Affirming is clearly not extra-topical in the sense defined earlier—it does not entail adding “additional planks” to the use of deadly force.

Additionally, most truth-testers would agree that the standard (value criterion) does not constitute the affirmative’s advocacy; the aff does not defend the standard in the same sense that the aff defends a plan text. Rather, the standard functions only as a filter to determine which impacts/arguments affect the resolution’s truth or falsity. So truth-testers have a very straightforward answer to the extra-T objection: the mere fact that the affirmative defends a *standard* that can only prove that deadly force is morally obligatory does not have any effect on whether the AC’s *position* is topical.

Now, let’s assume comparing worlds. A comparing worlds paradigm, as I understand it, claims that the affirmative must defend the desirability of everyone acting as though the resolution were true. As I mention earlier, this yields the following principle with regard to the current resolution: “It would desirable if everyone internalized the moral rule that [insert resolution].” However, if it follows from the affirmative’s choice of standard that

deadly force is morally obligatory, then a comparing worlds view yields an entirely different principle: "It would be desirable if everyone internalized the moral rule that it is morally obligatory for victims to use deadly force as a deliberate response to repeated domestic violence." Even under comparing worlds, the affirmative is not extra-topical in the sense that affirming does not entail adding "additional planks" to the use of deadly force, but if we understand extra-T as merely claiming that the aff may not defend anything beyond what is specified in the topic, then comparing worlds would hold the aff to defending the desirability of the resolitional principle as it stands and nothing more. So, assuming comparing worlds, a position proving that deadly force is morally obligatory is indeed extra-topical.

I admit that I am not sure that this is what a comparing worlds advocate would defend, but if my argument is sound, I hope it illustrates that there are deep argumentative assumptions often left un-touched in debates that have a huge effect on interpretational questions and topicality.

Case Positions

I have organized my case ideas by frameworks, as opposed to the general thesis/contention of the case. This reflects the way I tend to think about casing, at least initially, which is from the top down: I consider possible frameworks and then attempt to find literature that "fits" the considered frameworks. This may not be an optimal casing approach, but I find it easier to generate ideas when I am not artificially limited by the first few topical search results on JSTOR or Lexis-Nexis; especially given the wording of this topic (as a question of moral permissibility), many of the first search results you will find might be statistical analyses, historical surveys, or legal articles relating to domestic violence but that do not bear on the topic at all.

That said, here are my initial thoughts on possible case ideas.

Affirmative Arguments:

1. Self-Defense: The general thesis behind any self-defense position is that individuals should have a right to protect their right to life and autonomy, and that deadly force is a justifiable act of self-defense in response to repeated domestic violence. This case is strongly intuitive and is the most common argument in the literature in favor of the moral and legal permissibility of deadly force. There are few (no?) plausible moral theories that do not allow for at least some right to self-defense in face of an imminent and serious

threat. The more questionable link is whether deadly force functions as an act of self-defense within constraints of proportionality and imminence. There are a few general approaches to structuring a self-defense position:

- a. Nailbomb—This structure for affirmative casing is a relatively new innovation on the national circuit, really only becoming popular within the last two or three years. The case usually follows this syllogism: 1) The neg has a proactive burden (usually coupled with presume aff arguments) 2) The neg fails to meet this burden. It is called a “nailbomb” case because the substance of the case arguments is mostly spikes—defensive arguments for why the negative fails to meet the burden. As applied to self-defense and this topic, the argument could go like this:
 - i. Interpretation: The topic is about deadly force used in self-defense. Alternatively, you could say, “I parametricize to instances of victims acting in self-defense.”
 - ii. Framework: The negative must prove that self-defense is morally impermissible for X, Y, and Z reasons. One example of such reason is that morally permissible means not prohibited, so the neg must show a prohibition.
 - iii. Contention: The negative fails to meet this burden.

This structure has a number of advantages. It is highly strategic because it puts the neg at a disadvantage from the get-go. It is difficult for the neg to generate offense because the AC is just a list of defense. When they do make offensive arguments, they first have to answer the defense from the AC. Debaters are far worse at the second level of defense; by putting all of your defense in the AC, you push the debate back another level.

This case eliminates the neg off-case spread because their off-case ground is no longer responsive to the burden structure set up by the AC. However, because the aff case is all defense, you need to frontline every *possible* way the neg could meet the burden. To be successful, you must sit down and brainstorm every way the neg could meet your burden and think of at least two or three good responses to each. If you do not do the necessary pre-tournament prep with this aff, you will not be able to capitalize on its advantages.

One way around this problem is to make the defensive arguments in the AC as inclusive as possible; one argument should be able to answer basically any negative argument. For instance, argue that **no** moral theory could condemn self-defense when used as a last resort, and argue that many women are in no-access situations in which deadly force is permissible as a last resort. This kind of argument would also answer back proportionality arguments which claim that deadly force is not proportional and therefore an impermissible use of self-defense.

- b. Deontology—Deontological theories of ethics are rule or duty-based. Interpretationally, this case would be very similar to the nailbomb AC. The standard should be Kantian in nature, either about the universalizability of maxims or treating persons as ends, and claim that it would be morally permissible for an agent to act in self-defense. For an interesting argument on self-defense and Kant, see Chapter 6, “Murder and Mayhem,” of Barbara Herman’s book *The Practice of Moral Judgment*. Her argument interprets the categorical imperative procedure as yielding “deliberative presumptions” against taking certain kinds of actions like killing. She⁷ writes:

The CI [categorical imperative] procedure shows that certain patterns of reasoning—certain forms of willing—are not legitimate. This establishes directly some duties and prohibitions. In addition, the arguments of the procedure’s two tests reveal categories or rules of moral salience that are to be used to sort the details of cases, carrying with them certain presumptions about forms of impermissible willing. In rejecting the general maxim of violence, the CW [contradiction in will] argument shows that acts that use or harm the human body may not be regarded simply as available means for our various purposes. This sets the relevant principle of casuistry. It establishes a moral presumption against violence (moral devaluation of the body), putting the burden of argument on the agent who would be violent to explain why what he would do is not governed by the terms of the presumption.

Herman claims, with regard to self-defense, that “The deliberative question is whether the need to remove a threat to life is sufficient to rebut the presumption against violence.”⁸ She concludes that it is.

⁷Herman, Barbara. *The Practice of Moral Judgment*. Harvard University Press, 1993. p. 130.

⁸Ibid.

- c. Legal Arguments—Legal arguments in favor of self-defense must be accompanied with theoretical arguments in favor of specification to the United States legal system as well as arguments for why legal considerations count as moral ones. I think the latter is a tenuous claim, but I am sure that there are authors who write on both sides of this question. The contention arguments would cite legal precedents and argue for a change in laws regarding deadly force and domestic abuse.
2. Contractarian—This is another different approach to a self-defense case. The AC framework would need to establish some kind of Hobbesian contractarianism argument. The case argument claims that contractarianism cannot prohibit the right to self-defense because contractarian theories presuppose self-preservation as a natural right. In the state of nature, all individuals are justified in seeking their own preservation, and contractarian principles of mutual restraint are formed to leave the state of nature. When abusers violate individuals' right to self-preservation, they forfeit their stake in the agreement, resulting in a state of war between abuser and victim. Because there are no agreements in such a state, individuals may act in ways that seem right to themselves, justifying deadly force. Some works worth reading for a position like this are Morals by Agreement by David Gauthier and Force and Freedom by Arthur Ripstein.
3. Utilitarian—The AC will need to set up a framework claiming that only end states are morally relevant. The case position will claim that deadly force is morally obligatory if it produces the best end states overall.
 - a. Act Utilitarian—Act utilitarianism claims that any possible act is correct if it produces the greatest amount of happiness overall. The contention for this case would be very straight-forward, and you can compile any number of reasons for why acts of deadly force in no-access situations are net beneficial into a stacked affirmative— it deters future crime, solves court clog, alleviates personal suffering, etc.
 - b. Rule Utilitarian—The rule utilitarian theory is a hybrid between deontological theories and act-utilitarian theories. Brad Hooker⁹ clarifies the rule utilitarian thesis:

An act is wrong if and only if it is forbidden by the code of rules whose internalization by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being (with some priority for the worst off). The calculation of a code's expected value includes all

⁹Hooker, Brad. *Ideal Code, Real World: A Rule Consequentialist Theory of Morality*. Oxford University Press. 2003.

costs of getting the code internalized. If in terms of expected value two or more codes are better than the rest but equal to one another, the one closest to conventional morality determines what acts are wrong.

The case position should claim that the resolitional principle would be included in “the code of rules whose internalization by the overwhelming majority of everyone everywhere in each new generation has maximum expected value in terms of well-being.” I think the most compelling rule utilitarian argument is deterrence, the claim that the possibility of deadly force would send a message forcing abusers to reconsider before acting violently. Justified deadly force could deter potential abusers in much the same way that the death penalty deters. Benjamin Zipursky¹⁰, for instance, writes:

If use of deadly force in no-access situations were permitted, then it would arguably be the case that: (1) she would increase her ability to avert death or injury in the sort of “no-access” case that does frequently arise in these scenarios; (2) to the extent that her sense of lack of liberty and helplessness were based on actual condition, she might experience a greater sense of liberty because, if access has truly been cut off, she will have the right to defend herself; and (3) the assailant could no longer count on being able to rape and terrorize her by cutting off access and engaging in brutal conduct without facing the risk of defensive homicide (a risk that would presumably increase substantially if such defensive homicide were legal). Perhaps this fact would diminish the terrorizing conduct and the cutting off of access. With regard to both forms of domination I have considered, it might also be added that society might change so that access for women to alternative paths of relief were more available than it now is. If the cost to society of no-access scenarios were women killing men without criminal liability, the state might be more motivated to provide alternative avenues for relief

This argument is stronger when presented under a rule consequentialist criterion because rule consequentialists claim the benefits of everyone internalizing the resolitional principle as part of their moral code, and the internalization, it could be argued, is where most of the deterrent effect derives from. A rule consequentialist criterion also allows you to avoid most of the generic indictments to act consequentialism as a standard and also specific disads to particular instances of deadly force. What matters is

¹⁰Zipursky, Benjamin C. *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women who Kill: Self Defense, Domination, and the Social Contract*. University of Pittsburgh Law Review. 1996.

the overall consequences of the rule being adopted in general; exceptions to the rule do not deny the rule as a generally optimal principle.

4. Punishment/Retribution—This case claims that harming others warrants a reciprocal harm as punishment for the initial wrong-doing. This AC must set up a framework which says that punishment should be equivalent to the crime. The contention argument would prove that deadly force is an equivalent response to physical abuse. I am just throwing this out there as an idea, but I find it to be a relatively weak position. First, the claim that deadly force is punishment seems problematic; it could be argued that the likelier motives for deadly force are to either escape a terrible situation or to act in self-defense. Second, the negative could argue that punishment ought not be arbitrary: the abuser is not granted the right to a trial when deadly force is legitimated but instead is subject to vigilante justice.

Negative Arguments:

1. Legal Arguments—The same comments that apply to the aff about legal cases also apply here.
 - a. Democratic Proceduralism—This case will set up a standard that identifies what is morally permissible with following democratic procedures—following the current laws that have been decided. One way you could warrant such a standard is by first, specifying the resolution down to the United States; second, arguing for a Rawlsian practice rules framework (I recommend Tamar Schapiro’s article “Three Conceptions of Action in Moral Theory” if you’re interested in developing this kind of framework); finally, concluding that the United States is a democracy, of which a practice rule is following the procedures that have been democratically decided upon. The contention of the case would argue that current laws make deadly force illegal.
 - b. Right to Trial for the Abuser—This case will set up a standard for why all individuals should have a right to trial or for why the rule of law ought to be respected. The contention will argue that permitting deadly force allows for vigilante justice, which is unfair to the abuser, who should have a right to trial to determine a truly proportional punishment for his/her crimes.

2. Deontology: Killing is *always* wrong—I think this position will be very common, but also very difficult to defend; it equates deontology with pacifism, a position I think few authors would be willing to defend.

Killing is wrong because it cannot be universalized. Following Kant, there are two ways in which a maxim can fail the universalizability test: either by a contradiction in conception, in which the maxim cannot even be conceived of as a universal law without contradiction, or by a contradiction in will, in which the maxim cannot be willed as universal law without the will contradicting itself. A contradiction in conception leads to a perfect duty, basic required duties that must always be fulfilled, and a contradiction in will leads to an imperfect duty, a duty which must sometimes be fulfilled and for which one is morally praised for fulfilling (because he has gone beyond his basic duties). Robert Johnson¹¹ elaborates on the distinction:

Following Hill (1992), we can understand the difference in duties as formal: Perfect duties come in the form ‘One must never (or always) ϕ to the fullest extent possible in C ’, while imperfect duties, since they enjoin the pursuit of an end, come in the form ‘One must sometimes and to some extent ϕ in C ’.

If we spell out the derivation of the duty against killing, we can see why the conclusion that killing is *always* wrong is not a plausible Kantian conclusion.

The following argument is one made by Barbara Herman. First, we ask can we even conceive of a world in which everyone acts on a maxim of convenience killing, killing as they please? Clearly, we can: this is just the Hobbesian state of nature. So the duty comes from a contradiction in will, not a contradiction in conception. According to Herman, willing a maxim of convenience killing involves willing “that others not regard my life as a reason to refrain from taking it.” But “if I will anything at all, I must will the necessary conditions for continued agency.” The maxim of convenience killing can only pass the contradiction in will (CW) test if one can guarantee that willing universal indifference to life will not contradict willing the necessary conditions for continued agency. No human can guarantee this, so the maxim fails the CW test.

The conclusion: the duty not to kill is actually an *imperfect* duty. There may be some circumstances in which we are permitted to kill—e.g. in self-defense. Negatives wishing to read a Kantian NC must be prepared to answer this argument.

¹¹Johnson, Robert [Professor of Philosophy at the University of Missouri]. *Kant's Moral Philosophy*. Stanford Encyclopedia of Philosophy. Revised April 6, 2008. <http://plato.stanford.edu/entries/kant-moral/>

3. Utilitarian
 - a. Act Utilitarian—These arguments will claim disadvantages to everyone acting on the resolutional principle. An example of an argument you might hear is some kind of Vigilantism/Backlash DA. This would claim that allowing deadly force in the instance of domestic violence would allow for infinite abuse to people in the future. It justifies vigilante justice and individuals using deadly force in response to any degree of physical abuse, resulting in a multitude of unjustified murders. Allowing for deadly force sends a bad message about how ineffective the criminal justice system is, which could have a major backlash. This argument does hinge on the slippery slope fallacy.
 - b. Rule Utilitarian—The neg rule util argument would be the same as the act util one but presented in a different way. The contention would claim that internalizing a principle of deadly force creates a brutalization effect and a more violent society *in general*. The evidence read in the contention would need to be broad, whereas the evidence for a vigilantism DA under an act utilitarian standard should have specific evidence related to a particular scenario.
4. Moral Skepticism/Relativism—This is a generic argument read on most topics. It claims that moral facts are non-existent or relative, so questions of moral permissibility cannot be answered. For reading on skepticism, see J. L. Mackie, “The Subjectivity of Values,” *Ethics: Inventing Right and Wrong* (1977).
5. Alternatives to Deadly Force: This case will claim that acts of killing are morally wrong if a non-violent alternative is available and would be equally successful. The contention will claim that alternatives like calling the police or leaving the abusive relationship would be better than deadly force.
6. AC-Specific Cases—These are a few positions that are best when read against a particular AC.
 - a. Constraints on Self-Defense: Suppose the affirmative reads a self-defense AC. These are necessary constraints that could be imposed on acts of self-defense.

- i. Imminence—Any act of self-defense must be in response to an imminent threat. The contention will claim that a deliberately violent response to domestic abuse is not a response to an imminent threat.
 - ii. Proportionality—Acts of self-defense must be reciprocal to the harms committed. The contention will claim that deadly force is not a proportional response to repeated domestic abuse.
- b. Moral obligation is negative ground: Against utilitarian ACs or self-defense ACs, the negative can argue that these arguments are all actually neg ground because they prove moral obligation, rather than moral permissibility. I discuss this issue at length in the interpretational questions section, so I will not go into more detail here.

Conclusion

I think this is certainly one of the most contentious topics debated in recent years. Many have argued in online forums like NSDUpdate.com or debateaction.org that the topic lacks ground, is not broad enough, and that it may affect many debaters on a deeply personal level. The latter is an especially important consideration, and I urge everyone to stay sensitive of the emotional issues at the heart of this topic.

Despite all its flaws, however, this resolution does open up a space for some deep discussion on issues of self-defense and law, and I'm looking forward to hearing many interesting debates on the topic. Good luck!

Topic Analysis by Christian Tarsney

Well, the topic is domestic violence, and it doesn't look like it's going to be nullified. So unless you can find an extraordinarily broad definition of "domestic" somewhere, you'll have to put away those Predator drone strike files you worked so hard on last summer and move through the stages of grief fast enough to have topical, non-targeted-killing-related cases ready for your first tournament. It's sad, I know...

But this topic should be alright too. As I'm sure you know, it's a nearly exact replica of a topic from 06-07, so you can hopefully talk to people who coached or debated that topic and get a sense of the likely terrain. If that iteration of the topic area was any indicator, stock arguments will tend to dominate, and debates will more often than not come down to tech skills, basic strategic decision-making, and of course "execution". It'll be rough if you like extinction scenarios, but easier to bear if you dislike the messy framework debates and nine rounds out of ten devolving to theory that prevent you from ever debating those extinction scenarios anyway. So make of it what you will. In the spirit of facing the music, however, let's start off with...

I. Framework issues

There aren't too many ambiguities in the wording of the resolution, which is nice, but there are a few little, and not always entirely obvious, difficulties in terms of ground. Let's take them in order of occurrence within the resolution.

"Moral permissibility," of course, has recently acquired something of a fraught history in debate. The first thing that will leap to many debaters' minds, seeing that it's the evaluative threshold set by the resolution, is skepticism, and no doubt a few skeptical affs will exploit the ease with which the resolution lets them establish "permissibility ground". The framework dispute, as we know, concerns whether ethical skepticism (of one sort or another) should be properly understood as rendering everything "morally permissible," or as simply stripping away moral statuses (stati?) entirely—to put it more clearly, is "moral permissibility" the condition of being permitted by a valid moral rule, or the condition of not being forbidden by any valid moral rule?

It seems obvious to me that this dispute is entirely semantic and that, outside of a debate context, it would be perfectly reasonable to adopt either convention—it's fixed neither by usage, nor by any considerations of conceptual economy or "cutting reality at its joints". If that's true, then the only way to resolve the question in a debate round is through theory (presumably, deciding which convention yields a more appropriate division of ground). So that's about all there is to say

there...if you want (as the affirmative) or don't want (as the negative) to debate skip, then have at it.

A more interesting question is how moral permissibility interacts with notions like culpability, responsibility and blame. Because some arguments in the literature, particularly having to do with "battered women's syndrome," might imply that abuse victims are at least *not culpable* or *blameworthy* if they kill their abusers, the question will arise whether this conclusion amounts to the same thing as moral permissibility.

It might seem, on face, that not-blaming sounds a lot like permitting, at least assuming we restrict our attention to after the fact. But I think this is wrong—factors that mitigate culpability are generally seen, not as taking away from the wrongness (or at least the badness) of an act, but rather as taking away from the agent's degree of responsibility for choosing the act (perhaps even the degree to which the agent chose the act at all). In other words, it seems more reasonable to speak of holding someone less to blame for committing a wrongful (morally impermissible) act than to speak of the act not being wrongful, although it would have been for another, psychologically paradigmatic person in otherwise identical circumstances. I don't attach a ton of weight to this intuition, and I won't try to argue for it at length here, but it does seem to me that proving lack of culpability doesn't prove moral permissibility.

One last note on the topic of permissibility: I can't resist the opportunity to point out here, by comparison, something that drove me absolutely crazy in debates I judged on the last resolution. The action of the resolution, in this case, is using deadly force, as on the last topic it was assisting people in need. In both cases, the resolution questions whether that action has a particular moral status. In neither case does that mean that the *action of the resolution*, i.e. the thing that the affirmative defends and the negative gets to attack, involves *predicating* that status on anything, or *bringing it about* that the killing/assisting have a certain status. So, just as on the last topic, "obligations bad" (they're coercive, violate negative rights, whatever) *didn't even come close to negating* (because, as one way of thinking about it, the *obligation* is not created by the action of the resolution, and hence exists at both the affirmative and negative worlds or at neither), so on this topic the negative doesn't get to make arguments *criticizing the permission*—e.g., saying things like "If we permit killing for this reason, there's no bright line to prevent people from killing for other, worse reasons too," or "Labeling killing morally permissible devalues human life." There might *precedent-setting* arguments that battered women ought not kill because *the act of killing* might encourage or license future killings, but that link story doesn't hinge on "making killing morally permissible" as somehow getting the ball rolling.

Remember, the only difference between the aff and neg worlds is that in the aff world the action of the resolution occurs, and in the neg world it doesn't. The whole debate concerns (roughly) whether *the affirmative world is morally permissible, with respect to the salient alternative of the negative world*, and whether it is or it isn't, *that fact* will be true at both worlds. In other words, if killing is morally permissible, it's permissible even if no one does it, and if that fact by itself is bad, then its badness is non-unique. I don't think this sort of confusion will be as prevalent on this topic as it was on the last, but for the sake of preventing any further mind-numbingly incoherent debates about whether the resolution *should* be true, I bring it to your attention.

That takes care of moral permissibility. I think it's a pretty reasonable implicature that "victims" refers to victims *of the domestic violence being responded to*, so although that might be semantically underdetermined, I'll trust that no one's going to try and start any silliness there. There's also, of course, the question of whether and how affirmatives to limit down which "victims" they talk about, either explicitly at the framework level or implicitly via the specificity of their evidence. Most of the topic literature concerns battered women—and more specifically, women who are battered by their boyfriends or husbands—and most debates, inevitably, will proceed on that assumption. It's probably worthwhile to stick some sort of preempt to K's in your AC framework, to the effect of "Look, this is where the lit is, and it'll let us have a clearer debate in this particular round; I'm not saying there aren't other kinds of domestic violence, or that they aren't be worth debating, but domestic violence against women is obviously worth debating too." To deal with the theory, rather than the K, side of things, you can "defend disadvantages to" other sorts of domestic violence, which shouldn't cost you too much. Of course, it may also turn out that there are (affirmative or negative) arguments in the literature idiosyncratic to other types of abuse, and if you find them, then go for it, but my general intuition is that, as the affirmative, you're not going to find much better ground (e.g., although you'll find lots of stuff saying that women-on-men domestic violence is a serious and neglected problem, it's still a relatively tougher sell that husbands should be able to kill their wives), and as the negative, it'll be difficult to generate clear and significant offense (since there are obviously lots of cases where deadly force is unjustified, and it's unclear that the aff should have to defend all of them even as part of an "on balance" mosaic) without being spectacularly and stupidly abusive (PICs). So I think that for the most part, the existence of other sorts of abuse will be relevant primarily as K ground for the neg, and if affs make the right sorts of obeisance to the gods of whiny gender theory at some point in the AC, that ground should be more or less nullified.

The next interesting framework question, then, concerns "use of deadly force," and in particular is whether "use" should be understood as a success term—in other words, whether the phrase "use of deadly force" implies an assumption of success—and if so whether that means that

affirmatives aren't accountable for the possibility that deadly force will fail (which is not the same thing).

With respect to the first question, I think the answer is pretty clearly yes. "Using" means, in some sense, "succeeding in an attempt to use". But there are two further questions. First, "deadly force" is not force which *actually causes* death—the most typical definitions will say something like "carries a substantial risk of causing death or serious bodily injury". So, the fact that one has succeeded in using deadly force doesn't mean that anyone's actually dead. It may be that "deadly force," even when used, is often ineffective. Second, though, debaters often tend to assume that restricting our attention to a particular class of actions (e.g., successful ones of a certain kind) automatically allows the fact of membership in that class to inform our moral evaluations—which assumption, I think, is pretty clearly mistaken. To put it more straightforwardly—the resolution may only ask us about uses that succeed, whatever that entails, but to the extent that successful and unsuccessful uses are epistemically difficult to distinguish before the fact, that restriction might be entirely irrelevant to our normative evaluation. If the abuse victim does not know, before the fact, that her use of deadly force will succeed, then she must take account of the risk of failure in deciding what to do, and so must our moral evaluation of her choice.

All of that being said, I don't think that negatives should be running arguments about failures of deadly force, for at least two reasons. First, I can't imagine anyone making a reasonable attempt at quantifying *how often* deadly force succeeds or fails, by whatever success criterion; and second, the most obvious and general risks of deadly force failing accrue to the abuse victim herself, and presumably taking stupid risks is not morally impermissible—at least, you'd have to do a lot of arguing to establish that it is. And that's in addition to the amount of arguing you'd have to do at the framework level to establish that the affirmative has to defend the risk of failure (plus the attendant risk of theory). So on the whole, even though it's not actually granted by the resolution, I expect most rounds will (and ought to) be restricted to victims who try, and reliably succeed, in killing their abusers.

Next, "as a deliberate response"—here, I'll suggest, is the most interesting, important and difficult problem of resolitional interpretation. One, relatively stringent, way of reading the resolution would render it as "The fact of its responding to repeated domestic violence is a (generally, *prima facie*?) sufficient condition for the victim's deliberate use of deadly force being morally permissible." Another, weaker reading goes something like "For victims who are subject to repeated domestic violence, it is generally morally permissible to use deadly force." The difference between these readings, more or less, has to do with how seriously they take "as a deliberate response to".

The question, essentially, is this: If the consistent recurrence of a pattern of events over some length of time gives me reason to think that pattern will continue into the future, and I take action in light of that *expectation* (in the case of the resolution, to forestall the likelihood of future abuse), is my action a “response to” the past pattern? If the answer is no, then the aff seems to be limited to defending some variety of retributivism—after all, there’s no other obvious way in which past events (at least, past events which do not by themselves very strongly fix the future) could sufficiently justify present action. If the answer is yes, on the other hand, then it seems like the aff must be able to help themselves to a liberal handful of empirical background assumptions—most importantly, that the abuse is likely to be ongoing. What about victims who were repeatedly abused in the past, but have managed to extricate themselves and are now safe? Maybe “response to” entails some sort of recency condition (although that seems suspect to me), but what about victims who *just* managed to escape? Are they justified in returning to kill their abusers? Presumably not, *sans* (very strong) retributivism. This might seem like abusive literalism, but then what about victims who still live with their abusers, but have good reason to believe that the abuse will not continue? What if the abuser has (just recently) sincerely repented, with no past pattern of doing so and renegeing, is perhaps undergoing psychological treatment, and so on? Even retributivists (I hope) have to gag on cases like this, but any sort of consequentialist justification for deadly force must even more so. And finally, what about all the abuse victims who *do* have reasonable alternatives available to them—a responsive local police force, a well-staffed battered women’s shelter three blocks down the street, a supportive family nearby? Presumably, forward-looking rationales for deadly force must be able to exclude all of these conditions in order to survive.

I don’t see a particularly obvious answer here, and as with the skepticism-and-permissibility problem, the question of textual interpretation seems to come down to a free choice of semantics. As a theory issue, I do think that requiring “morally permissible as a response...” to imply fully sufficient backward-looking justification just leaves the aff with inadequate quantity and quality of ground, but hopefully I’ve succeeded in demonstrating that the alternative is more than a little fraught as well.

The solution to this fraught-ness can take one of a couple forms. One is to say that affirmative ground is something like: “Repeated domestic violence establishes a *prima facie* moral permission for the victim to use deadly force—i.e., a permission absent defeating conditions.” All of the above cases would then be characterized as defeating conditions for the permission—so characterized because they are deviations from a norm (conceptually, if not empirically—the *norm* of repeated anything is continuation rather than cessation).

Another, more confused but less confusing approach is for affirmative to give some vague blather about “on balance” burdens (not to say that such talk is always confused, or cannot be precisified), which will amount to about the same thing, but with some sort of counting mechanism built in—more often than not, repeated domestic violence will continue, there are no obvious avenues of escape, etc. This sort of thing sounds plausible, but may not really be that likely—its plausibility comes, I think, by way of excluding from our attention the sorts of cases we’re less interested in—a few instances of violence after which the victim simply becomes fed up, leaves the relationship, and nothing more comes of it. Maybe these relatively mild, easy-exit cases are uncommon, but it’s not obvious that they are, and the intuitive truth conditions of the resolution don’t seem to depend on it—if a large enough absolute number of victims are trapped in severe, no-easy-exit types of situations, that seems to get most stock arguments for affirmation off the ground, regardless of the ratio of severe to non-severe cases. If that’s your intuition, then “on balance” may not really be the most coherent or felicitous language to which affs can appeal. But it will probably do the job in most rounds anyway.

All of this has hinted at one final framework issue, which is what sort of threshold the term “repeated domestic violence” implies by itself. What I’ve just said should suggest that this threshold won’t by itself be enough to get affirmative everything they’ll (normally) need, but it should presumably exclude at least some stuff from the balancing act. Can affs reasonably assume that “repeated” means something more than just two? And that “domestic violence” doesn’t exclude, at the very least, things like verbal abuse? The proper-minded liberal tendency, I think, is to want to count anything and everything as “domestic violence,” because the proper way of responding to anything bad is to apply to it every bad-sounding descriptor that’s even remotely applicable. But of course yelling at someone or insulting them, however reprehensible it may be, is not “violence” in anything but a metaphorical sense (“psychological violence”—a great example of an obvious metaphor which some people will militantly demand to be understood non-metaphorically). Neither are unactualized threats, although again, they might in a lot of cases be just as bad (or nearly) as actual violence. Presumably, also, “domestic violence” as a term of art excludes consensual violence—S&M, or sparring in your private boxing gym, don’t count. Finally, bear in mind that “domestic violence” is generally understood as spousal, so it excludes other sorts of violence that may take place within a household. None of these restrictions are enormously important, and in many cases you can avoid the necessity of arguing for them, as an aff, by subsuming them under an “on balance” or “defeating conditions” framework.

II. Affirming

There are a fairly limited number of stock positions on this topic, and my recollection from the last time this topic was debated was that there were, if anything, fewer adventures into the non-stock than on the average topic—with the probable exception of critical positions, which are less pervasive now than they were then (more's the mercy). It's kind of tough to parametricize (Rihanna plans?), and there's something a little sleazy about trying to squeeze large impacts out of the topic in either direction. Some debaters might try to affirm by defending a policy that takes some sort of legal stance analogous to a moral permission towards certain acts of killing, but we've already seen, tangentially, why such a position would be self-evidently non-topical: it involves neither an instance of the resolitional actor (abuse victims) nor an instance of the resolitional action (killing abusers), but instead acts as if the action of the resolution were making-it-permissible-for-victim-to-kill-abuser, which it's not.

At any rate, the upshot is that you can expect to debate the same couple of stock positions on each side *a lot*, and you should do your best to develop your own interesting, nuanced and spiked out versions of those positions, and conversely to develop nuanced and detailed answers to the various forms and guises in which other debaters will be running them. There are lots of different ways of articulating a retributivist position, but they will mostly share the same broad logical structure, and be subject to similar responses, suitably adapted into the appropriately responsive-sounding rhetoric.

The most basic affirmative position on this topic is one that can take quite a few forms, all of which will have to do with something like a right to recourse. The argument, commonly appealed to in either implicit or explicit form within the literature, runs like so: “Look, people have a right not to be subjected to violence. And when someone is repeatedly and intentionally subjecting them to violence, they have a right to extract themselves from the situation in one way or another (else the former right didn't really amount to anything). And while some means of doing so may be impermissible, the interests of the abuser can't place any absolute limit on permissible means (either because abusers in such situations forfeit the right to have their interests counted, or because over the long run, the interests of the victim and others effected by the abuse will simply outweigh any interest of the abuser—in other words, for either means-based or ends-based reasons or both). The victim does probably have an obligation to use the least harmful means available to her, or something like that. But [contention level of the position] as it unfortunately turns out, many abuse victims *don't* have means of escape available to them short of killing their abusers. And when an available alternative doesn't intervene, the interests of the abuser can't, and it has to be concluded that killing is permissible.”

Variations of this sort of framework can be run under a fairly wide variety of normative ethics and, if you like, metaethics, or it can be run in a way that's broadly neutral as to choice of ethical framework. I prefer the latter, strategically, but if you're desperate to make your position seem more complicated than it really is, fancy it up with metaethics to your heart's content. In either case, the majority of the action is likely to occur at the contention level, and here's where it's a little hard to say what the affirmative is supposed to do, because the task is essentially to prove a negative. A lot of affirmatives will read evidence to the effect that police don't take domestic violence seriously, courts tend to be unsympathetic to battered women and punish their abusers inadequately if at all, restraining orders are often poorly enforced, and many battered women lack places to go (family, shelters, etc.) or the ability to go there (because they don't have their own money, are psychologically traumatized to the point of being too scared to leave, feel the need to stay for their children, or are simply physically confined).

Unfortunately, even all of these in conjunction don't really prove that battered women (and these arguments will really be about battered women, rather than abuse victims generally) have *no available alternative* to using deadly force—they just preempt the most obvious alternatives. And to establish even what you have, you need to win every like individually—losing even one of those arguments indicates the existence of an alternative. But ultimately, that's fine. You should imagine positions like this as burdening the negative to defend a counteradvocacy that solves, and then spending the rest of the AC spiking out as many as possible.

One tricky issue with these sorts of positions that you can use to your advantage: In principle, assuming something like “on balance” burdens, the affirmative has to win something along the lines of “sufficient overlapping solvency deficit across alternatives”—in other words, showing that *most of the time*, “on balance,” or at least *sufficiently often* (by whatever standard) abuse victims have no other avenue of recourse, involves showing that the intersection of cases where each alternative form of recourse is unavailable is above a certain size. But a lot of negatives will be squeamish about explicitly garnering solvency from more than one alternative, and a lot of judges will be receptive to (fairly nonsensical) theory stories against those that try it too explicitly. You probably don't want to say explicitly that the negative has to defend a single alternative, since that will make the ridiculousness a bit too apparent. But you can exploit a pretty nice catch-22 by running a position to which the most natural, and perhaps the only empirically supportable, line of response is something that you can call “multiple floating PICs” and make grounds for convincing-sounding 1AR theory.

Next, but closely related to recourse arguments, a lot of affirmative positions will have to do with something called “battered woman syndrome” (battered women's syndrome, battered wife

syndrome, battered person syndrome, etc.). References to this “syndrome” are common in the topic literature because it forms the basis for the “battered woman defense” (etc.) which is commonly deployed in a trial setting on behalf of women who kill their abusive partners. It’s not entirely clear whether the identification of the syndrome has any solid medical or psychological foundation (and when you’re cutting answers, you should look for the medical and psychological literature that speaks to this question), but as a legal construct, it’s held to provide a broad explanation for cases where abuse victims who may have had avenues of escape or recourse physically available to them nevertheless killed their abusers rather than availing themselves of those other options. The condition held to be most essentially symptomatic of the syndrome is “learned helplessness”—a loss of the psychological capacity for independent planning and action, brought on by repeated abuse (and particularly by abuse in response to attempts at escape or other forms of self-assertion). Abuse victims, so the story goes, tend to believe that the abuse is their fault, enervating their sense of self-worth and making it difficult for them to engage in rational forethought or planning to improve their situations.

I won’t say too much about BWS arguments, other than to suggest that it will take a very involved story about moral permissibility in order to get there, rather than merely getting to lack of culpability/blameworthiness (as per the gap discussed in the last section). The story might go as follows: Given that deadly force would be permissible were it the only option, the question becomes what “available” means. And the story that’s given here surely can’t be one *purely* about physical capacity—for instance, my available options in any given situation are obviously constrained by the limits of my intelligence, in that strategies which I can’t reliably detect or devise are functionally unavailable to me. It seems reasonable, then, that actions which I’m psychologically unable to execute would also be counted outside my option set for the purpose of moral evaluation. And, if these two claims are accepted, it also seems reasonable to exclude strategies which could be detected only by deliberation which I’m psychologically unable to perform.

The objection to this line of reasoning, of course, is that it seems to result in a sweeping deterministic negation of moral choice—if one holds every fact about me fixed, then it will turn out that there are never any options available to me but the one I actually take, and hence that all my actions are both the morally best and morally worst action available to me. Wearing our philosopher hats, we might simply accept (happily or unhappily) this implication, but wearing our debater/debate coach hats, we’re worried about “skept triggers bad” theory, arguments that this skeptical implication is in fact negative ground, and of course the simple appeal to intuition which might render this response a *reduction* of the position. With our philosopher hats back on, the conventional solution is to say something like: in determining an agent’s option set, we hold

everything about the agent constant but for his or her will/preferences/dispositions—the purpose of moral evaluation being to judge these features of the agent. And in this light, psychological syndromes that prevent us from willing as we ought are counted as pathologies of the will—possibly exculpating, if the right sort of story is told, but not changing the option set against which the question of what we ought to have done is to be tested. So, while a lot of debaters will make BWS arguments, I don't think you should be one of them, unless you have an unusually fancy story to tell about how it affirms.

A third category of affirmative position involves one or another form of retributivism—the idea that past wrongs intrinsically merit punishment. A number of authors say things like this in the context of abuse victims killing their abusers—that the killing, for instance, “rights the moral balance,” which was skewed by the moral wrongs of the abuser. Normally, retributivism is tightly linked to the notion of proportionality—that punishment should match the crime in terms of intensity or severity—and this might seem hard to do, in light of the *prima facie* imbalance between lethal and non-lethal violence. But affirmatives might say either that domestic violence often involves deadly force (which, after all, need not always have actually lethal effects), or risks some sort of uncontrollable escalation thereto. They might also say that the severity of the trauma which domestic violence inflicts is such as to make deadly force a proportionate response (or even less than proportionate, which is not necessarily objectionable).

The argument can also be made in terms of rights forfeiture—it is not the case that abusers “deserve” punishment or “ought to be” punished, but rather that they simply renounce certain rights—for instance, a right not to be violently aggressed upon—when they violate the equivalent rights of their victims. There's still a sort of proportionality issue, though, involving how one carves up the space of rights. Since presumably (i.e. intuitively), punching someone in the face doesn't generally give them moral license to kill you, or subject you to a merciless, hour-long curb-stomping, one does not easily and automatically forfeit rights as broad and sweeping as a “right against physical aggression” (or, if one does, there are other moral constraints besides the right which make certain actions which that right would have prohibited still morally wrongful). Why in particular should my right not to be (non-fatally) assaulted not be held separate from my right not to be killed? If the rights-forfeiture story has to do with something like “willing maxims,” it seems perfectly conceivable that someone could think (“will the maxim”) that it's okay to hit your spouse, but not okay to kill her. Rights forfeiture presumably shouldn't depend on anything so sensitive as what a rights-violator would identify as their moral stance, if pressed.

Beyond those problems, there are a raft of standard objections to retributivist positions generally. In the context of the resolution, one we've already seen involves repentance and reform—is the

abuser who sees the error of his ways, repents any maxims he's willed, and sets himself on a morally blameless course to which there's every reason to think he'll adhere really deserving of death (let alone extrajudicial death) because of his past actions? The appeal of retributivist positions, I think, will be that they easily allow for long, shenanigan-filled metaethical frameworks that neatly transition into a fairly clear ballot story, but I would suggest that there are enough smart positional responses that can derail the shenanigans that it's worth thinking twice before investing time in this sort of aff.

Next are self-defense cases. I think that if nothing else, "deliberate response" clearly rules out *immediate* self-defense as a basis for deadly force. And aside from this textual point, the affirmative ground here is just too nice—there aren't a lot of arguments against the legitimacy of using deadly force, when necessary, to defend yourself against physical assault within your own home. Reasonable self-defense affs, then, will defend the use of deadly force even when abuse is not immediately occurring, on the grounds that it is the only available means of defense against *future* abuse. The position becomes, then, essentially a recasting of arguments about recourse, and as far as I can see an unstrategic recasting, in that it seems to open up arguments about the legal doctrine of self-defense, which won't always be favorable. Without pretending to know anything about the subject, *pre-emptive killing* of whatever kind seems like quite a stretch from self-defense as traditionally understood in a legal context. I'll leave it to you to research the question further, but I would advise against framing positions in terms of the rhetoric of self-defense.

The final group of affirmatives I'll mention, because of their likely prevalence, includes the many varieties of broadly "feminist" positions that some debaters will no doubt feel the need to run. Knowing even less about this literature than I do about the law of self-defense, I won't say very much about these positions except to describe why I don't like them: To characterize an argument as "feminist" presumably implies that it has something to do with systemic and structural injustices against women, rather than individual and particular ones. But it's very hard to see how these sorts of structural facts could ever justify one individual killing another in a facially nonpolitical (non-judicial, non-military) context, except in starkly utilitarian terms (each male abuser killed by his female victim chips away at patriarchy enough, at the margins, to outweigh the otherwise-wrongness of the death), terms in which feminist arguments are almost never cast. (Of course, many feminists would seize on the characterization of the domestic context as "nonpolitical," but the only special significance of this distinction for my purposes is just that it divides the context of governmental policymaking, in which we've come to be generally comfortable with, and managed to rationalize within non-utilitarian frameworks, a certain amount of consequentialist life-balancing, from contexts in which contractarian stories are not readily

available to justify killing individuals in order to chip away at social problems.) Util plus some enormous, silly patriarchy impact cards from a policy file might make a feminist affirmative at least intelligible, but I'd be surprised to see it done otherwise.

So, the takeaway from this section is that there are some fairly tough problems for any affirmative position, but probably least so with the simple availability-of-recourse arguments. For what it's worth, the sort of position I'd recommend (and the one I think is most likely true) involves a utilitarian framework, some attempt at comparison between the harms of domestic violence (both psychological and social) with the harms of the death of the abuser, and arguments to the effects that there is no less harmful means available to many abuse victims for preventing the harm that abuse does to them and those around them. This position inevitably involves playing a lot of strategic defense in the ARs, but it's defense on which the balance of arguments and evidence will be generally favorable.

III. Negating

I'll say a lot less about negating than affirming, since most stock negative positions are essentially the converse of stock affs, and play on objections to affirmative arguments which in many cases we're already discussed. Negative positions will tend to fall into one of two categories. One way of negating is to argue that one or more alternatives to deadly force are available to battered women. The other is to find a reasonably good way of finishing the sentence "Even if there's no other way of escaping from domestic violence, deadly force is still impermissible because..." There's a fairly limited space of options for filling that blank without saying something heinously offensive (e.g. "...because abusers tend to contribute more to the economy than their victims are likely to in the near term, and growth key to recovery key to..."). To my mind, actually, the only really stock position that falls into this space is the proportionality neg, which we'll discuss in a second.

Beyond those categories, there's the argument that deadly force itself is likely to be ineffective, but as we saw, this position makes for an involved and probably unwinnable debate at the framework level; there are various sorts of out-lefting, discoursey positions ("the language of the resolution subordinates women to Western, patriarchal, hierarchical, etc. modes of thought because 'moral permissibility' and 'deliberation' are things philosophers talk about, and philosophers are men"; or "intersectionalities" arguments criticizing affirmatives for not discussing the horrors of domestic violence among mixed-race disabled transgendered lesbian couples), which are overall fairly stultified and stultifying; and finally, some positions which play heavily on

the limits of what counts as a “response to,” which are less unreasonable and which we’ll also discuss momentarily.

To start, however, with the “alternatives” positions: every avenue of recourse the affirmative says battered women don’t have, you can say they do, plus several more. Some of these are probably not winners—in particular, the balance of literature with respect to police and the legal system is not in your favor as the negative. They may work for some abuse victims, but they don’t work for a lot of them, and the literature is far more interested in the second category (presumably, because our reasonable expectation is that law enforcement and the judicial system, unlike private institutions, are *supposed to* work for everyone who needs them).

Alternatives towards which the literature is more favorable include various kinds of non-profit organizations, most particularly battered women’s shelters. Of course, the fundamental objection is more or less the same—they’re available, and effective, for some but not all abuse victims. Someone who’s severely enough abused may not have the degree of information access needed to locate a shelter, may not have one near enough, or may even be physically prevented from leaving. A roughly analogous story is true for family and friends as avenues of recourse.

The negative’s job, then, is either to win that there is one alternative which really is available to most/nearly all women, or else to win that there’s an overlapping network of options such that no abuse victims, or very few, truly have no alternative but to use deadly force. We’ve already talked about the theoretical issues with these debates, but as the negative you’re on the side of truth with respect to those theory questions, so if you do your prep, this sort of position should be entirely viable.

Proportionality arguments we’ve also managed to discuss in the course of covering their affirmative counterparts. If proportionality is a constraint on punishment, self-defense, or whatever else might justify a violent response to abuse, and deadly force is disproportionate to non-deadly force, then that seems like a reason to negate. You have to deal with arguments that domestic violence might amount to, or escalate to, deadly force, but there are plenty of answers back to these arguments.

Along with proportionality positions, there are various sorts of arguments against killing outside of judicial, military, or immediately self-defensive contexts. A social contract theorist might suggest that the right to kill aggressors is one we give up, except in certain very narrowly circumscribed contexts, when we enter into civil society (here feminists will have something not entirely pleasant to say about the social contract theorist). And a strict utilitarian logic might suggest precedent-

setting arguments against almost any sort of unregulated killing—the more our norms leave it to people to decide for themselves when deadly force is appropriate, the harder it will be to maintain various social goods and institutions. As we've already seen, this argument has to be very clearly framed in terms of the norming or precedent-setting effects of individual actions, rather than taking the norm to be set by affirmative fiat, but the argument can still be made.

Lastly, as I've already suggested, there are the strict readings of “deliberate response”—in the first section, we imagined that these might render the resolution as “The fact of its responding to repeated domestic violence is a (generally, *prima facie*?) sufficient condition for the victim's deliberate use of deadly force being morally permissible.” If the affirmative has to defend this sort of (almost?) unlimited permission for bloody retribution, the negative can make any one of very convincing responses to naïve retributivism an offensive reason to negate.

So, that's all I have to say. Do your research, best of luck, and have fun!

Topic Analysis by Adam Torson

Intellectual honesty is a fundamental part of debate. We frankly discuss difficult issues that affect our lives. As part of the process, we take positions with which we ultimately disagree in order to win debates and engage in a meaningful contest of ideas. Nothing about this topic should change that.

But, we all know that isn't the whole story. Many members of our community have experienced and are experiencing domestic violence. For many of them, having to engage in a public discussion of the issue is at least troublesome and to some perhaps even traumatic. I'll not go into the detailed discussions about whether this is appropriate that have taken place in various forums, but I will take a moment to point out that these are not imaginary post-fiat impacts. It is within our power to argue in a way that is sensitive to the needs of those among us who suffer as a result of domestic violence. We are personally responsible for the arguments we make. I urge you to take that responsibility seriously – not to cut off the legitimate exploration of perspectives and ideas, but to do so in a way that is mindful of the part we play in creating a welcoming and safe community.

Interpretation

A. Morally

Right out of the gates we have an interpretive conundrum. The resolution asks us to talk about *moral* permissibility, but most of the literature on this topic comes from the legal community. Are legal concepts relevant? Does demonstrating legal permissibility logically imply moral permissibility?

There will be two opposing views. The first will argue that legal and moral permissibility ought not to be vigorously distinguished. There are several reasons to believe this is true. First, the underlying justification for obedience to the law is almost certainly based in moral claims, e.g. contractualist or utilitarian positions. Theoretically, the law is shaped by these underlying norms. While this does not mean that legal and moral concepts are formally identical, it may be reasonable to assume that a legal justification must imply a moral justification. This is potentially important from a theoretical perspective – if the affirmative must defend some kind of action, it will generally require some kind of public policy, which is almost certainly implemented through the law.

More particularly, the criminal law and self-defense in particular are concerned with very explicitly moral concepts. As I will indicate below, the concepts of justification and excuse derive from common law rules that are very explicitly based in moral intuitions like what permissions reasonable beings have in honoring a commitment to their inherent right to life.

The alternative view will maintain that a rigorous distinction between law and morality ought to be maintained. Again, there are several reasons this might be true. First of all, legal rules are created by institutional actors designed to aggregate preferences and subject to certain systemic restraints (like the Constitution). This suggests that we may need a different set of norms to guide government action than we do to guide individual action. Moreover, some argue that identifying the law with morality makes it more difficult to criticize the law. For example, if the law inherently carries normative weight, how are we to evaluate those who defied the law in the name of some external moral standard like Gandhi or Martin Luther King? This will be particularly compelling to debaters who want the primary question of the resolution to be whether you can break the law in doing what you think is right.

B. Permissible

We finally have a resolution where permissibility explicitly flows Aff, although given the nature of the resolution this doesn't provide you terribly compelling ground on the affirmative. Nonetheless, you will see as you generally do the claim that absent a prohibition on a given act, that act is permissible, so it is the negative's burden to show such a moral prohibition. Absent such a showing, the Aff may argue, the judge should default affirmative.

The more interesting issue raised by the word permissible is the philosophical and legal distinction between justification and excuse. Both ethical and legal theorists make a subtle distinction between actions which are considered moral goods to be encouraged ("justified" acts) and those which are still reprehensible but which nonetheless a person cannot be held accountable for ("excused" acts). In a traditional self-defense case, for example, we would normally say that killing an aggressor is *justified* – an individual on the street is *encouraged* to defend himself with force against an attacker. On the other hand, a typical insanity case is an instance of excuse. The person committed a violent act not because he ought to have done it, but because he could not help doing so given some mental infirmity or incapacity (e.g. he was under the delusion that he was being attacked).

The question for the purpose of the resolution is whether the Aff must prove that a victim is *justified* in using deadly force, or whether the Aff must merely prove that the victim's conduct is

excused. As a general rule we would associate permissibility with justification. It seems a bit peculiar to say that murder is “permissible” when in fact we would always discourage similarly situated people from doing it and would be obliged to stop them if we could (as when a delusional man attacks an innocent victim on the mistaken belief that the victim is persecuting him). Still, we might say that the delusional man was in some sense “permitted” to attack his phantom persecutor in that he will not be condemned as morally blameworthy for doing so. This issue will definitely be implicated in various ways in the topic literature, and in particular in relation to Battered Woman Syndrome which I will discuss more below. In any case, you should be prepared to debate both sides of this issue.

C. Victims

Identifying the victims of domestic abuse is largely a judgment call about determining the relationship of the victim to the perpetrator. Obviously the people against whom any physical abuse is directed are victims. It is slightly unclear whether domestic “violence” means only physical violence (as opposed to emotional abuse), but I’ll discuss that more below. For now we might expand the circle to nuclear families and then extended families. For example, even if children are not the direct target of physical abuse on their mother, it is difficult to argue that they are not in some sense a victim of that crime, especially given the pervasive psychological effects of living in an abusive household. Finally, we might extend the circle out to communities and society as a whole. This seems an implausible account for debate – certainly it doesn’t seem like we’re arguing about whether the state has a right to use deadly force against abusers. It is, however, important to note that domestic abuse has an impact on communities. We need look no farther than the fallout from the recent sex abuse scandal at Penn State, or periodic fights over public funding for domestic abuse shelters to see that. Depending on your advocacy, you will want to have a plausible interpretation prepared to defend your account of who counts as a victim in the resolitional sense.

D. Use Deadly Force

The first relevant interpretive question is whether force must actually cause death to be called “deadly” force. Again there will be two perspectives. The intuitive answer seems to be that force should not automatically result in death simply by virtue of the fact that we call it deadly. Deadly force is a legal term of art which suggests that the force was intended to cause death and/or it was reasonably foreseeable that the force would likely cause death. In other words, if I tap your shoulder to get your attention and in turning around you slip and hit your head and bleed to death,

the tap on the shoulder is still not “deadly force.” Conversely, if I try to kill someone by throwing marshmallows at him it does not count as deadly force.

Still, some will argue that we should assume that the targeted aggressor is killed as a result of the force in the resolution. They may argue that this interpretation is necessary to access certain important ground like proportionality arguments. While this is less plausible than the first interpretation, be prepared to debate it out. It is useful for some positions, as with affirmatives who want to discount the possibility a failed use of deadly force may escalate an abusive situation.

A related question about the phrase “deadly force” is whether the “force” has to be even violent at all. Would poisoning an abuser’s food when there was no imminent danger count as “deadly force?” I think that it probably does, and negatives will want to use this fact to emphasize non-confrontational cases where self-defense is claimed as a way of painting the affirmative position as more radical. Again, though, this doesn’t seem like a hugely important issue.

E. Deliberate

The major interpretive question raised by the term “deliberate” is again whether the affirmative may defend that the use of deadly force is permissible in these cases because the victim was excused from moral responsibility. Is it possible to say that deadly force was “deliberate” but still say that the victim had some kind of diminished capacity that makes her less responsible for her actions?

The law uses concept of “intent” in two different ways. An action can be intentional in the sense that the person intends the result of the action. First degree murder is intentional in the sense that the perpetrator *intended* that the victim would die. Sometimes that is called “specific” intent. In other cases an act is intentional in the sense simply that the person intended to act but didn’t necessarily intend the consequences. We call this “general” intent. For example, a person can be convicted of drunk driving so long as he chose to drink – it doesn’t matter whether he intended to drink enough to be impaired. If, for example, he was drugged and therefore drove impaired, his action would *not* be intentional and therefore he wouldn’t be responsible for it. In that case he lacks general intent.

How would we apply the “general” versus “specific” intent concept to the resolution? If “deliberate” deadly force only requires general intent, then the person using it need not intend that the abuser be killed, only that she means to use whatever force she chooses. That is less burdensome for

the Aff, because it can advocate permission for cases where victims use severe force without necessarily having the intention to kill. That kind of situation is much more commonly a “confrontational” one where the victim reasonably perceives an immediate threat to her bodily safety. It also makes it more difficult for the Neg to argue that deadly force is disproportionate to the threat. On the other hand, deliberate may require the Aff to defend the *specific intention* to kill. This seems like a more onerous burden for the Aff.

What does this say about the question of whether the affirmative can simply defend the idea that victims of abuse are not responsible for their actions? It seems to me that deadly force can be “deliberate” and yet we can clearly maintain that a victim lacked specific intent. Virtually every criminal act requires that an act be intentional only in the general and not the specific sense (arson and first degree murder being the two major exceptions; both require that the perpetrator specifically intended the consequences). So, it seems unreasonable to force the Aff to defend the intention to kill rather than the intention to use some kind of severe force.

The more important question is whether cases where the victim lacks *general* intent fall under the resolution. In particular, some scholars argue that Domestic Abuse Syndrome is really an incapacity defense rather than justified self-defense. The victim was in a psychological state where she could not make another choice (note that this interpretation probably misunderstands DAS). If such actions are not deliberate, then the affirmative cannot use such cases as the basis of their position. The practical effect of this is a cautionary tale for Affs. Do not carelessly frame your position in terms of the mental incapacity of abuse victims – they at the very least have to intend to use severe force in order to plausibly fall under the resolution.

F. Response

There are two senses in which deadly force could be a “response” to domestic violence – one broad, and one narrow.

The narrow interpretation of response is classical self-defense. There is an imminent danger which justifies the victim’s use of proportional force as a response. These cases are the most intuitively compelling for the Aff. Just about everyone would agree that when one’s life is imminently in danger self-defense is permissible. In the literature these are often called “confrontational” cases of self-defense.

The broad sense of the term “response” would be instances where deadly force is used because there has been an abusive relationship, but it need not be an *immediate* response. These

implicate what the literature calls “non-confrontational” cases. Victims kill their abusers in their sleep or while they are watching television rather than at a moment when there is imminent peril. This sense of “response” might also include the use of deadly force by indirect victims of domestic abuse, like children in a family where one parent abuses another.

It is not apparent that the resolution excludes either sense of the word “response,” despite the fact that we would like to treat them differently. For those that parametricize, watch out for topicality objections suggesting that your position does not correctly interpret “response,” in particular if your position is about non-confrontational cases. Conversely, Negs should take care that the affirmative has not defined “response” in a way that denies links to important ground like disadvantages to allowing self-defense claims in non-confrontational cases.

G. Repeated

Domestic abuse is often cyclical. This is one of the core aspects of abuse highlighted by Domestic Abuse Syndrome (or Battered Woman Syndrome or Battered Person Syndrome). Abusers will lash out violently, apologize and pledge never to repeat the violence, tensions will escalate, and the abuser will again lash out violently. This scenario demonstrates the important psychological and emotional component of abusive relationships, which helps to explain why victims of abuse often feel like they are always in physical danger.

To say that deadly force is a response to *repeated* domestic violence suggests contextually that the resolution is not about instances of immediate self-defense, but rather actions aimed at addressing a whole history and cycle of violence. This is good and bad for the Aff. It is good in the sense that it allows the Aff to deal with extreme cases of abuse, which in turn makes the case for deadly force more compelling. On the other hand, the Aff loses the intuitively compelling circumstances when a person has to use force to protect themselves from the imminent threat of severe bodily injury.

An alternative interpretation would say that repeated domestic violence just means more than one instance. This is a silly interpretation – it fails to deal with the reality of domestic violence and attempts to move the debate to the fringe of the topic literature.

F. Domestic Violence

To call violence *domestic* usually means that it takes place in the home, typically among family. It also seems likely to include ongoing abuse of the immediate family whether or not they are physically in their home – the relationship is domestic, not necessarily the location.

Along with physical abuse, emotional and psychological abuse is common in abusive families. Do repeated instances of severe emotional abuse count as “domestic *violence*?” In reality both are often present, but I think it is reasonable to say that if emotional abuse is severe enough it may constitute violence – after all, it can do substantial harm to the victim’s wellbeing. We might also ask about other non-traditional cases like violent means of discipline, e.g. spanking a child. Some consider this type of discipline to be abusive in nature. While this would be an interesting interpretation, I don’t know that it is especially strategic to deviate so substantially from the core of the topic.

Affirmative Positions

A. Self-Defense

The basic thesis of this position is that the use of deadly force is permissible because victims are exercising the right to self-defense. Self-defense has both a moral meaning and a legal meaning. For better or worse, the two are often conflated in the topic literature. While most of the literature comes from legal sources, they often explore the moral intuitions that undergird self-defense law. You can take up insights from one or the other or both, but make sure the delineation is clear in your head so that you can explain the distinction clearly should the need arise.

1. Moral Right to Self-Defense

The moral right to self-defense can be based on a number of different arguments. First, a prominent justification for self-defense comes from the idea of forced choice. In an ideal world nobody would have to kill anyone else. When someone acts aggressively towards another, however, the victim must make a choice. She can let herself be killed, or use force against the aggressor. In this case, reason dictates that the party who forced the choice between lives should bear the associated costs. The victim cannot be blamed for being in an impossible position, and so should not be made to sacrifice her life for a culpable aggressor.

A second but related argument is the idea of moral forfeiture. Some theorists argue that one can only claim the protection of a moral rule against the use of force when she respects that rule herself. So, when an aggressor uses force against a victim, she can no longer claim the

protection of the rule against using violence – she has forfeited her moral right to be protected by a taboo against killing.

A third argument closely related to moral forfeiture is the idea of the social contract. This argument says that in the state of nature individuals were at absolute liberty to do whatever they wanted, including taking the life of other people. In exchange for the advantages of a settled standing society, they gave up certain rights, like the right to kill indiscriminately. This argument, however, suggests that individuals would never give up the right to self-defense. The entire purpose of the state is to secure people against the aggression of others. Nobody would agree to give up their right to use force even when the state is unable or unwilling to step in to protect them. Thus, the legal rules proscribing force are not binding on an individual when she is in danger for her life, because she has not given up the right to use force to the government in such situations.

A fourth argument suggests that self-defense is a natural consequence of honoring our own self-worth. Many take the fact that we value ourselves as a fundamental starting point for morality. From it they infer that humans have an innate dignity and ought to be treated as such. While it may be the case that aggressor against whom deadly force is used has dignity, many argue it would be wrong not to defend the value of your own life. In other words, because everyone values himself as an end, he ought to afford others the basic right to defend their most fundamental interests as well, namely the right to life.

Finally, one can justify defense based on simple utilitarianism. If people are not permitted to defend themselves they are unlikely to submit to the authority of the state, which has so many attendant advantages. Also, it may be the case that using deadly force against aggressors is better for net utility because those who threaten others and therefore decrease net utility are thwarted.

As the literature makes evident, different types of justifications for self-defense help to define its scope. For instance, if self-defense is justified by utilitarianism, then it probably is not permissible to use self-defense in certain circumstances, as when the aggressor actually contributes substantially to net utility. The take home point is to think through how you justify self-defense and if the self-defense arguments your opponents make actually compel the conclusion that victims in this specific situation are justified in using deadly force.

2. The Legal Right To Self-Defense

a. Legal Conception of Self-Defense

The legal right to self-defense is a shift in focus rather than underlying justification. Self-defense is one of several defenses a person can raise as a reason why they should not be guilty of a crime even though they committed all the acts that would normally constitute a criminal offense. The prosecution has to prove beyond a reasonable doubt that the accused committed all the elements of a crime, but the defendant has the burden to prove that she has satisfied the elements of a legal defense.

Different jurisdictions have slightly different elements for self-defense, but there are several key ones that are pretty universal. First, to be justified self-defense must be characterized by immediacy – the threat is imminent and there is no reasonable chance to avoid it. The majority of jurisdictions still require you to retreat rather than to use physical force against an aggressor if escape is reasonably possible. This speaks to the second element, which is that self-defense has to be necessary. You may not use force when simply whistling for the police officer up the block would suffice. Finally, the force used must be proportional. Deadly force can only be used when there is a severe threat of serious bodily injury or death.

An interesting fact to note is that self-defense is traditionally a “justification” defense, as explained above. In other words it claimed not that victims were somehow mentally incapacitated but that they should rationally decide to do what they did; that is to say, their choices should be encouraged.

b. Domestic Abuse Syndrome, Battered Person Syndrome, Battered Woman Syndrome

Over time courts have begun to allow testimony about a psychological condition known popularly as Battered Woman Syndrome (the more expansive terms are used to apply to cases where women are not the victim). These conditions are the results of a cycle of violence which results in the phenomenon of “learned helplessness.” The victim cannot reasonably formulate a strategy to help herself – she is not only economically dependent or physically afraid of the abuser (though she probably is those things), but also she is emotionally dependent on him in a way that impairs the ability to escape.

In these cases, Courts emphasize the subjective perception of the need to kill the abuser because there is no other viable option. Traditionally courts have also required an objective element – is it in fact the case that there is no other reasonable option. This is a difficult call.

When an abuser threatens the victim's life or the life of her children, when the police are ineffective, when the best the law can do is a piece of paper with a restraining order on it, it does not seem so unreasonable that a person might perceive that their only way out is to kill the abuser.

There is much scholarly debate over whether Domestic Abuse Syndrome has confused self-defense doctrine by turning it into an excuse rather than a justification. If all that matters is the victim's subjective perspective that she was in constant danger, regardless of whether that belief was objectively reasonable, then essentially self-defense becomes an excuse – she can't be held responsible because she thought she was in imminent danger, even though in a particular instance she may not have been. Affs will probably want to argue that in either case the action is morally permissible, or perhaps that in this case the excuse/justification dichotomy is inapposite.

Keep in mind, also, that Domestic Abuse Syndrome is not the only possible legal defense which might be used to justify the use of deadly force by a domestic abuse victim. For instance, some argue that the provocation defense should be modified to fit situations like these. These are good case positions to be cognizant of.

B. Defense of Others

Another common legal defense in these cases is the "defense of others." As a general rule, if a victim of a crime is entitled to use self-defense, a third party can come to their aid using the same amount of force the direct victim had a right to use. For instance, if an abuser threatened to kill a child, his mother likely has the right to use deadly force to protect the child's life. This case position would not be all that different from the self-defense position described above, except that it adds the contextual family element that is common in domestic abuse cases.

C. Retribution

Many conceptions of justice start with the assumption that wrongdoers should get their just desserts. There are a variety of reasons this might be true. Retributive justice is often said to affirm the moral worth of the victim, which the offender has violated in committing a crime. It may also affirm the primacy of community norms and the rule of law, and provide a demonstration effect for others who would break it.

Domestic abuse is a horrific crime that victimizes people physically, psychologically, and emotionally. Dependence on a violent loved one is incredibly demeaning, and often victims suffer

terribly for many years. For that reason, these positions argue, the punishment of death is certainly proportional to the crime committed, and the abuser is justifiably killed.

D. Contracts

Another common basis for moral claims is that they derive from reasonable hypothetical or actual contracts into which people enter. This again raises the moral forfeiture argument. We only give up the right to kill other people so long as they mutually agree to do the same. Once they fail to honor the contract, all bets are off as far as the norm against killing them goes. Alternatively, Affs could argue that we would all reasonably agree to grant the right to self-defense to those who are potentially the victims a crime, as we figure that as rational creatures we are more likely to be the victims of a crime than the perpetrators.

Negative Positions

A. Rule of Law

A common negative position will essentially argue that vigilantism is bad. People cannot simply take the law into their own hands or chaos will ensue. There are several potential justifications for this argument.

The first is the social contract. Because we have agreed to abide by settled standing rules, individuals are not entitled to break those rules. This is good for utility, because people can operate with a greater degree of certainty in their everyday lives and avoid the disutility of a world where self-help is common. The rule of law also protects basic fairness – one of the major advantages of the social contract is that nobody is a judge in his own case. There is a reason we do not let victims determine the punishment of criminals. Everyone is owed due process of law as an individual right to protect us against unfair or unjust persecution.

Adherence to the rule of law also explains the intuitive limits of self-defense. Self-defense is permissible when the government cannot intervene and when the victim has no other choice but to act. These are, however, very narrow circumstances. Where a potential victim could utilize a legal alternative to the use of force, he is obliged to do so. This suggests that those who kill their abusers in non-confrontational cases have wrongfully failed to avail themselves of the police and the Courts and instead taken the law into their own hands. These legal mechanisms are far from perfect, but working through the system is preferable to a world where everyone is judge, jury, and executioner in his personal affairs.

B. Proportionality

We are bound to see proportionality arguments on the negative. If run properly they can be persuasive. I am going to caution you right away, however, that you should *not* pursue these positions by minimizing the severity of abuse or the toll it takes. That argument is very insensitive and likely betrays a lack of meaningful understanding of the situation.

Instead these positions should focus on the severity of death as a punishment. Repeated domestic violence represents repeated assaults or failed attempts at murder. That is an incredibly severe crime, but even so in a Court the abuser could not constitutionally be sentenced to death. These negatives will argue that taking an abusers life may be gratifying, but it fails to honor the fact that society has said that the only crime for which we will execute a criminal is pre-meditated murder (and in most societies there is no death penalty at all).

C. Pacifism

An interesting avenue of research is to study those who adopt a principled pacifism – the refusal to do physical violence to others. Luminaries like Gandhi and Martin Luther King argued that pacifism is an affirmation of human worth that drives all projects of liberation. They argue that virtue demands of us precisely that we forgo justice in terms of a proportional response, an eye for an eye, and instead refuse to use violence and thus tacitly validate the oppressor's methodology.

D. Excuse is not Justification

As I indicated above, some negatives will argue that simply showing that the conduct of the victim is excusable does not mean that it is justified. This argument will take a couple of different forms. Some will run this argument as a topicality violation. The aff case proves that the use of deadly force is excusable when the resolution asks whether it is justified, therefore the AC is not topical. Others may run excuse as a kind of counter-advocacy. We should not declare that the use of deadly force in these circumstances is a social good that should be promoted. Instead we should simply excuse the victim from moral and legal culpability. Still others will make less technical use of the concept and simply claim it is terminal defense on the AC – that something is excused does not logically compel the conclusion that it is justified, which it is the Aff's burden to prove under the resolution.

E. Dehumanizing Victims

There is a set of arguments which suggests that allowing victims to kill their abusers even in non-confrontational settings dehumanizes the victim. Instead of portraying the victim as an autonomous individual who is responsible for her choices even in difficult circumstances, it portrays them as a kind of mindless automaton who is afflicted by “learned helplessness.” These criticisms come especially from feminist criticism of Battered Woman Syndrome, which problematically suggests that there is a single monolithic response to domestic abuse *and* that it should be treated like a pathology.

F. Critical Feminist Positions

This topic is at the intersection of a whole variety of interesting feminist theorizing about gender roles, the family, reason in the law, etc. For that reason I suspect there will be whole panoply of critical feminist positions, some of which may well be formulated as kritiks.

1. Gendered Language

In much topic literature there is an assumption that the victims of domestic abuse will always be women. While most abusers are in fact men, some theorists assert that the presumption that women are *always* the victim is a product of outmoded stereotypes about gender roles and family dynamics. Indeed, it serves to cover up situations where men are abused by a loved one or even a parent by a child. These positions will problematize those assumptions and ask for a negative ballot to reject them.

2. Homophobia

Another under-represented group in the domestic abuse literature is gay and lesbian couples. Like any other family, homosexual relationships can be afflicted by domestic violence. In the real world such violence is often not taken seriously by police and other officials, and the unique needs of gay and lesbian victims and perpetrators are rarely discussed as part of main stream legal theory or policy. This oversight may be the subject of a kritik for affirmatives that seem to perpetuate these assumptions.

3. Legal Objectivity

Critical Legal Studies, whose feminist allies have been the most influential branch of the movement, has often criticized the idea that the law can produce objective rules that apply to every situation. Trying to create blanket policies to apply to domestic abuse situations, this case might argue, does violence by failing to account for the particularity one must necessarily address to treat the parties fairly. The literature suggests a variety of other reasons why this kind of legal objectivity is bad (for example it reifies the perspectives of the particular social groups that made the law in the first place), and so rejecting it may be a reason to negate.

4. Public / Private Dichotomy

Another target of feminist critique is the strict separation of the public and private. Allowing the private sphere to go largely unregulated in the name of traditional conceptions of privacy allowed men to essentially run their homes like authoritarian rulers. It covered up not only domestic violence but also other forms of unfairness and oppression. It continues to shape policy in variety of troublesome ways today. An AC might be criticized on the grounds that it fails to reject this dichotomy and so actually entrenches the underlying problem permitting and indeed spurring domestic abuse.

5. Reason

The idea that there is one monolithic faculty of reason has been called into question by feminist scholars. The supposedly objective “reasonable man” test fails to take into account the unique perspectives of women and other marginalized groups, and assumes that there can be a kind of “God’s Eye View” when in fact there are only partial perspectives. Trying to argue within the legal framework of reasonability may perpetuate the underlying problem that leaders think that there is only one valid perspective on the world for them to consider. Thus, negate to reject this oppressive conception of reason.

G. Politics

In a political season you should be prepared to hit and maybe run politics DAs. The presidential race, the President’s jobs bill, and the debt commission might all serve as major internal links to bad impacts should a particular kind of policy be enacted at this time. The possible scenarios are too myriad to go into, but suffice it to say you should be prepared to deal with those links at the very least.

Conclusion

This is an important issue – take the time to learn not only about the positions you intend to run, but also the issue of domestic abuse as a whole. This is one topic area where each individual can make a tangible difference in the lives of people around them. I urge you to take advantage of that opportunity.

FRAMEWORK EVIDENCE

THE NUMBER OF CHILDREN WHO SUFFER FROM OR ARE KILLED BY ABUSE IS SHOCKINGLY HIGH

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 76

Every year, millions of American women and children suffer domestic abuse at the hands of their partners, spouses, parents or guardians.¹ Every day, nearly 2,500 children are abused or neglected.² As many as 8.8 million children under the age of seventeen sustain severe physical abuse inflicted by their parents or guardians.³ Many of these battered children also suffer from sexual and psychological abuse.⁴ Some experts estimate that a child will be abused in some manner in America every ten seconds.⁵ Indeed, "an additional 3.3 million children are traumatized as indirect victims of domestic abuse, by witnessing the physical violence perpetrated against their siblings or between their parents."⁶

Unfortunately, there has been a steady increase in the number of children who die from domestic abuse at the hands of their parents. In 1989, approximately 600 children were killed by their parents.⁷ By 1995, almost twice as many children (or 1,000 youngsters annually) died of domestic abuse.⁸ By 2004, there were almost 1,500 deaths annually from child abuse, an average of more than four children each day.⁹ Unfortunately, many experts believe that these shocking figures are conservative since death from parental abuse may be incorrectly diagnosed as accidental or as the result of sudden infant death syndrome. ¹⁰

A LARGE PROPORTION OF WOMEN WILL EXPERIENCE SOME FORM OF DOMESTIC ABUSE

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 76

The incidence of domestic violence against women is also shockingly high. According to the Kansas Supreme Court in *State v. Hundley*, the physical abuse of women is "extremely widespread" with the court "estimating that it affects between four and forty million women." In fact, the American Medical Association estimates that "one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." 12

Moreover, according to the Wyoming Supreme Court in *Witt v. State*, battered women frequently suffer other forms of abuse as well, such as "humiliation, denial of power, name calling, sexual abuse, threats of violence, and deprivation of food, sleep, heat, shelter and/or money." 13 In addition, 30% of domestic violence incidents involve the use of a weapon and the injuries that battered women receive are at least as severe as those suffered in 90% of violent felonies. 14 In fact, each year approximately two million of these women suffer severe beatings at the hands of their spouses or partners.15 Unfortunately, over three women every day are murdered by their husbands 16 frequently experiencing "prolonged, brutal deaths after years of violence." 17

THE NUMBER OF VICTIMS WHO KILL THEIR ABUSERS REMAINS LOW, BUT THE ISSUE IMPLICATES GENDER EQUALITY ISSUES

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 420

Nationally, the likelihood that a female partner will kill her abuser remains extremely rare; a woman is much more likely to be killed by an intimate partner than to kill an intimate partner herself. n14 Between 1976 and 2005, the number of men murdered by intimates decreased by 75%, while the number of women killed by intimates remained steady. n15 However, the broader social and legal implications, rather than the numbers, have made cases in which women kill their intimate partners compelling. Notwithstanding their rarity, the issues raised by battered women's self-defense continue to generate debate among scholars and social commentators. n16 From a sociological standpoint, women who kill anyone let alone their husbands or other intimates defy traditional notions of women as "passive" caregivers and nurturers. n17 The law's treatment of battered- woman defendants serves as a marker in the broader struggle for [*420] female equality. n18 As Elizabeth M. Schneider's work suggests, how the law responds to battered-woman defendants is not a sporadic, "individual" problem, but a social problem that is "shaped by a larger culture of social violence" n19

THE NATURE OF DOMESTIC ABUSE

BATTERED CHILD SYNDROME MAY REFER EITHER TO INJURIES SUSTAINED BY YOUNG CHILDREN BECAUSE OF ABUSE OR THE PSYCHOLOGICAL CYCLE OF ABUSE EXPERIENCED BY OLDER CHILDREN

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 76-77

Following the lead of attorneys offering expert testimony regarding the effects of domestic abuse on adult victims, lawyers representing children, who have killed their abusive parents, have tried to introduce expert testimony regarding the impact of domestic abuse on child victims as part of a self-defense plea.²⁵ In the case of physical abuse, attorneys have proffered expert testimony regarding "battered child syndrome" (or BCS) to describe the psychological effects on the child as part of a self-defense plea.²⁶ Medical evidence of BCS has long been admissible in dependency hearings to remove children from abusive homes and in criminal trials to prosecute the abusive parents.²⁷ However, as used in those cases, BCS referred only to severe abuse of infants or very young children, usually under the age of five.²⁸ Use of the same term "battered child syndrome" as part of a self-defense plea for parricide is, therefore, clearly a misnomer and has led to considerable confusion, since obviously, very young children are not capable of killing their abusers. Thus, the psychological effects of physical, sexual and psychological abuse of children who are old enough to kill their abusers might more appropriately be termed "battered child syndrome of an older child."

DOMESTIC ABUSE CAN BE PHYSICAL, SEXUAL, AND EMOTION, AND FOLLOW A DISTINCTIVE CYCLE OF TENSION BUILDING, ACCUTE EXPLOSION, AND CONTRITION

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 78

The abuse suffered by both adult women and children, who are victims of DAS, can be divided into three main categories: physical injury, sexual abuse and psychological maltreatment. Whichever types of domestic violence are suffered by the abused women or children, the battering follows a cyclical pattern consisting of three phases: tension building, acute explosion and loving contrition. The psychological impact of domestic abuse is the same on all of the victims of DAS. Both women and children display "hypervigilance" in monitoring the abuse and "learned helplessness" in trying, usually unsuccessfully, to cope with the battering. Moreover, many of the women and children who are victims of DAS are impoverished, which exacerbates the psychological effects of their abuse.

BATTERED WOMEN GENERALLY EXPERIENCE MULTIPLE KINDS AND INCIDENTS OF DOMESTIC ABUSE

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 78

According to Dr. Walker, a woman is a victim of battered woman's syndrome (and would, therefore, be a victim of domestic abuse syndrome), if she has been subjected to either physical, sexual or serious psychological abuse, on at least two occasions, by a man with whom she has an intimate relationship.⁴⁵ Unfortunately, most victims of BWS are not subjected to just one of these types of abuse on just two occasions; rather, many battered women suffer from two or three of the categories of abuse delineated by Dr. Walker, often on multiple occasions.⁴⁶ For example, the wife in *State v. Koss* not only suffered psychological damage when her husband repeatedly threatened to kill her but also suffered physical injuries when her husband actually tried to kill her.⁴⁷ On one occasion her husband tried to smother her with a pillow and on another, he put a radio in the bathtub while she was taking a bath.⁴⁸ Ultimately, she killed him before he succeeded in killing her.⁴⁹ Similarly, in *Commonwealth v. Rodriguez*, Nelly Rodriguez suffered three types of abuse at the hands of her live-in boyfriend.⁵⁰ In addition to raping and psychologically abusing Nelly, her boyfriend slapped her; pulled her hair; bent her over a chair; "hit and punched her on many occasions; tried to strangle her with an extension cord; ... punched her in the abdomen while she was pregnant with their son, in an attempt to induce an abortion; threw bleach in her face; and held a baseball bat to her head and threatened to kill her with it. '⁵¹ Ultimately, after suffering from continuous domestic abuse for over six years, Nelly stabbed her boyfriend to death during an argument. 52

COURT TREATMENT OF ABUSE VICTIMS

STATES TAKES A VARIETY OF APPROACHES TO BATTERED WOMAN'S SYNDROME

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 422-424

Approximately a dozen state legislatures have enacted statutes that specifically address the relevance of evidence on battering either as a general matter or in the specific context of self-defense. n41 These legislative approaches loosely demonstrate how the function of BWS testimony has [*423] transformed, as well as the divergence in opinion as to the need for experts. Some statutes, such as Missouri's 1987 law, specifically reference "battered spouse syndrome" or "battered woman syndrome" and place such testimony solely within the province of trained psychiatrists or psychologists. n42 Other statutes reference the syndrome, but do not explicitly require testimony by experts. n43 A third group of states have taken a more generalized approach and do not limit evidence on battering to the BWS or syndrome model. n44 All of these state laws deem at least some evidence of prior abuse relevant in self-defense cases, but they reflect a continuum of varying support for the BWS model. The divide as to whether to require expert testimony calls into question whether evidence on battering is only relevant to the defendant's state of mind, or whether BWS merely serves as a vehicle to explain the broader context in which the altercation occurred.

Courts and advocates have also struggled with whether and how the trial court should instruct the jury on the issue of past abuse as it relates to self-defense. Defendants often request tailored jury instructions that carefully define the elements of "imminence" or "reasonableness" and explain how the jury should apply the expert testimony in its deliberations. n45 State laws on special BWS or syndrome-related jury instructions on self-defense also differ. Massachusetts, California, and Georgia, for example, have adopted pattern jury instructions that specifically apply to the self-defense claims of battered women defendants. n46 Other states, such as Ohio, have rejected certain formulations of BWS instructions to avoid "elevat[ing] the battered woman syndrome to the level of an independent affirmative defense, rather than informing the jury that evidence of the syndrome is merely one factor to consider" n47 In many states the admission of expert testimony does not guarantee that [*424] juries will receive instructions on how to apply the testimony to the distinct elements of the law.

COURTS DIFFER IN THEIR TREATMENT OF CONFRONTATIONAL VERSUS NON-CONFRONTATIONAL KILLINGS BY VICTIMS OF ABUSE

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 424-425

A final point of disagreement arises from cases categorized as "nonconfrontational" homicides. n48 These cases are especially rare relative to confrontational cases, such as in the Grace scenario, in which the act occurs during a one-on-one domestic altercation. n49 The term "nonconfrontational" applies when the act occurs in the absence of contemporaneous aggression on the part of the abusive partner. n50 State v. Norman n51 provides a well-known example. After decades of horrifying abuse, Judy Norman shot her husband while he slept in bed, claiming self-defense with BWS expert testimony at trial. n52 In such cases, the standard argument against the use of BWS contends that the defendant could not possibly have considered her sleeping partner an "imminent" threat. n53 If he was sleeping, why did she not just leave? According to this critique, only someone psychologically disconnected from reality could believe that killing a sleeping partner was the only means of escape. n54 This purist view of the role of "imminence" in self-defense may emerge from the historical values underlying the doctrine, including the notion that "real men" face their adversaries and fight fair, rather than acting preemptively. n55 Defendants may face even greater difficulties if the court determines as a matter of law that the nonconfrontational act did not constitute self-defense, thereby declining to give a self-defense instruction to the jury. n56

Those who would defend battered women in nonconfrontational situations counter that women who kill their abusers are "rational people acting in self-defense." n57 For many in abusive relationships, the threat of abuse is always imminent. n58 Therefore, the legal definition of "imminence" [*425] should accommodate an examination of the defendant's actions in context. n59 As the argument follows, an abuse victim's state of mind is only abnormal to the extent that her entire living situation although somewhat commonplace in a society saturated by domestic violence deviates substantially from what the average judge or juror might consider "normal." The context of abuse is necessary to explain why these women acted reasonably in accordance with a legal doctrine that was not originally intended to recognize such claims. n60

LEGAL ELEMENTS OF SELF-DEFENSE

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 773-774

Self-defense is generally defined as the justifiable use of force upon another when one reasonably believes that such force is necessary to protect oneself from imminent danger of unlawful bodily harm. n26 The force used must not be excessive in relation to the harm threatened. n27 Thus, a person is justified in using deadly force only if there is a reasonable belief that such force is necessary to protect herself from imminent, unlawful deadly force by another. n28

In homicide cases, the traditional requirements of self-defense are interpreted narrowly because the defense is being used to justify the taking of a human life. n29 A person who defends herself against a threat of harm can only use violent self-help as a last resort. n30 By requiring that the defender's actions be in response to an immediately threatened harm, self-defense law aims to ensure that only those defendants who have no other choice but to kill are acquitted. n31

1. The Elements of Self-Defense

To make a successful self-defense claim, a defendant must show that she had a reasonable belief that she was in imminent danger of great bodily harm or death at the time she acted. n32 Most courts have found that a self-defense claim has both subjective and objective elements. n33 First, the defendant must have subjectively believed she was in danger of death or serious harm at the time she acted and thus needed to use deadly force to repel an imminent, [*774] unlawful attack. n34 Second, her subjective belief must have been one that a "reasonable person" in the same situation would have possessed. n35 Therefore, self-defense justifies a defendant in killing a perceived aggressor only if the belief was also objectively reasonable. n36

Reasonableness and imminence are closely related. In the absence of an imminent threat, the objective reasonableness element of self-defense usually cannot be met since there was no immediate harm requiring a reaction. n37 Though there is no single definition of "imminence" applied by courts, at common law it is generally understood to mean a threat of harm that is pressing and urgent and will occur immediately. n38 The danger is not imminent if the harm is threatened to occur at a later time. n39 The imminence requirement ensures that a person will use deadly force to preserve herself from death or serious harm only as a last resort. n40

JUSTIFICATION VERSUS EXCUSE

JUSTIFICATION DEFENSES CLAIM THAT AN OTHERWISE CRIMINAL ACT WAS FULLY WARRANTED OR PRAISEWORTHY IN THE PARTICULAR CASE, WHEREAS EXCUSE DEFENSES MAINTAIN THAT THE ACT WAS STILL WRONGFUL BUT THE PERSON CANNOT BE BLAMED FOR DOING IT

Kent Greenawalt [Prof. of Jurisprudence, Columbia University School of Law], "THE PERPLEXING BORDERS OF JUSTIFICATION AND EXCUSE," *Columbia Law Review*, Vol. 84, No. 8 (December 1984), p. 1897

Most reasons why otherwise criminal acts, such as A's intentional shooting of B, may be noncriminal fall roughly into the categories of justification and excuse.' If A's claim is that what he did was fully warranted he shot B to stop B from killing other people-A offers a justification; if A acknowledges he acted wrongfully but claims he was not to blame-he was too disturbed mentally to be responsible for his behavior-he offers an excuse.

THE JUSTIFICATION-EXCUSE DISTINCTION RESOLVES SCENARIOS THAT WOULD OTHERWISE RESULT IN MORAL PARADOX #1 -

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. The Journal of Criminal Law and Criminology. Vol 85, No. 2 page 298

The central difference between the two approaches is evident from one of Fletcher's hypotheticals:¹² Suppose Dan reasonably, but incorrectly, believes that Allan is wrong fully attacking him. In what he reasonably believes to be justified self-defense, Dan attacks Allan. Allan then uses defensive force against Dan. Under a subjective theory of justification, both Dan's reasonably mistaken force and Allan's force would be justified.¹³ Under an objective theory of justification, however, Dan's force is "putatively"⁴ justified (i.e., excused), and only Allan's force is actually justified.⁵ Fletcher argues that because the subjective theory "assimilat[es] a putative justification to an actual justification [, it] undermines the matrix of legal relationships affected by a [valid] claim of justification."⁶ Under the subjective theory, a third-party intervenor's force in defense of either Dan or Allan or even both could be justified. Furthermore, if Allan realized that Dan believed he was justified, the use of force by Allan (the innocent victim) against Dan (the initial aggressor) would not be justified.¹⁷ By justifying only Allan's force, the objective theory avoids incompatible or conflicting justifications (between Dan and Allan), the legal anarchy of an intervenor justifiably using force against an innocent victim (Allan) or whichever actor the intervenor chooses, and the anomaly of barring an innocent victim from using justified force. Fletcher argues that because the subjective theory "assimilat[es] a putative justification to an actual justification [, it] undermines the matrix of legal relationships affected by a [valid] claim of justification."⁶ Under the subjective theory, a third-party intervenor's force in defense of either Dan or Allan or even both could be justified. Furthermore, if Allan realized that Dan believed he was justified, the use of force by Allan (the innocent victim) against Dan (the initial aggressor) would not be justified.¹⁷ By justifying only Allan's force, the objective theory avoids incompatible or conflicting justifications (between Dan and Allan), the legal anarchy of an intervenor justifiably using force against an innocent victim (Allan) or whichever actor the intervenor chooses, and the anomaly of barring an innocent victim from using justified force.

THE FOLLOWING HYPOTHETICAL IS #1 – 303

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. The Journal of Criminal Law and Criminology. Vol 85, No. 2

Suppose Dan and Allan each reasonably, but incorrectly, believe that the other is attacking him. In fact, neither Dan nor Allan is using force against anyone. Dan and Allan each decide to use what each believes is justified self-defense force against the other. Dan and Allan each use similar force against the other simultaneously. Each actor's use of force interferes with the other actor's use of force.

**ONLY THE JUSTIFICATION-EXCUSE DISTINCTION RESOLVES THE PARADOX IN
HYPOTHETICAL #1 – 305**

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. The Journal of Criminal Law and Criminology. Vol 85, No. 2. Page 305

Further, suppose that the force Dan used was proportional and "the minimal force necessary."³³ Objectively viewed, was Dan's force necessary? If Dan had not used force against Allan, Allan would have unjustifiably attacked Dan, unimpeded by any force from Dan. As a result, Dan would have sustained an even more forceful blow from Allan. Therefore, it may reasonably be maintained that Dan's force was necessary and justified. A similar argument also demonstrates that Allan's force is necessary and justified. Since Allan's beliefs about Dan and actions against Dan are identical to Dan's beliefs about Allan and Dan's actions against Allan, the same reasoning showing Dan's force to be justified would also reveal Allan's force to be justified. Under the objective theories, however, force used against justified force cannot be justified. Fletcher's incompatibility thesis and Robinson's correlate principle dictate that in any conflict between two opposed parties, only one of the parties can be justified.³⁴ If both Dan's force and Allan's force are justified, then each used force against the other's justified force and thus paradoxically neither actor's use of force would be justified.³⁵ Yet if neither actor's use of force is justified, then each actor used force against unjustified force. Force used against unjustified force is eligible to be justified. Since Dan's force and Allan's force satisfy all of the requirements under the objective theories, their use of force is justified. Therefore, if neither actor's force is justified, then paradoxically both actors' use of force is justified.³⁶ If both actors' use of force is justified or neither actor's use of force is justified, then a paradox ensues. If both actors' use of force is justified, then neither actor's use of force is justified; if neither actor's use of force is justified, then both actors' use of force is unjustified.³⁷ As a result, if both actors' use of force is justified or neither actor's force is justified, each actor's force is both justified and not justified under the objective theories of justification.

THE FOLLOWING HYPOTHETICAL IS #2

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. The Journal of Criminal Law and Criminology. Vol 85, No. 2 page 310.

Cindy and Joanne, two bitter enemies who have had physical altercations with each other on many occasions, unexpectedly meet each other on a dark, deserted street. Neither wishes to attack the other, yet neither wishes to be unjustifiably attacked. Each reasonably believes that the other will imminently use unjustified force against her. Because of their history of hostile encounters, Cindy reasonably believes that Joanne will unjustifiably use self-defense force because Cindy believes that Joanne believes that Cindy will reasonably, but mistakenly, use self-defense force against her (Joanne). Also due to their history of violence, Joanne reasonably believes that Cindy will unjustifiably use self-defense force because Joanne believes that Cindy believes that Joanne will reasonably, but mistakenly, use self-defense force against her (Cindy). Acting with justificatory intent, each uses similar force against the other simultaneously. Each actor's use of force interferes with the other actor's use of force.

AGAIN, THE EXCUSE-JUSTIFICATION DISTINCTION IS NECESSARY TO RESOLVE THE PARADOX

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. *The Journal of Criminal Law and Criminology*. Vol 85, No. 2 PAGE 310

If Cindy had complete knowledge of the circumstances, she would have known that Joanne would imminently use force against her, because Joanne believed that Cindy would mistakenly use self-defense force against her (Joanne). In fact, that is what Cindy actually believes. Thus, Cindy correctly comprehended the circumstances. Furthermore, if Cindy had not used force against Joanne, Joanne would have unjustifiably used force against Cindy, unimpeded by Cindy's force. As a result, Cindy would have sustained an even more forceful blow from Joanne. Therefore, even if Cindy did have complete knowledge of the situation, Cindy would still have reasonably and correctly believed that her force was necessary and justified. Consequently, Cindy is not putatively justified. A similar form of argument would also demonstrate that Joanne is not putatively justified. Since each actor reasonably believed that her force was justified, each one has the requisite justificatory purpose. Therefore, each one satisfied Fletcher's requirement of having justificatory intent or knowledge of the justificatory circumstances.⁴⁴ Suppose further that the force each actor used was proportional and necessary.⁴⁵ The only remaining issue then is whether the actor in question was unjustifiably threatened or attacked. Since Fletcher's incompatibility thesis and Robinson's correlate principle dictate that force cannot justifiably be used against justified force, if the actor in question was justifiably attacked the actor cannot be justified. Only an unjustified attack or threat against an actor would render the actor's force eligible to be justified. The first consideration is whether Cindy was unjustifiably attacked. This depends on whether Joanne's force is justified. But whether Joanne's force is justified depends on whether Cindy's force is justified. In turn, whether Cindy's force is justified depends on whether Joanne's force is justified. A vicious circle ensues.

USING JUST JUSTIFICATION RESULTS IN A REDUCTION AD ABSURDUM OF TWO RIGHTS MAKE TWO WRONGS MAKE TWO RIGHTS, ETC. -

Russell Christopher [Research Associate, Columbia University School of Law. J.D. 1988, University of Michigan Law School] Mistake of fact in the objective theory of justification: do two rights make two wrongs make two rights...? 1994. The Journal of Criminal Law and Criminology. Vol 85, No. 2

The archetypal self-defense scenario consists of a culpable aggressor wrongfully attacking an innocent victim who rightfully, for self- protection, uses what otherwise would be wrongful force against the aggressor.¹²³ It might be said that in such self-defense situations two wrongs make a right. Yet in applying the objective theories of justification to Hypotheticals 1 and 2, two rights make two wrongs,¹²⁴ which generate two rights ad infinitum. Each actor's rightful and justified conduct transforms the other actor's rightful and justified conduct into wrongful and unjustified conduct. In turn, each actor's wrongful and unjustified conduct causes the other actor's wrongful and unjustified conduct to be rightful and justified conduct. A determination that each actor's use of force is justified (or unjustified) "cannibalizes itself"²⁵and generates the opposite conclusion. A vicious circle or "infinite alternation of opposite conclusions"¹²⁶ ensues. Consequently, each actor's force is simultaneously justified and unjustified in violation of the law of noncontradiction.¹²⁷

SELF-DEFENSE IS TRADITIONALLY A JUSTIFICATION DEFENSE, NOT MERELY AN EXCUSE

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
“FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL
REFLECTIONS,” 93 Marq. L. Rev. 1475 (2010)

Recent modifications in self-defense law, as well as currently proposed changes, are the focus of this Barrock Lecture. I need to start, however, with a brief review of traditional (—old fashioned, if you will) self-defense law. First, in recent centuries self-defense has been characterized as a justification defense. That is, when a person claims self-defense, she is stating that killing the aggressor was the right thing to do—that the result of a dead human being is a good result or, at least, a non-wrongful result. Thus, in thinking about the reform proposals we should not lose sight of the fact that by expanding the right to use deadly force, our society is asserting that greater use of deadly force by persons threatened with harm is desirable or, at least, okay with us.

AFFIRMATIVE EVIDENCE

MORAL RIGHT TO SELF-DEFENSE

THE RIGHT TO SELF-DEFENSE IS A LAW OF NATURE

John Locke [Philosopher, 1632-1704], "Of the State of War," Second Treatise on Civil Government. (1689), Ch. 3, Sec. 16. Accessed 12/9/2011 <<http://constitution.org/jl/2ndtreat.htm>>

Sec. 16. THE state of war is a state of enmity and destruction: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man's life, puts him in a state of war with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defence, and espouses his quarrel; it being reasonable and just, I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred: and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the commonlaw of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him whenever he falls into their power.

Sec. 17. And hence it is, that he who attempts to get another man into his absolute power, does thereby put himself into a state of war with him; it being to be understood as a declaration of a design upon his life: for I have reason to conclude, that he who would get me into his power without my consent, would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for no body can desire to have me in his absolute power, unless it be to compel me by force to that which is against the right of my freedom, i.e. make me a slave. To be free from such force is the only security of my preservation; and reason bids me look on him, as an enemy to my preservation, who would take away that freedom which is the fence to it; so that he who makes an attempt to enslave me, thereby puts himself into a state of war with me. He that, in the state of nature, would take away the freedom that belongs to any one in that state, must necessarily be supposed to have a foundation of all the rest; as he that in the state of society, would take away the freedom belonging to those of that society or commonwealth, must be supposed to design to take away from them every thing else, and so be looked on as in a state of war.

THE RIGHT TO SELF-DEFENSE COMES FROM THE BASIC LOGIC OF JUSTICE

Phillip Montague [Prof. Emeritus of Philosophy, Western Washington University], "Self-Defense and Choosing between Lives," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 40, No. 2 (Sep., 1981), pp. 207-219, 216.

The 'matter of basic justice' to which I have referred here is difficult to characterize precisely, but it is no doubt related to the very general principle that the good and bad things that happen to people should have some reasonably direct connection with their responsible behavior. According to a strong version of this principle, good things should befall those who behave well, and bad things those who behave badly. According to a somewhat weaker version, good people should benefit if anyone does; and if harm is unavoidable, then (*ceteris paribus*) the guilty rather than the innocent should suffer. Whatever else might be said of this principle (under its various interpretations), it is undeniably present in much of our thinking about justice. At the level of institutions and institutionalized practices, it underlies the notion that such things as reward and punishment must be based on desert (and not simply on utilitarian considerations, for example). At a less formal level it embodies a sense of 'cosmic justice' that leads us to think it unjust when good people suffer natural catastrophes and the wicked lead carefree and happy lives; and an idea of 'poetic justice' according to which it is particularly fitting when someone who attempts wrongfully to harm others somehow manages to harm himself instead. Some of this thinking may be misguided. But it surely contains a kernel of truth large and solid enough to support the principle in terms of which I am explaining the moral status of self- and other-defense: that if harm must befall some but not all members of a group; and if the existence of the situation is the fault of certain individuals in the group; then it is the guilty rather than the innocent who should suffer.¹⁵

SELF-DEFENSE CANNOT BE JUSTIFIED SIMPLY BY BALANCING THE INTERESTS OF THE PARTIES; CULPABILITY MUST BE A RELEVANT FACTOR

David Wasserman [Director of Research at the Center for Ethics at Yeshiva University], "Justifying Self-Defense," *Philosophy & Public Affairs*, Vol. 16, No. 4 (Autumn, 1987), pp. 356-378, 358-359

Fletcher points out the "obvious problem ... that if we simply compared the interests of the two parties, we should never be able to justify the defender killing the aggressor—at least where only one life was threatened. If it is only one against one, it is hard to see why we should favor either party to the affray." Fletcher explains that "the factor which skews the balance in favor of the accused is the aggressor's culpability in starting the fight."⁸ His culpability permits his interests to be discounted, tipping the balance toward the victim. This "skewing" strikes many critics as a makeweight, incompatible with what is perceived to be a fundamental principle of Anglo-American law—the equality of all lives, whatever their moral worth. If two shipwreck victims were struggling for a plank capable of supporting only one, most of us would not regard one of them as justified in pushing the other off merely because the other had recently committed attempted murder, or even mass murder.⁹ If the aggressor's responsibility for the current predicament justifies his sacrifice, it is not by devaluing his life.

SELF-DEFENSE IS NOT JUSTIFIED BY BALANCING THE PARTIES' INTERESTS, BECAUSE IT PERMITS THE USE OF LETHAL FORCE WHEN LESSER HARM IS THREATENED

David Wasserman [Director of Research at the Center for Ethics at Yeshiva University],
"Justifying Self-Defense," *Philosophy & Public Affairs*, Vol. 16, No. 4 (Autumn, 1987), pp. 356-378, 359

Furthermore, considerations of moral worth would fail to justify many acts of self-defense permitted under existing law. The aggressor may be insane, innocently mistaken, or provoked by the victim's fraud, betrayal, or oppression. Moreover, only a nearly complete discounting of the aggressor's interests could explain the law's refusal to weigh the probability and magnitude of the threatened injuries once an imminent threat of serious injury has been found. The law permits the victim to dispatch the most inept aggressor if he cannot sidestep the confrontation with complete safety. Similarly, most states permit the killing of an aggressor threatening not life, but only lesser interests such as property and bodily integrity.

THE RIGHT TO SELF-DEFENSE IS NOT MITIGATED BY THE FACT THAT IT WOULD PRODUCE A NET REDUCTION IN UTILITY, AND THEREFORE IT IS NOT BASED ON THE BALANCING OF INTERESTS

David Wasserman [Director of Research at the Center for Ethics at Yeshiva University], "Justifying Self-Defense," *Philosophy & Public Affairs*, Vol. 16, No. 4 (Autumn, 1987), pp. 356-378, 359

A proponent of a lesser-evil approach might reject many of these provisions as too permissive or construe them as conditions of excusable rather than justifiable killing (see Section II). There is a more basic feature of existing law, however, which is equally incompatible with a balancing of evils: a single victim is permitted to kill any number of intentional aggressors if it is necessary for his survival. If the aggressors' lives retain any value, as the restrictions on defensive force certainly suggest, their combined weight must eventually exceed that of the victim's. The victim, however, does not need to desist when it does.

The law is also indifferent to the collateral consequences of self-defense, however significant. One who kills an intentional aggressor need not worry if his act incites rather than deters further aggression. The law permits the aggressor's life to be taken even if his survival is linked to other, innocent lives: a victim is entitled to kill an aggressor even if his killing is sure to provoke widespread bloodshed, or even if the aggressor is on the brink of discovering a cure for cancer or a solution to African famine. The person deciding whether to burn his neighbor's field is required to take such indirect consequences into account; their irrelevance to an act of self-defense strongly suggests that it is not the consequences of particular acts that are being weighed in the balance.

SELF-DEFENSE PROTECTS THE VALUES OF LIFE AND AUTONOMY AND MAKES IT POSSIBLE TO LIVE IN A SOCIETY

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1027-1028

Starting from the premise of an absolute unqualified right not to be killed, it follows that self-defense, as a derivative right, must be an absolute natural right as well. This is so because without an absolute right to self-defense the right not to be killed can hardly be regarded as a right, as it provides its owner no effective tools to protect it. Self-defense plays a major role in resisting the direct imminent unjust threat posed by an aggressor. It also has an additional role in the defense against an indirect threat to autonomy, a threat that is generated by the fear and instability that the lack of such a right would bring about. It constitutes one of the basic conditions that allow people to live together in society. One of the reasons we value life is because it is a necessary precondition to the possibility of autonomy, of pursuing various personal and communal goals. Thus, the right to self-defense can be partly explained by reason of its implications for autonomy. No matter how comprehensive the rules of a given society are, there will always be situations where one is unable to turn to the community for help. Unless the possibility to defend oneself is recognized in these situations, the risks associated with living in a society would increase. Many people would devote their lives to creating conditions that would ensure their survival instead of promoting their autonomy in other ways. Given that life is a precondition of (or at any rate, closely connected to) autonomy, the protection of these two interests is inseparable; even if we justify the right of self-defense in terms of defending one's life from an imminent unjust threat, the defense of life is, *inter alia*, a defense of autonomy. That is to say, defending one's life is defending one's autonomy.

THE RIGHT TO SELF-DEFENSE IS BASED ON THE AGGRESSOR FORCING THE VICTIM TO CHOOSE BETWEEN LIVES, NOT SOME RETRIBUTIVE PRINCIPLE

David Wasserman [Director of Research at the Center for Ethics at Yeshiva University],
"Justifying Self-Defense," *Philosophy & Public Affairs*, Vol. 16, No. 4 (Autumn, 1987), pp. 356-378, 372

The present aggressor, in contrast, is forcing a choice between lives at the moment that the victim makes it. He cannot dissociate himself from his actions without eliminating the threat. It is his present posture that justifies his sacrifice and eliminates the quality of retribution found in the sacrifice of the past aggressor. While this quality of contemporaneous choice is normally associated with physical aggression, it will be found wherever one person maintains a lethal threat against another by action or inaction. Thus, it would make little difference if Jonah tried to drown the first mate by throwing him overboard, by steering the ship away from him, or merely by holding the rudder in place to maintain a course away from him. While only the first of these would ordinarily be thought of as aggression, all three would give the first mate the same justification for killing Jonah if that were the only way to save himself. In each case, Jonah would be forcing the choice between lives at the very moment that the first mate made it, and his sacrifice would lack the retributive character it has in the original hypothetical.

SELF-DEFENSE IS JUSTIFIED BECAUSE THE AGGRESSOR SHOULD BEAR THE COSTS ASSOCIATED WITH FORCING A CHOICE BETWEEN LIVES

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1027-1028

The account I offer accepts much of the account of forced choice, but also extends it. In the core situations of culpable aggressors, the permission to use defensive force is based, I argue, on the commonly accepted fault-based selection principle as modified by Wasserman to the "present aggression"—a modification which does not allow the aggressor to disassociate him or herself from his actions.⁸² The idea that the person who is morally responsible for a situation ought to be the one to bear the burdens of the situation accords with our general intuitions of fairness. Hence, an aggressor who culpably brings about a situation in which the defender is forced to choose between his life and the life of the aggressor ought "to pay the price" for his actions.

SELF-DEFENSE IS JUSTIFIED EVEN WHEN THE AGGRESSOR IS NOT CULPABLE OR NOT AN AGENT, BECAUSE THE VICTIM HAS DONE NO WRONG AND HAS BEEN FORCED TO CHOOSE BETWEEN LIVES

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1027-1028

It is this same idea that justifies the defensive response. Through "bad" luck, the non-culpable and non-agent aggressor wrongs the defender, violating his right not to be killed. He is posing an unjust threat to the defender, creating a situation in which either the de-fender or the aggressor will have to pay the costs. In these circum-stances, I think it is wrong for the aggressor to transfer the burden to the defender and demand that the defender be the one to suffer the consequences. Hence, it is the causal responsibility of the ag-gressor for the unjust threat that spawns the right to self-defense. Also note that as self-defense is not about punishment but about resisting, repelling or warding off an attack, we are no longer con-fined to the concept of moral responsibility.⁸⁴ The causal responsi-bility of the aggressor creates the asymmetry between the aggres-sor and the defender in the following way: The defender has a right to life. Therefore, if the aggressor makes an attack upon the de-fender's life, in the absence of any special justifying circumstances, he wrongs him. Because the aggressor had "bad" luck and is caus-ally responsible for the aggression that created a situation in which either he or the defender will have to suffer the consequences, the defender has a right to use necessary and proportionate force against him. Therefore, when the defender attacks his aggressor to defend himself, he has justifying circumstances and does not vio-late the aggressor's right to life and does not wrong him. Because the defender does not wrong the aggressor, the aggressor does not have a right to defend himself from the defender's threat.

INDIVIDUALS DO NOT SURRENDER THEIR INNATE RIGHT TO KILL AN AGGRESSOR TO THE STATE AS PART OF THE SOCIAL CONTRACT

Sanford H. Kadish [Professor of Law, School of Law, University of California, Berkeley], "Respect for Life and Regard for Rights in the Criminal Law," *California Law Review*, Vol. 64, No. 4 (Jul., 1976), pp. 871-901, 884-884

As a way of accounting for the law of justified killing of a deadly attacker, a more satisfactory rights approach than the forfeiture concept, which derives only a liberty of the victim to kill from the loss of the aggressor's right to live, is one that derives the liberty from a right against the state. That right, I suggest, is the right of every person to the law's protection against the deadly threats of others. For whatever uncertainty there may be about how much protection must be afforded under this right, it must at least, if it is to have any content, include maintenance of a legal liberty to resist deadly threats by all necessary means, including killing the aggressor. There is, after all, no novelty in positing such a right. The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.²³ This liberty to resist deadly aggression by deadly force, and the moral right against the state from which it derives, I will refer to as the right to resist aggression.

SELF-DEFENSE IS A PRE-POLITICAL, MORAL RIGHT

Kimberly Kessler Ferzan [Professor of Law & Co-Director, Institute for Law and Philosophy, Rutgers University School of Law-Camden], "Self-Defense and the State," *OHIO STATE JOURNAL OF CRIMINAL LAW* 5:999 (2008), p. 457

I will not engage in a lengthy exegesis of Hobbes or Locke here. Rather, my aim is simply to sketch out enough of their theories to demonstrate that whatever the relationship between the right to self-defense and the state, it is not that the social contract constructs the right to self-defense. Rather, self-defense is a pre-political moral (or amoral) right. The question of how the construction of the state intersects with such a moral right is an interesting one (and one I address in the next section), but the point here is that even under a Hobbesian or Lockeian view, self-defense is not a right against the state. Rather, self-defense is a relationship that exists within the state of nature that is preserved through the social contract.

According to Hobbes, in the state of nature, all men are at war with each other, and in this condition, all men have a right to everything including each others' bodies.⁴⁷ And, because "every man has right to every thing[,] . . . no action can be Unjust."⁴⁸ In forming the social contract, man could not alienate the right to self-defense and retain the right to use deadly force against anyone, including a lawful executioner.⁴⁹

Notably, even on this view, self-defense is pre-political. It is a right to do anything to anyone in the name of self-preservation. The right is a natural right, and it is a natural right that we do not (and could not) surrender.⁵⁰ We must understand self-defense—and understand human nature—to understand what we would contract to preserve. We learn about the content of the right counterfactually, but the contract itself does not define the right—it only recognizes it.

THE STATE IS ILLEGITIMATE IF IT FAILS TO RECOGNIZE THE RIGHT TO SELF-DEFENSE

Kimberly Kessler Ferzan [Professor of Law & Co-Director, Institute for Law and Philosophy, Rutgers University School of Law-Camden], "Self-Defense and the State," *OHIO STATE JOURNAL OF CRIMINAL LAW* 5:999 (2008), p. 471

Despite its (possible) bystander status, we have grounds for criticizing the state when it does not grant us the right to self-defense. Imagine that a state did not allow citizens to use deadly force against culpable attackers. It is hard to believe that such a state would last for long. Citizens would have no reason to defer to an institution that failed to protect them. They would have no reason to leave the state of nature.¹⁰³ As Claire Finkelstein explicates the Hobbesian view, "self-defense provides the very condition for the willingness of individuals to leave the state of nature, and the scope of the duty to the sovereign is limited by the latter's ability to fulfill that purpose."¹⁰⁴ Thus, Kadish is entirely correct when he argues,

[t]he individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before. ¹⁰⁵

PSYCHOLOGICAL AND STRUCTURAL BARRIERS TO ESCAPING ABUSIVE RELATIONSHIPS

VICTIMS OFTEN FEEL THAT THE ONLY WAY OUT OF THE PSYCHOLOGICAL TRAP OF DOMESTIC ABUSE IS TO KILL THEIR ABUSERS; MANY DO SO

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 76

The women and children who are domestically abused by their spouses or parents are among the most marginalized members of American society, trapped in abusive relationships from which they can see no escape. They are often trapped by their abusers, who isolate them from family and friends who might otherwise provide them with assistance and support in leaving. They are frequently trapped by poverty, making retreat from the abusive situation a financial impossibility. And they are virtually always trapped by the unremitting violence, which not only batters them physically but emotionally as well, making leaving the abusive situation a psychologically unrealistic option.

Faced with the inevitable prospect of escalating physical violence, often accompanied by sexual and psychological abuse, some of these women and children decide that the only escape from their imprisonment is to kill their abusers. Every year, almost 500 battered women murder their abusive spouses or partners.¹⁸ Although less frequent, studies show that about 2% of all homicides in the nation, or approximately 400 killings each year, are committed by children against their parents. ¹⁹ Although not all of these homicides are committed by children who have suffered domestic violence, according to some estimates, more than 90% of the children who commit parricide have been abused by the parent. ²⁰ In situations like these, the tables are turned, and it is the battered women or children who decide that the only way out of their agony is to kill their abusers.

THERE ARE A PLETHORA OF REASONS VICTIMS STAY IN BATTERING RELATIONSHIPS

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. NYU Review of Law & Social Change – Volume 32, 191.

Most victims experience some ambivalence in leaving a battering relationship. Commonly cited explanations for failing to leave and for returning to a battering relationship include lack of financial resources, 4 1 fear of both violent and non-violent retribution, 42 lack of access to information about options for escape,4 3 continuing love for the batterer and belief he will change,4 4 desire to maintain the two-parent family structure, 45 prior negative interactions with the legal system,46 community pressure to refrain from seeking and general Skepticism about legal intervention,47 and psychological diagnoses such as depression and post traumatic stress disorder. 4 8 Social science research asserts that victims attempt to leave abusive relationships multiple times before they succeed. 4 9 Because such behavior is inconsistent with typical crime victim behavior, system actors may conclude victims are unreliable at best, dishonest at worst, and may prefer to move forward on the cases without them

THE GOVERNMENT IS PERCEIVED TO BE AND ACTUALLY UNHELPFUL IN PREVENTING ABUSE -

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 270

Even if someone does call authorities, the police and courts often fail to protect women from abuse. Before mandatory arrest laws, police often refused to arrest a batterer if they did not witness the abuse first hand, even if they arrived at the scene of a reported battering to find a woman covered with blood waiting for them outside.²⁴³ Perhaps as a result of police avoidance of arrests in domestic violence situations, batterers themselves do not perceive any significant risk of arrest for their conduct.²⁴⁴ Although mandatory arrest statutes increase the rate at which batterers are arrested,²⁴⁵ they also increase the likelihood that a domestic violence victim will be arrested for using defensive force.²⁴⁶ An unfortunate consequence is that battered women may be less likely to call the police for help if they fear they will be the partner selected for arrest or that the police, not knowing which partner was at fault, will arrest both parties.²⁴⁷ Even if a woman manages to leave her husband and secure a restraining order against him, the hurdles to enforcement of the order can be considerable.²⁴⁸ A battered woman's past attempts to resort to the police, the courts, or other avenues of escape may have failed to protect her from additional and escalating abuse, leaving her with a reasonable belief that she has no safe options.²⁴⁹

CRIMINAL JUSTICE SYSTEM ACTORS APPROACH INTERVENTION WITH DIFFERENT GOALS THAN VICTIMS: THIS DISCREPANCY IS PROBLEMATIC-

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. NYU Review of Law & Social Change – Volume 32, 191.

System actors often approach official intervention from a different perspective than survivors since system actors generally prioritize the legal aspects of the conflict. 38 Most individuals in the justice system hope to protect battered women from further violence by seeking to remove them from abusive relationships. When confronted with a domestic violence offense, the system actor sees a straight-forward scenario: an individual has been beaten by her partner and needs protection. The system actor sees an offender who must be brought to justice to vindicate the public good and protect the victim from further harm. As a dispassionate bystander to the relationship, the prosecutor, police officer, or judge can narrowly view the offense and focus on the solution, untouched by the dynamics of the offending relationship. 39 Because of the complexity of battering relationships, victims experience a wide range of pressures and emotions in the aftermath of a violent episode. These forces compel most victims to perceive battering relationships in shades of gray that do not exist in the monochrome world of most lawyers, police officers, and judges. While some victims may wholeheartedly and consistently embrace the actor's mission to end the relationship, most victims will, at some point during a criminal or civil case, deviate from the path to a successful termination of the relationship.40

THE COURTS FOCUS ON PAST JUSTICE IS NOT IN LINE WITH THE VICTIMS FOCUS ON FUTURE CARE – DECREASES THE LIKELIHOOD THEY VIEW THE SYSTEM AS AN ALTERNATIVE

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. NYU Review of Law & Social Change – Volume 32, 191.

Further, the insistent demands of supporting a family or caring for children might lead a victim to assign low priority to court proceedings. Seemingly endless continuances, recesses, and procedural delays require significant time investment by the complaining witness, who may be missing work and related income and neglecting child care responsibilities. 52 In the end, the ultimate goal of criminal justice-punishment for past crimes-may not resonate with a victim whose everyday obligations mandate that she focus on the future. Punishment of batterers is often a low priority for victims of domestic violence.53 Finally, the victim may resist legal interventions because she harbors a deep distrust of the justice system based on past interactions or collective community perceptions. 54 When system actors confront victims' different goals and priorities, many become frustrated and wish to divorce their actions from the victims' actions.55

**WHEN THE STATE ASSERTS COERCIVE CONTROL OVER THE VICTIM THEY MIRROR
THE ABUSIVE RELATIONSHIP -**

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. NYU Review of Law & Social Change – Volume 32, 191.

Further, some advocates have accused state actors of replicating battering relationships in their treatment of victims.²⁴⁰ By bulldozing victims, ignoring their needs and preferences, and substituting the state's interest for the victim's, the state coerces victims into compliance in the same way as the typical batterer might. As Linda Mills describes in critiquing no-drop prosecution, "state approaches that involve coercive and dismissive tactics may effectively revictimize the battered woman, first by reinforcing the batterer's judgments of her, and then by silencing her still further by limiting how she can proceed. 24 1 Mandatory intervention policies also replicate the emotional detachment endemic to some battering relationships. As Mills further argues, In the era of mandatory interventions, one of the most striking features of the dynamic between state actors and battered women is the state actors' emotional detachment. The police are required to ignore the battered woman's desires and to arrest the batterer regardless of her wishes, prosecutors are encouraged to craft their arguments and to gather evidence without the battered woman's inputphysicians are required to ignore a battered woman's request for confidentiality. In these situations, state actors emotionally detach from the battered woman and fail to respond to her emotional (and clinical) need to reconnect with people in healthy ways that promote her recovery.^{2 42} While advocates could level this critique of police and prosecutors against judges when they deny petitioners' motions to vacate civil protection orders, it would be less valid in the context of a judicial hearing, again because of the inherent role of the judge. A victim may expect a police officer or prosecutor to be sympathetic, but she may not have the same expectation of a judge. Emotional detachment and hierarchy are innate in the relationship between judge and litigant.

TRADITIONAL PERSPECTIVES OF IMMINENCE DO NOT CAPTURE THE COMPLEXITIES OF DOMESTIC VIOLENCE -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

These traditional self-defense requirements are problematic for women.¹¹⁰ Because society has believed for so long that the proper role for women is to obey their husbands, a woman who kills her husband is often perceived as insane or inherently unreasonable.¹¹¹ Men are generally physically stronger than women, thus women may need to use deadly force rather than equal force to survive an attack.¹¹² Women are also more likely to kill their male abusers when the abusers are off guard, such as when they are asleep, because women are more likely to be killed themselves when their abusers are directly confronting them.¹¹³ Moreover, leaving their abusers may not be a viable option for women whose abusers have stalked them in the past after they tried to leave and/or have threatened to stalk and injure them in the future if they leave. The traditional view of imminent danger, however, does not make allowances for these realities.

MEDIATION IS AN UNSUCCESSFUL TACTIC WITH DOMESTIC VIOLENCE COUPLES -

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim. NYU Review of Law & Social Change – Volume 32, 191.

The tide began to turn in the years after 1982, when the Minneapolis Police Department and the Police Foundation completed a study of police response to domestic violence offenses in Minneapolis. The study determined that arrest of the suspect led to a far lower likelihood of repeat violence than mediation or asking the suspect to "cool it." 10 6 Mediation rarely succeeds in domestic violence cases due to the prevalent power imbalances between the parties. A National Institute of Justice report concluded that "victim coercion during mediation is virtually unavoidable."

**WOMEN FEEL LIKE THERE ARE NO OPTIONS NOW THAT THERE ARE MANDATORY
ARREST LAWS – THEY WON'T EVEN CALL FOR HELP**

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. NYU Review of Law & Social Change – Volume 32, 191.

A study conducted in Wisconsin found a large increase in the number of women who stated that they would not call law enforcement again after the mandatory arrest law went into effect (68.4%) compared with those who did not intend to call police before the law went into effect (0% would not, 22.5% were unsure). ZORZA & WOODS, *supra* note 124, at 17 (citing STAFNE, *supra* note 130, at 5). If the mandatory arrest policy was the only material change reported in Wisconsin during that period-and contemporary analysis suggests that this was the case-this is a striking difference. See *id.* at 14.

RURAL WOMAN FACE PARTICULARLY STRONG BARRIERS TO ESCAPING ABUSIVE RELATIONSHIPS

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 417

The national statistics also mask the prevalence of intimate homicide in rural places like Vermont. In 2005, the highest percentage of intimate homicides occurred in rural areas. n20 Lisa R. Pruitt identifies the unique practical constraints faced by women living in rural areas that can compound the challenge of leaving an abusive relationship. n21 These barriers include the need to travel long distances and the lack of reliable transportation, the scarcity of childcare options, the lack of stable housing, and economic inequality. n22 In rural places, spatial isolation and a paradox of "neighborly" patriarchal privacy intensifies the significance of the domestic context in battered women's lives and complicates their ability to leave. n23 When no other means of escaping the relationship alive exist, rural women including those in Vermont who experience domestic abuse may be more likely to find themselves in situations that force them to act in defense of their lives.

PARENTAL KIDNAPPING LAWS ARE A BARRIER TO ABUSE VICTIMS EFFECTIVELY FLEEING THEIR ABUSERS

Laura Theresa Curcio Curry [2009 J.D. Candidate, University of Baltimore School of Law], "ON THE BORDER: THE COUNTRY'S AMBIGUOUS RESPONSE TO OUT-OF-STATE DOMESTIC VIOLENCE VICTIMS FLEEING THEIR ABUSERS," 13 Holy Cross J.L. & Pub. Pol'y 9 (2009), p. 13-14

One of the main concerns of victims who are considering fleeing their abuser with their children is potential parental kidnapping charges and possible custody ramifications. 4 The overwhelming majority of states have statutes that address parental kidnapping and possible ramifications of one parent's interference with the other parent's custody of the child.⁵ To make the situation even more challenging, Goodmark points out that "[s]ome state laws apply only when a custody order is in effect, some apply regardless of whether a court has issued a custody order, and in some states the law is unclear."⁶

Under many states' parental kidnapping or relocation law, a domestic violence victim is not explicitly required to tell the other parent where they are going. 7 Some state law prohibits a relative who is aware that another person is the lawful custodian of a child from taking a child under the age of sixteen.⁸ The statute states that they may not "abduct, take, or carry away the child from the lawful custodian to a place in another state."⁹ Under the next section, a person concerned with a child's health and safety may have a statutory recourse. Maryland law also provides a defense in that a person who violates § 9-304 or § 9-305 may file a petition in an equity court.²⁰ In the petition, the concerned individual must state that, "at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child."²¹ While the statute may provide a defense to a domestic violence victim, it certainly requires that a victim take legal steps to dissuade possible prosecution. The filing of the petition may also disclose the victim's new whereabouts and certainly may place the victim and child in a threatening situation where abuse may occur again.

WOMEN WHO FLEE FROM ABUSE WITH THEIR CHILDREN RISK LOSING CUSTODY

Laura Theresa Curcio Curry [2009 J.D. Candidate, University of Baltimore School of Law], "ON THE BORDER: THE COUNTRY'S AMBIGUOUS RESPONSE TO OUT-OF-STATE DOMESTIC VIOLENCE VICTIMS FLEEING THEIR ABUSERS," 13 Holy Cross J.L. & Pub. Pol'y 9 (2009), p. 14

A women fleeing with a child must also consider the possible implications of her action in regards to child custody proceedings and existing custody agreements. If a woman decides to flee or go underground, then she will not be present or able to participate in custody proceedings and will likely lose custody as a result of her leaving the state where abuse occurred.²⁴ While under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the fleeing victim can file for temporary custody, however, she may still be forced to return to the home state if she wants to go forward with litigation.²⁵ Furthermore, the mother may be required to disclose her whereabouts, facing a similar confidentiality problem as she would if facing parental kidnapping charges.²⁶ Clearly, a woman faces many additional legal challenges when a child is involved as she makes the difficult, but often lifesaving decision, to rebuild her life in a new state.

THE PUBLIC IS SHAMEFULLY APATHETIC ABOUT DOMESTIC VIOLENCE

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 269

An especially disturbing contribution to a woman's failure to leave a battering relationship is that, even when people are aware of the abuse, they often fail to protect battered women. Sarah Buel, a survivor of domestic violence, recalls one effort to leave her husband in New York and hide from him in a small town.²³⁸ She was at a crowded laundromat with her son when she looked up and saw her husband in the door.²³⁹ She began screaming, telling the people around her to call the police. Her husband responded, "No, this is my wife. We've just had a little fight."²⁴⁰ No one moved, so Buel pointed to the bruises still blackening her face and said, "This is the person who beat me up.... [p]lease, call the police." Her husband responded repeatedly, "No, this is my wife," and still no one moved.²⁴¹ Women commonly report being beaten in front of their homes, in apartments with paper-thin walls, and in houses with open windows and doors. ⁴² Despite a woman's pleas for help, passersby simply look the other way, and neighbors call police only to complain about the noise.

SUICIDAL PARTNERS AND BELIEF IN THE SANCTITY OF MARRIAGE PREVENTS VICTIMS FROM LEAVING – IT IS RATIONAL FROM THEIR PERSPECTIVE –

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 272

Some women are coerced into remaining within abusive relationships by batterers who threaten to commit suicide if the relationship is terminated.²⁵⁷ The victim's feelings of responsibility for the batterer's well-being may defeat her strong desire to protect herself by leaving the abusive relationship. Opposition to divorce, whether because of a high valuation of the marital bond²⁵⁸ or religious commitment,²⁵⁹ presents an additional hurdle for married battered women.

BATTERED WOMAN SYNDROME, BATTERED PERSON SYNDROME, AND DOMESTIC ABUSE SYNDROME

SUMMARY OF BATTERED WOMAN SYNDROME

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

To briefly summarize this model, Walker's cycle of violence consists of a three-part pattern of a battering relationship explaining why some battered women stay with their abusers. In the first, tension- building phase, the woman is not severely abused, although the batterer begins to express hostility towards her. ² In the second, acute- battering phase, "[t]he batterer typically unleashes a barrage of verbal and physical aggression that can leave the woman severely shaken and injured. ^{5 3} Finally, in the phase of loving contrition, the batterer may profusely apologize and even assist the injured woman with her injuries. Promises of a change in the relationship and gifts may also follow the abuse. This transformation of the abuser back into a loving partner "provides the positive reinforcement for remaining in the relationship."⁵⁴ As the relationship continues, however, the cycle of violence continues, with an increase of the tension- building phase and a decrease in the loving contrition phase.⁵⁵

SUMMARY OF LEARNED HELPLESSNESS

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

Learned helplessness is a psychological "paralysis" that battered women experience that contributes to keeping them in abusive relationships.^{5 6} It is a psychosocial learning, theory,⁵⁷ whereby women, after repeated abuse, come to believe that they cannot control the abusive situation: "Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless.'" ^{5 8} A battered woman's cognitive perceptions and motivation to act are altered: Repeated batterings ... diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success [in the relationship] is changed. She does not believe her response will result in a favorable outcome, whether or not it might.... She cannot think of alternatives. She says: "I am incapable and too stupid to learn how to change things."⁵

**BATTERED WOMANS SYNDROME DESCRIBES A PSYCHOLOGICAL CYCLE
EXPERIENCED BY VICTIMS OF ABUSE WHICH MAKES THEM FEEL THEY CANNOT
ESCAPE ABUSIVE RELATIONSHIPS**

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT:
KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory
L.J. 769, p. 775-776

Battered Woman Syndrome n51 describes the psychological effects and behavioral reactions exhibited by victims of ongoing domestic abuse. n52 Since Lenore Walker introduced the theory in 1979, n53 battered defendants have relied [*776] on BWS evidence to explain why their beliefs and actions could be considered reasonable in the context of a self-defense claim. n54 The syndrome draws on the theory of the cycle of violence in battering relationships, explaining that the battering is neither random nor constant, but rather it occurs in repetitive cyclical phases. n55 This cycle leads the battered woman to develop a sense of helplessness in which she feels powerless to change the situation because she can neither control nor predict the next outbreak of violence. n56 Walker hypothesized that such "learned helplessness" n57 would prevent a battered woman from perceiving or acting on opportunities to escape the violent relationship. n58

Psychologically, BWS may apply when a woman has been abused at least twice and exhibits a cluster of symptoms such as low self-esteem, self-blame, anxiety, depression, and despair. n59 The syndrome explains that a battered woman stays in an abusive relationship as a result of these feelings of helplessness and fear. n60 Since a woman suffering from BWS feels she cannot leave the relationship, she may come to believe that using deadly force is her only option for escape. n61

**WITHOUT THE ABILITY TO PRESENT EVIDENCE ABOUT DOMESTIC ABUSE SYNDROME,
VICTIMS ARE UNABLE TO DEMONSTRATE THAT THEIR USE OF LETHAL FORCE WAS
REASONABLE UNDER THE CIRCUMSTANCES**

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 76

When victims of domestic abuse are charged with the murder of their abusers, they frequently claim that they acted in selfdefense. Attorneys for these victims of domestic abuse ask courts to admit expert testimony regarding various "syndromes" to describe the devastating psychological impact of a lifetime of severe physical, sexual and psychological violence, as part of the self-defense plea. These various syndromes, detailed below, are referred to collectively in this article as "domestic abuse syndrome" (or DAS) whether the victim is a battered woman or a battered child. Without the opportunity to present this expert testimony, victims of domestic abuse syndrome will not be able to demonstrate to the jury the reasonableness of their perceptions of imminent danger or the concomitant reasonableness of their use of lethal force to defend themselves. Unless all victims of domestic abuse syndrome are able to present this evidence, it is likely that their already broken lives will be completely shattered by a murder conviction, and they will once again find themselves trapped with no ability to escape; only this time it will be in a prison cell.

**BATTERED WOMAN SYNDROME IS ACCEPTED TO VARYING DEGREES AS PART OF
SELF-DEFENSE LAW IN VIRTUALLY EVERY AMERICAN JURISDICTION**

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 417

Today the concept would not warrant such publicity, in part because of national legal reforms that have focused on integrating theories about BWS into legal doctrine. While not entirely uncontroversial, over the past several decades BWS has achieved acceptance among lawyers, advocates, and social-service providers. n5 Recognizing the potential for women who kill their abusers to use the BWS theory, courts and legislatures have adopted measures that support the "battered woman" or "battered spouse" defense. n6 Syndrome evidence does not justify the act, but instead supports the notion that battered women who kill their abusers may do so out of reasonable fear. n7 Every state in the country allows for the admissibility of expert testimony on battered woman syndrome and evidence on battering to varying degrees. n8 Other states provide explicit self-defense jury instructions to supplement the use of BWS or general battering evidence. n9

BEFORE RECOGNITION OF BATTERED WOMAN SYNDROME AS A PART OF SELF-DEFENSE LAW, VICTIMS WHO KILLED THEIR ABUSERS GENERALLY PLEAD INSANITY, WHICH IN TURN REFLECTS SEXIST ASSUMPTIONS

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 420-421

Before the ascendance of the BWS theory, female defendants accused of killing their abusers avoided self-defense and instead argued insanity defenses "almost automatically." n24 Twenty years ago, women typically had two options: plead temporary insanity or plead guilty to manslaughter. n25 Few could have considered such a choice viable or just. While insanity can provide a "complete" or "partial" defense depending upon the jurisdiction, a successful outcome could range from a mitigated charge resulting in [*421] incarceration to indefinite institutionalization. n26 More broadly, insanity defenses used in these circumstances played into misogynistic stereotypes and ignored the realities of women who live with domestic violence. As Robbin S. Ogle and Susan Jacobs write, psychosis theory "reflects our his-tory of stereotypes about women and a belief that femininity makes crime impossible, thus any woman committing a crime must be crazy to go so far outside her social role." n27 Insanity defenses failed to acknowledge that women who kill their abusers can do so in response to rational, competent fear.

BATTERED WOMAN'S SYNDROME EXPLAINS A VICTIM'S OMNIPRESENT FEAR OF VIOLENCE

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 421-422

In the late 1970s, Lenore Walker's BWS theory offered the opportunity for women charged with killing their abusers to pursue self-defense instead. n28 Walker identified three stages that typify violent relationships and applied them to the theory of "learned helplessness" to explain why battered women fail to escape their abusers. n29 According to the BWS model,

[t]he threat of violence [by the abuser] is a permanent and ongoing part of the battered woman's life. The question is not whether he will beat her up again but when, and not whether he will injure her again but when, and not whether he will injure her but how badly or whether he will kill her this time. n30

For those who have never experienced domestic violence, the BWS model may clarify and legitimize the impact of a battered woman's experience on her behavior by explaining how and why her perceptions of the relationship may deviate from the perceptions of an outsider.

Expert testimony on BWS became an evidentiary mechanism to advance defenses that might otherwise fail. BWS testimony functions within the existing framework of common law self-defense, not as a separate affirmative defense. n31 At common law, an actor is justified in exercising deadly force to protect herself if she, "reasonably believes that [deadly force] is necessary to prevent imminent and unlawful use of deadly force by the aggressor." n32 Generally, deadly force cannot be justified if another "nondeadly response" might have otherwise mitigated the threat, or [*422] if she used deadly force against an attack that she knew to be "nondeadly." n33 Expert testimony supports the view that the defendant took reasonable action to save her own life, or the life of her children, against the imminent threat posed by her abuser. Asserting self-defense requires the defendant to address not only the legal elements of the claim, such as "imminence" and "reasonableness," n34 but also the biases of judges and juries who may fail to appreciate the dynamics of abusive relationships. n35 At a basic level, expert testimony on BWS has functioned to help juries understand general patterns of abuse and why the defendant did not leave the situation. n36 Only then could syndrome evidence provide insight into the defendant's subjective understanding of the "imminence" of the threat she faced and enable the jury to appreciate whether the defendant also had an objectively "reasonable belief" of imminent harm. n37

MOST WOMEN DO NOT NEED BWS TO EXPLAIN THEIR SCENARIO – MOST KILL IN THE SITUATION OF IMMINENCE

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 274.

As an initial matter, few battered women who defend themselves do so under the circumstances that initially motivated the use of the battered woman syndrome as a legal theory. Despite modern perceptions fueled by well-publicized stories of battered heroines who strike back when their abusers least suspect it,²⁶⁶ cases like Judy Norman's and Joann Hennum's are not typical. One researcher has concluded that only approximately twenty percent of battered women who kill an abusive spouse do so in circumstances one would characterize as non-confrontational.²⁶⁷ Most battered women who kill their abusers do so during a pending attack or under threat of death or serious injury and, therefore, under circumstances comporting with traditional self-defense. ²⁶⁸ Accordingly, a theory designed to explain battered women's use of self-defense in non-confrontational situations is not necessary to assist most battered women who kill.

CHILDREN OF ABUSIVE FAMILIES ARE VICTIMIZED, BUT COURTS HAVE BEEN SLOWER TO RECOGNIZE DOMESTIC ABUSE SYNDROME AS A VALID DEFENSE FOR THEM

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 77

Whatever term is used, courts have been far more reluctant to allow expert testimony regarding the psychological effects of battering on children than on adults as part of a self-defense plea.²⁹ This reluctance is hard to understand since BWS (and its various iterations) and BCS of an older child are the functional and psychological equivalents of each other.³⁰ Therefore, there seems to be little basis for courts to deny battered children the right to present expert testimony regarding their abuse to help the jury understand why, like battered adults, abused children could be justified in killing their abusers based on self-defense. The same logic also supports the admission of expert testimony regarding the very similar psychological impact on children of intra-familial sexual abuse.³¹ Moreover, modern research has shown that children who are indirect victims of domestic abuse, by witnessing the physical or sexual abuse of their parent or siblings (which might be called "witness of abuse syndrome") also suffer from the same psychological effects as direct victims. ³² Although studies of the psychological effects of witnessing abuse are more limited, it seems clear that over time courts will also begin to admit expert testimony regarding this form of domestic abuse.

**COURTS FAIL TO RECOGNIZE DOMESTIC ABUSE SYNDROME FOR CHILDREN EVEN
THOUGH THE PSYCHOLOGICAL EFFECTS OF ABUSE ARE THE SAME AS FOR ADULT
WOMEN**

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 78

Although both women and children sustain the same types of abuse, suffer virtually identical psychological effects from the battering, and are often similarly impoverished, most courts still do not allow expert testimony regarding BCS as part of a child's self defense plea for parricide. Furthermore, the courts will not allow the testimony even though they do allow expert testimony regarding BWS as part of a women's self defense plea when she kills her abusive husband or boyfriend. This almost incomprehensible legal anomaly must be rectified so that all victims of DAS have an equal opportunity to present expert testimony regarding their suffering as part of a self-defense plea.

TRAUMATIC BONDING THEORY IS BOTH DIFFERENT AND PREFERABLE TO BWS -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

One study of traumatic bonding describes the "pathway into an abusive relationship" as a kind of "social trap. To the victim, the first violent incident seems to be out of character for the abuser, and the sense of optimism that often accompanies a new relationship obscures its seriousness. Strong emotional bonding begins to take place before the victim realizes that the abuse will become repetitive.⁷⁴ As the relationship continues, the intermittent abuse works to strengthen these bonds. One study explains: 'The situation of alternating aversive and pleasant conditions is an experimental paradigm within learning theory known as intermittent reinforcement/punishment, which is highly effective in producing persistent patterns of behavior that are difficult to extinguish or terminate, and which develops the strongest experimentally produced emotional bonds.'⁷⁵ Traumatic bonding theory also differs from Walker's theory in that it is not gender-specific. Instead of focusing solely on women, it applies to diverse people within battering relationships: The formation of strong emotional attachments under conditions of intermittent maltreatment is not specific to assaulted women but has been reported in a variety of studies, both experimental and observational, with both human and animal subjects. For example ... people taken hostage may subsequently show positive regard for their captors..., abused children have been found to have strong attachments to their abusing parents . . . and cult members are sometimes amazingly loyal to malevolent cult leaders. The relationship between assaulted women and their partners, then, may not be an isolated phenomenon. Rather, it might be seen as one example of what we have termed traumatic bonding-the development of strong emotional ties between two persons where one person intermittently harasses, beats, threatens, abuses, or intimidates the other.⁷⁶ Thus, intermittent abuse coupled with power differentials within a relationship may create strong emotional attachments between battered women, men, or children, and their abusers.

TRAUMATIC BONDING AND HOSTAGE THEORY ARE PREFERABLE TO BWS -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

This hostage behavior contrasts with Walker's prediction that learned helplessness, passivity, and cognitive distortions are typical responses of battered women.⁸⁸ The hostage actively decides to behave in a certain way in order to avoid harm. By contrast, many of the battered women that Walker describes become helpless and passive because they have come to believe that they cannot control their situation. They do not decide to behave in a passive manner to please their batterers, but instead react to what they believe is a hopeless situation.⁸⁹ The advantage of hostage survival strategy is that it recognizes that the behavior of the victim is an adaptive way of surviving, not a mental impairment. In other words, hostage survival strategy describes what the average, rational person would do in the same abusive situation. It better characterizes the way in which many battered people behave than does Walker's theory.⁹⁰

SELF-DEFENSE LAW

IN A MAJORITY OF JURISDICTIONS, VICTIMS WHO KILL THEIR ABUSERS WHILE THE ABUSER IS ASLEEP CANNOT RAISE A SELF-DEFENSE CLAIM

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 779-780

In a majority of jurisdictions, a battered woman who kills her sleeping abuser is not entitled to a jury instruction on self-defense. n79 The rationale used by these jurisdictions is that because the woman did not kill to repel an ongoing un-lawful attack or an imminent assault, she cannot fulfill the objective reasonableness requirement of self-defense. n80 Courts employing traditional, objective notions of self-defense generally decide as a matter of law that the "fatal blow" could not have been struck in self-defense. n81 Therefore, in most jurisdictions, as a matter of law the battered woman's actions are not classified as self-defense but as a culpable homicide like premeditated murder. n82

The Kansas Supreme Court decision of *State v. Stewart* illustrates how courts in majority jurisdictions treat battered women who kill in nonconfrontational cases. n83 In this case, a battered woman shot her abusive husband as he slept. n84 The trial court allowed testimony of the history of abuse in the marriage to help the jury determine whether the defendant reasonably perceived danger from her husband. n85 However, the Kansas Supreme Court made clear that an objective standard of reasonableness must be used when measuring a defendant's actions. n86

The court established a two-part standard for self-defense n87 that requires use of a subjective standard "to determine whether the defendant sincerely and [*780] honestly believed it necessary to kill in order to defend" herself. n88 Then, an objective standard must be used to determine whether a reasonable person in the defendant's circumstances would have perceived self-defense as necessary. n89 With this hybrid test, the court recognized that some subjectivity is appropriate in the reasonable person standard. n90 However, such "subjectivization" should be limited to certain characteristics of the battered defendant - for example, the defendant's physical size, ability to defend herself, and relevant experiences with the abuser. n91

The court went on to hold that in a nonconfrontational case such as this, the requirements of self-defense could never be met because a sleeping spouse could never pose an imminent danger to a battered woman, and thus she could never reasonably fear imminent harm. n92 Therefore, a self-defense instruction cannot be given to the jury under such circumstances. n93 Furthermore, the court believed that "to hold otherwise ... would in effect allow the execution of the abuser for past or future acts and conduct." n94 In a later Kansas case, *State v. Cramer*, the state court of appeals rejected the argument that the objective test requires the jury to consider "whether a reasonably prudent battered woman would have perceived self-defense as necessary." The court also reiterated that the jurisdiction did not recognize such a standard. n95

VICTIMS OF ABUSE HAVE A DIFFICULT TIME MAKING A TRADITIONAL SELF-DEFENSE CLAIM

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 774-775

Battered women who kill sleeping abusers face many obstacles in raising a traditional self-defense claim. n41 The objective reasonableness element of self-defense is the most problematic. n42 This requirement was originally developed to address situations where a man kills another man in a one-time, face-to-face [*775] confrontation. n43 Of course, this stereotypical scenario does not accurately reflect the realities of a battered woman's situation. n44 Generally, a battered woman must protect herself against a male abuser who is physically larger and stronger and with whom she has an ongoing or past relationship. n45 Nevertheless, under traditional self-defense law, a battered woman defendant who kills in a nonconfrontational situation could not have acted as a "reasonable person" since there was no obvious, immediate threat. n46 Accordingly, a majority of courts have found, as a matter of law, that a battered woman's use of deadly force against her sleeping abuser can never be objectively reasonable. n47

Self-defense law also requires that a defendant kill only in response to a threatened harm that is immediately going to occur. Otherwise, the self-defense claim is negated, and a jury is not given a self-defense instruction. n48 Battered women defendants who kill their abusers preemptively, rather than in response to an ongoing, physical attack, do not appear to meet this requirement because of the lack of imminent danger posed by a sleeping abuser. n49 Thus, when self-defense law is strictly applied, a jury will not be allowed to consider a self-defense claim in nonconfrontational cases. n50

IMMINENCY STANDARDS DO NOT CAPTURE THE NECESSITY THAT THEY MEAN TO–

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 276

Outside of the context of domestic violence, Paul Robinson and others have pointed out the unnecessary rigidity of the imminency requirement. For example, Robinson hypothesizes a kidnapping victim confined by a captor who announces that the victim will be murdered in a week. 69 The traditional requirement of an imminent threat would appear to prohibit a kidnap victim from using force against his sleeping jailer to escape, and would require him instead to wait until the use of force was imminent and then try to escape, possibly to his peril.^{27°} As Robinson notes, this cannot be the preferred decision. Arguing that the imminency requirement does not properly capture the concept of necessity, Robinson argues that the proper inquiry should be the actor's need to act in defense, not the imminence of the threat.²⁷¹

**IMMINENT THREAT REQUIREMENTS ARE SUPPOSED TO PROTECT FROM VIGILANTISM,
BUT NECESSITY REQUIREMENTS DO THIS BETTER–**

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 279

Advocates of the imminency requirement argue that to permit the use of force absent an imminent threat of harm is to encourage vigilantism.²⁸¹ For example, they argue that, without the imminency requirement, actors would be permitted to engage in "self-help" even when there was sufficient time to seek police assistance.²⁸² This argument, however, presumes that the use of force in a non- confrontational situation is always unnecessary. Because the requirement of imminency is an imperfect proxy to ensure that a defendant's use of force is necessary, a better standard would require that the use of force be necessary. Requiring that the defendant have a reasonable belief that the use of force was necessary for self-protection²⁸³ avoids by definition the extension of the defense to unnecessary and therefore unjustified uses of force.²⁸⁴ And, although in most situations, the avoided threat would need to be imminent in order for self-protection to be necessary, Robinson's hypothetical kidnap victim demonstrates that the standard of necessity can be met even when imminence is absent. The battered woman syndrome theory may permit an end-run around the imminency requirement for domestic violence victims, but it does not remedy the underlying formal doctrinal problem. As one court astutely noted, the current standard's requirement of an imminent threat-even in conjunction with the battered woman syndrome theory-renders the defense inapplicable when a battered woman who faces no imminent threat reasonably concludes that homicide or suicide are her only possible long-term means of escaping an abusive relationship.²⁸⁵

THE RATIONAL ACTOR MODEL JUSTIFIES VICTIMS OF REPEATED DOMESTIC VIOLENCE TO USE DEADLY FORCE–

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 282

Combined with the rational actor approach to understanding the continuation of domestic violence relationships, a necessity standard for self-defense would permit some victims of domestic violence to claim self-defense even in non-confrontational situations. For example, consider a woman who remained in a violent domestic relationship because she tried multiple times to leave only to be tracked down, beaten, and dragged back home, a phenomenon so common that Martha Mahoney has coined it "separation assault."²⁹⁰ Suppose, in addition, that after the most recent and most aggravated separation assault, the batterer stated that if she ever tried to leave again, he would track her down and this time kill her, himself, and their children. If the woman were to kill her husband in his sleep, a necessity-based theory of justification would permit the woman to present a claim of self-defense for jury decision.²⁹¹

MANY VICTIMS WHO KILL THEIR ABUSERS IN THEIR SLEEP RECEIVE EXECUTIVE CLEMENCY, SUGGESTING WIDESPREAD DISSATISFACTION WITH THE APPROACH OF MOST JURISDICTIONS TO SELF-DEFENSE IN THESE CASES

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 784-785

Since most jurisdictions do not allow battered women who kill in nonconfrontational situations to successfully plead self-defense, it is not surprising that a large number of clemencies have been granted to battered women who were denied the opportunity to present evidence of BWS at trial or were unable to get a jury instruction on self-defense. n124 The "clemency movement" n125 for battered women prisoners first gained recognition in December 1990, when Ohio Governor Richard Celeste issued pardons to twenty-five battered women convicted of killing or assaulting their batterers. n126 Shortly thereafter, Governor William Schaefer of Maryland granted clemency to eight battered women incarcerated for killing their abusers. n127 The governors of several other states, including Colorado, California, Illinois, and Florida, followed suit by granting clemency to battered women convicted of [*785] killing their abusers. n128 These events not only suggest a widespread recognition of the problems faced by battered women charged with homicide, but also reveal deep dissatisfaction with the current majority approach. n129

JURY NULLIFICATION IN CASES WHERE VICTIMS KILL THEIR ABUSERS IN A NON-CONFRONTATIONAL SETTING SUGGEST INCONSISTENCY BETWEEN CURRENT LEGAL APPROACHES AND SOCIAL NORMS

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 785

In a homicide case with a battered woman defendant, jurors may be presented with a choice between two extreme outcomes: convict the woman of murder or completely acquit her on self-defense grounds. n130 Self-defense is a complete defense, n131 but if a battered woman has not technically met the requirements of the defense, she risks being convicted as an intentional killer. n132 Nevertheless, jurors and society may feel that even if the battered woman's actions were objectively unreasonable, they were understandable, and thus the jurors may be unwilling to convict her of a culpable intentional homicide. n133

Through jury nullification, juries have the ability to acquit battered women defendants or convict them of lesser charges - even if the law technically requires a murder conviction. n134 Jury nullification occurs when jurors refuse to follow the law and instead reach a result that is in accord with their own feelings of justice. n135 When a jury nullifies evidentiary standards, it sends a message that it is unwilling to impose the outcome dictated by current law. n136

[*786] In battered women cases, juries sometimes do acquit defendants who have not established the legal re-quirements of self-defense. n137 Nullification in those instances indicates that the current law is in tension with societal views and sentiments. n138 As a result, jury nullification lends even more support to the claim that the current majority approach of using, but then denying, self-defense for battered women is problematic.

THE PROVOCATION DEFENSE IN AMERICAN LAW IS CURRENTLY INADEQUATE FOR VICTIMS WHO KILL THEIR ABUSERS IN A NON-CONFRONTATIONAL SITUATION

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 799-801

Battered women who kill in nonconfrontational situations usually have great difficulty raising a traditional provocation defense. n240 Just like self-defense, provocation was created with male interactions and reactions in mind; as such, the partial defense was developed to deal with situations in which a man kills as a result of being provoked by some act, such as a wife's infidelity. n241 Current provocation law is based on the notion that an ordinary person may lose self-control when faced with adequate provocation. n242 The American Law Institute has observed that this partial defense is basically a "concession to human weakness," n243 recognizing that a person acting out of passion is less able to control her actions and is less blameworthy than a person [*800] who kills in a normal state of mind. n244 Therefore, the defense reduces intentional homicide to voluntary manslaughter. n245

At common law, a provocation defense requires the actor to act (1) in the sudden heat of passion, (2) as a result of adequate provocation, and (3) without a reasonable opportunity to cool off. n246 For a battered woman, the primary difficulty with using a provocation defense in its current form is the sudden "heat of passion" element, which does not allow for a "cooling off" period. n247 This element requires the killing to occur immediately or soon after the provoking act. n248 If a reasonable person would have cooled off in the time that elapsed between the provocation and the fatal act, the "suddenness" requirement fails. n249 The battered woman who kills a sleeping abuser is usually unable to meet such a requirement because of the very fact that she killed in a nonconfrontational situation instead of immediately after some provoking act. n250

Current provocation laws fail to take into account the complexities of a battered woman's situation. Battered women usually kill their batterers out of an accumulation of fear and despair rather than just anger. n251 However, the primary emotion associated with "heat of passion" is anger or rage - the typical male reaction - and only some jurisdictions consistently include fear in their definition of "heat of passion." n252 Thus, while courts might recognize [*801] that fear is an emotion that is capable of inducing "heat of passion," such language may disadvantage battered women who kill their batterers out of fear or desperation. n253

VICTIMS CAN ACCURATELY PREDICT BATTERERS' FUTURE BEHAVIOR -

Laurie Kohn. [Associate Professor and Co-Director of the Domestic Violence Clinic at Georgetown University Law Center]. *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*. *NYU Review of Law & Social Change* – Volume 32, 191.

An effective system response must allow for victim participation. While mandatory interventions represent good faith efforts to address domestic violence, they do not deal with the nuances of this complex social and legal problem. Research has shown that we cannot effectively safeguard victim safety if we continue to exclude victims from our interventions. First, as discussed above, studies have failed to prove that mandatory interventions that exclude victim input enhance victim safety.²⁴³ Instead, they may place victims in greater jeopardy of re-abuse. Second, research has illustrated that victims are well positioned to predict batterers' future behavior.²⁴⁴ A recent eighteen-month study of 406 domestic violence victims found that victim self-assessments of risks were accurate for about 66 percent of the sample.²⁴⁵ This research was highly consistent with earlier studies finding between 63 percent and 74 percent.²⁴⁶ In contrast, a recent study illustrated that outside parties, such as clinicians treating batterers, are not effective in predicting re-assault. ²⁴⁷ Further, empirical predictive tools for interpersonal violence risk assessment are also flawed and, with some exceptions, ²⁴⁸ are often not sufficient predictors of future violence. Therefore, victim voices are vital to assessing the safety implications of a criminal case or the continued imposition of a protection order.²⁴

DOMESTIC ABUSE IN HOMOSEXUAL RELATIONSHIPS

GAY VICTIMS ARE PARTICULARLY SUSCEPTIBLE TO SELF-DEFENSE LAWS THAT REINFORCE MISCONCEPTIONS ABOUT FAIR FIGHTS -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

The "boxing ring" myth holds that when two gay men fight it is a fair fight between equals.²⁰ This idea ignores the obvious physical disparities that exist among men, the fact that both men are not equally willing to be violent, and the element of psychological abuse in battering relationships.²¹ These factors combine to create a power imbalance. A similar myth is the cliché that "boys will be boys"- meaning it is normal for males to fight.²² Domestic violence should never be perceived as normal, and such attitudes contribute to the unfortunate current underreporting of gay domestic violence.

IT IS A MYTH THAT IT IS EASIER FOR GAY VICTIMS TO LEAVE THEIR ABUSERS -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

It is also a myth that it is easier for a gay male victim to leave his abuser than it is for a battered woman: This myth is based on many false assumptions and prejudices about gay men and their love relationships, such as the myth that gay men flit from lover to lover, or that gay male relationships are sexual but not emotional. Gay couples are as intertwined and involved in each other's lives as straight couples. Similar to many straight battered women, many battered gay men are raising children, are financially dependent on their violent partners, and feel that a failed relationship represents their failure as a person.¹²⁵ Furthermore, many gay men are alienated from their families due to their families' homophobia, which makes leaving the relationship more difficult. Heterosexual battered women do not face this unique prejudice. Gay men may also legitimately fear prejudice and homophobia from law enforcement agencies if they seek help in leaving.¹²⁶

IMPACT OF DOMESTIC VIOLENCE

CHILDREN EXPERIENCE VARIOUS KINDS OF ABUSE WITH MYRIAD NEGATIVE PSYCHOLOGICAL CONSEQUENCES

Nancy Wright [Associate Prof. of Law, Santa Clara Law], "Voice for the Voiceless: The Case for Adopting the "Domestic Abuse Syndrome "for Self Defense Purposes for All Victims of Domestic Violence Who Kill Their Abusers," 4 Crim. L. Brief 76 (2009), p. 79-80

If victims of battered child's syndrome survive and remain in the home of the abusive parent, the battering almost always continues. As they grow older, battered children suffer the same kind of injuries from their parents that an abused woman suffers at the hands of her abusive spouse; however, domestic abuse syndrome is relevant in both cases. For example, in *In re Appeal in Maricopa County*, the Arizona Appellate Court described how, like an adult victim of DAS, the typical battered child, is "subjected to horrific abuse, more than episodic or occasional, sustained repetitive terrorizing abuse over long periods of time.' 87 In Maricopa County, both twelve year old K.T. and her younger sister suffered "terrible and degrading physical and emotional abuse" throughout their lives until K.T. ultimately killed their abusive mother.⁸⁸ Moreover, like Nelly Rodriguez, who was raped by her live-in boyfriend, child victims of DAS also suffer from intra-familial sexual abuse. Almost one-half (46%) of all child rape is incestuous and 85% of all child sexual abuse is committed by a family member, relative or care provider.⁸⁹ Children who suffer from DAS, like K.T. and her sister, are at increased risk of having "delays in reaching developmental milestones," often refuse "to attend school," and suffer from "separation anxiety disorders."⁹⁰ They are also at increased risk of developing health and behavioral problems as adults, including "smoking, alcoholism, drug abuse, eating disorders, severe obesity, depression, suicide, sexual promiscuity, and certain chronic dis- eases."⁹¹ In addition, they may suffer from "aggressive behaviors," criminal activity, post-traumatic stress disorder, personality disorders, schizophrenia, and may inflict abuse on their own children and spouse. 9 2

In addition to physical or sexual abuse, many child victims of DAS also suffer from "psychological traumas", including "sensory overload with light, sound, stench, aversive taste, itching, pain, or prevention of sleep." ⁹³ For example, in *Brodie v Summit County Children's Services Board*, the father of eleven-year-old Tara Cook imprisoned his daughter in stairwells and closets and shackled her to the bathroom sink for almost one month, in addition to beating, burning, and starving her.⁹⁴ In *M.A. v. J.A.* the parents of a twelve-year-old boy confined the child in a three by four foot dog cage for two hours each week, during a period of two months, because he was expelled from his religion class.⁹⁵

A2 PACIFISM

PACIFISM FAILS TO ACCOUNT FOR THE FACT THAT SOMETIMES VIOLENCE IS REQUIRED TO RESPECT OUR OWN STATUS AS HUMAN BEINGS

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 523

If the pacifist's intent is to acknowledge through his attitudes and actions the other person's status as a fellow creature, the problem is that violence, and even killing, are at times a means of acknowledging this as well, a way of bridging the distance between oneself and another person, a way of acknowledging one's own status as a person. This is one of the underlying themes of Hegel's account of conflict in the masterslave dialectic, and the important truth it contains should not be lost in its seeming glorification of conflict. That the refusal to allow others to treat one as an object is an important step to defining one's own integrity is a point well understood by revolutionary theorists such as Fannon. It is a point apparently lost to pacifists like Gandhi, who suggested that the Jews in the Warsaw Ghetto would have made the superior moral statement by committing collective suicide, since their resistance proved futile anyway. What strikes us as positively bizarre in the pacifist's suggestion, for example, that we not defend our loved ones when attacked is not the fact that someone's rights might be abused by our refusal to so act. Our real concern is what the refusal to intervene would express about our relationships and ourselves, for one of the ways we acknowledge the importance of a relationship is through our willingness to take such actions, and that is why the problem in such cases is how we can bring ourselves not to intervene (how is passivity possible).

NEGATIVE EVIDENCE

A2 SELF-DEFENSE

THE MORAL FORFEITURE THEORY OF SELF-DEFENSE CANNOT EXPLAIN THE BASIC LIMITS OF SELF-DEFENSE

David Wasserman [Director of Research at the Center for Ethics at Yeshiva University], "Justifying Self-Defense," *Philosophy & Public Affairs*, Vol. 16, No. 4 (Autumn, 1987), pp. 356-378, 361

One obvious suggestion is that the aggressor forfeits his right to life. There are serious and well-recognized drawbacks to a forfeiture approach, however. In a representative critique, Fletcher argues that it falsely likens the aggressor to an outlaw, whose life may be taken by anyone for any reason, and that it cannot account for the fact that the aggressor's life is "forfeit" only during the assault, only to those responding defensively to it, and only to the force necessary to repel it.³ Fletcher concludes that any notion of forfeiture embodying these qualifications is hardly worth the name.

THE THEORY OF LESSER HARM CANNOT JUSTIFY SELF-DEFENSE

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1003-1004

Some scholars justify self-defense on modified consequentialist grounds as a choice of lesser harmful results.¹¹ Self-defense, they argue, should be recognized as an exception to the general prohibition on the use of force because it brings about less harm than following the general prohibition. This evaluation is based on a comparison of the interests of the defender and the aggressor, modified by taking into account the aggressor's responsibility for the situation. A pure consequentialist account, which simply compares the interests of the two sides, fails to justify the preference for the defender's life in cases where there is a similar number of aggressors and defenders. This is so because the lives of the aggressor and the defender have equal value. The introduction of a guilt-based modification, however, tips the balance in favor of the defender: the aggressor is morally at fault because he brought about the need to use force. If moral fault is a reason for devaluing the aggressor's interests, the interests of the defender are more worthy of protection than those of the aggressor.

This modification attracts two objections. First, it contradicts the widely-held Anglo-American principle that all lives have equal value regardless of their moral worth. Second, the argument depends on the collateral consequences of self-defense. If we accept that moral worth may change the value of people's lives, then there is no reason why the general moral worth of both aggressors and defenders should not be taken into account. For example, a defender may be a known violent criminal and his aggressor a brilliant scientist on the verge of curing HIV. Similarly, if the aggressor's life retains any value, then the balance between the aggressor and the defender depends on the number of aggressors and defenders. Yet our common understanding is that these factors—the number and the identities of aggressors and defenders—ought not affect the right of self-defense. The law is indifferent to the specific consequences of self-defense.¹²

RULE UTILITARIANISM CANNOT SAVE THE LESSER HARM THEORY OF SELF-DEFENSE

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1004-1005

To address these objections, some theorists adopt a position that tracks the shift from act utilitarianism to rule utilitarianism. Instead of focusing on the consequences of specific acts of self-defense, they focus on the overall beneficial consequences of recognizing the right to self-defense. According to this approach, the de-fender's right to self-defense can be justified by "the anxiety and insecurity that would result if one's life could be taken at any time, and for any reason, and also because of the deterrence it provides against aggressive acts."¹³ But even this approach is subject to significant criticism for being both too strong and too weak. As Professor Wasserman explains, the account is too strong because taking deterrence seriously may permit defenders to use force in self-defense beyond the commonly recognized limits of necessity and proportionality. At the same time, the argument is too weak because the defender's right depends on the marginal gain achieved by granting this right. Permitting the use of defensive force because of a moral justification based on its contribution to general deterrence would exclude situations in which the defensive response does not actually contribute to the deterrence of others. For example, if no one will ever know about the act, permitting the use of defensive force will not contribute to general deterrence. This rationale may even require withholding permission if it would bring about further harm (a blood-feud, for example).¹⁴

THE CONCEPT OF MORAL FORFEITURE IS INSUFFICIENT TO JUSTIFY KILLING IN SELF-DEFENSE

Shlomit Wallerstein [Lecturer, St. Peter's College, Oxford University], "JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES," *Virginia Law Review*, Vol. 91 (2005), p. 1016-1017

The idea of forfeiting one's right to life in the context of self-defense attracts two objections. First, if all people have an unconditional and unspecified right not to be killed, it is difficult to see how one could forfeit that right by virtue of one's actions. Second, forfeiture is inconsistent with the notion of a right in rem not to be killed.⁴⁸ The concept of forfeiture usually means a permanent forfeiture.⁴⁹ If we accept the concept of forfeiture, and unless we are willing to recognize an idea of temporary forfeiture, then once a person acts in a way that forfeits his right not to be killed, he can-not regain his right when he stops acting in a threatening manner. This conclusion is contrary to our understanding that a person who does not pose a threat should not be killed, even if his death would be useful for some other purpose.⁵⁰ Furthermore, a right may be forfeited even without the knowledge of its owner, and it may be forfeited with respect to the entire world. In self-defense, by contrast, a third party who does not know of an aggressor's attack—and thus does not know that the aggressor has forfeited his right not to be killed—is not permitted to attack the aggressor for his own reasons.⁵¹

KADISH'S CLAIM THAT THE RIGHT TO SELF-DEFENSE IS ABOUT THE RELATIONSHIP BETWEEN AN INDIVIDUAL AND THE STATE IS NOT SUFFICIENT TO JUSTIFY SELF-DEFENSE

Kimberly Kessler Ferzan [Professor of Law & Co-Director, Institute for Law and Philosophy, Rutgers University School of Law-Camden], "Self-Defense and the State," *OHIO STATE JOURNAL OF CRIMINAL LAW* 5:999 (2008), p. 455

Unable to explain how a defender might be entitled to kill another, Kadish creates a different relationship by substituting one of the parties. He claims that the right to self-defense is a relationship between the defender and the state. This shift—from defender/aggressor to defender/state—is unsatisfactory for three reasons.

First, shifting from an aggressor/defender relationship to a defender/state does not tell us about the content of the right to self-defense. Substituting one of the parties does not explain the underlying content of the relationship. That is, saying that self-defense is a claim-right against the state instead of against the aggressor tells us nothing about why the defender may kill to preserve his life.³⁵

Second, even if identifying a different party might, in some instances, cast a different light on the nature of the right, it does not do so here. Kadish's "right to resist aggression" remains undefined.³⁶ The most that Kadish has told us is that the state cannot punish us for this killing. But that does not answer any of the questions that Kadish sought to answer. Whatever the label, why is it that we should understand innocent aggressors as aggressing? Under what theory did the state grant us the right to kill a toddler pointing a gun at us?³⁷

Third, even supposing there is an aspect of self-defense that should be understood as a citizen/state relationship, it simply cannot be the case that the aggressor drops out of the picture completely. Even if the state allows us to resist the culpable aggressor, does a victim wrong the aggressor by killing him?³⁸ In other instances, the state grants us a justification for taking the lesser evil, yet still requires us to compensate the victim of our actions.³⁹ However, there is something different about the relationship between the defender and the aggressor that leads to the conclusion that the defender need not compensate the culpable aggressor. But how are we to understand this relationship between the victim and the aggressor if the aggressor simply drops out of the picture on Kadish's account?

MORAL FORFEITURE CANNOT EXPLAIN THE SCOPE OF THE RIGHT TO SELF-DEFENSE

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 511

Those who hold that Aggressor forfeits his right to live by his actions must give an account of why his actions have caused such a forfeiture. Presumably it is the criminal nature of his act which strips Aggressor of his right-but what is the crime which Aggressor commits? As Judith Jarvis Thomson has pointed out, Aggressor has only attempted to take someone's life, he has not in fact committed murder.² To punish someone with loss of life for merely attempting to take the life of another would be a harsh code indeed. Thus Thomson: "I doubt that those who think of death as an acceptable penalty (for murder-CR) would think it an acceptable penalty for an (unsuccessful) attempt on the life of another, and it will be remembered that an (unsuccessful) attempt is all that Aggressor is guilty of."³

Aggressor need not even be guilty of that. Consider the case of a feigned threat: Aggressor tells you that if he sees you with his wife again, he will blow your brains out. Caught in an indiscretion, you observe him advancing toward you, gun on shoulder. In fact, his gun is a fake-it is a realistic toy that belongs to his son-and his intent is only to scare you. Believing your life in danger, with good reason, you are legally permitted to kill in self-defense. But Aggressor's "crime" here-which presumably forfeits his right to live-is certainly a minor one (feigning a threat). There are further instances of permissible killing where Aggressor need not be guilty of any crime at all. Suppose I administer a mind-controlling drug to Janet and order her to kill you. Seeing the threat, you kill Janet in self-defense. Those who would permit such an action by appealing to Aggressor's forfeit of her right to live must tell us what in Janet's behavior warrants such a forfeit. She has intended no evil, and though her actions threaten your well-being she is not responsible for them. Even more problematic than this case of innocent threat is what may be called a mistaken threat. One may permissibly kill in self-defense if one has good grounds for believing that it is necessary to save one's life against unlawful attack; as the case of feigned threat illustrated, it is the reasonableness of the belief in the threat, and not the reality of the threat itself, which is important. One could imagine a case, then, where through coincidence or happenstance "Victim" is given perfectly good grounds for believing that another's actions constitute a threat to his life, when in fact there is no threat or even feigned threat on "Aggressor's" part. "Aggressor" may be no aggressor at all, but the reasonableness of "Victim's" mistake may render his unnecessary killing of "Aggressor" permissible.

EVEN IF AN AGGRESSOR FORFEITS HIS RIGHT TO LIFE, IT DOES NOT FOLLOW THAT THE VICTIM IS THE AGENT WHICH MAY ACT ON THAT FORFEITURE

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 511

Regardless of the kind of threat to Victim, Victim cannot kill in selfdefense if he can avoid the threat by retreating. Suppose that Aggressor, threatens Victim,, who because he is lame cannot escape over the wall behind him. Aggressor2, in exactly the same circumstances, threatens Victim2, who is a champion high jumper and can easily vault the wall. In the morally relevant respects the two aggressors would seem to be guilty of the same thing, hence if there is a forfeit of right in the former case there would seem to be a forfeit in the latter case as well. But only in the former case can Victim permissibly kill: the forfeit of the right to life, in other words, need not imply the right to kill on another's part. Even when it does, it must still be established where that right lies. If a condemned murderer has forfeited his right to live, it does not follow that just anyone can kill him. Once the right to kill him is established it must still be shown who possesses that right, in this case the power to execute.

THE "CAUSER-PAYS" PRINCIPLE IS NOT SUFFICIENT TO JUSTIFY KILLING IN SELF-DEFENSE

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 516-517

A basic principle of the law of torts is that, where a loss has been incurred, between two innocents the causer pays. Thus where Jones has mistakenly damaged Smith's property, Jones must reimburse Smith and absorb the loss himself because his actions have caused it, even though there is no criminal fault or negligence on his part. Now applying this principle to the case of self-defense would seem to justify Victim's sacrificing Aggressor's life rather than his own, since Aggressor's actions are ultimately responsible for causing a loss of life. Note that the principle at work here does not presume any prior forfeit of rights and is broad enough to justify Victim's defensive actions whether or not the threat against him is innocent or malicious.⁸

That Victim's actions are supported by a basic principle of our civil law, one which has its intuitive attractions, seems a strong count in their favor. But obviously the "causer-pays" principle cannot be taken at face value, and any full account of this justification would have to consider the objections to which that principle is susceptible. Those objections cannot be rehearsed here, but one point is worth noting. The value of the causer-pays principle, for justifying self-defense at least, is that it suspends questions of fault. The problem is that, having set aside such matters, it is difficult to imagine what positive grounds could be given for this principle. An obvious consideration might be utility. But in the case of property damage, a famous theorem of Ronald Coase suggests that social welfare is not affected by the acceptance or rejection of the causerpays principle.⁹ And certainly in the case of self-defense involving an innocent aggressor, it is not obvious at all that social welfare is enhanced by having Aggressor rather than Victim lose his life.

NARROW INTERPRETATIONS OF SELF DEFENSE PREFERABLE

SELF-DEFENSE IS TRADITIONALLY A VERY NARROW CONCEPT, WITH SOME EXCEPTIONS

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law], "FEMINIST (OR "FEMINIST") REFORM OF SELF-DEFENSE LAW: SOME CRITICAL REFLECTIONS," 93 Marq. L. Rev. 1475 (2010)

When is deadly force justifiable? In general, traditional self-defense law provides that such force may be used only by an innocent person against an aggressor if the non-aggressor reasonably believes (even if she is wrong) that deadly force is necessary to repel an imminent unlawful deadly attack.⁷ Under this doctrine, if the innocent person can reasonably avoid death using no force at all, she must use the nonviolent route rather than kill. Similarly, if she can reasonably avoid death by using nondeadly force, then she must use this lesser degree of force. And she must use deadly force only if the unlawful deadly attack reasonably appears to be imminent; that is, it will occur almost immediately. One message, therefore, of traditional self-defense law is that it generally values human life.⁸ Even the bad guy, the aggressor, should not be killed unless there reasonably appears to be no realistic option. Another reason (one to which I will return later) for the narrow rules of selfdefense is the belief that use of deadly force should, whenever possible, be reserved to the state because, as Hale put it in the seventeenth century, —private persons are not trusted to take capital revenge one of another.¹⁹

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

ALLOWING 'PRE-EMPTIVE' SELF-DEFENSE WITHOUT THE REQUIREMENT THAT THE DANGER BE IMMEDIATE ALLOWS THE USE OF DEADLY FORCE WHEN IT IS NOT A LAST RESORT

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
"FEMINIST (OR "FEMINIST") REFORM OF SELF-DEFENSE LAW: SOME CRITICAL REFLECTIONS," 93 Marq. L. Rev. 1475 (2010)

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

I oppose this. First, one benefit of a strict temporal requirement is that it considerably reduces the risk of false positive killings—that is, when a person kills based on an incorrect belief that such force was necessary. When an attack is underway, the risk of a false positive is virtually non-existent. In the absence of any temporal limitation, however, false positives will increase dramatically. As Professor Albert Alschuler has nicely put it in a different context, but which applies here as well, —even funnel clouds sometimes turn around, and human beings sometimes defy predictions. They turn around as well.¶50 Indeed, in view of meteorological advances, I would submit that the general path of funnel clouds is more predictable than the free-willed actions of human beings. Lest we be too pessimistic, some abusers do turn their lives around. Many of them are alcoholics; when they stop drinking, violence ends. Thus, what seems necessary now—killing the batterer—may turn out to be unnecessary. Or, the abuser may find religion and turn his life around. Or, the abuser might abandon his family and no longer represent a threat to the spouse. Yes, he might represent a threat to someone else, but self-defense is just that—the right to use force to protect oneself, not to execute dangerous people. One can list other possibilities, albeit far more remote: Maybe the abuser, if allowed to survive, will have a stroke and become an invalid or, for that matter, be hit by a truck and killed. The point is just this: Once we dispense with a temporal requirement, we will find ourselves justifying the use of deadly force that would have proven unnecessary—but by killing the abuser today, we will never know if this was one of the false positive cases. And, if we abolish the temporal requirement, the newly expanded defense will presumably be available to all defendants, not just domestic violence victims. A self-defense rule with no temporal limitation, therefore, strikes me as quite troubling.

REMOVING THE IMMEDIACY REQUIREMENT FOR SELF-DEFENSE ALLOWS IT TO BECOME A VEHICLE FOR SIMPLE REVENGE

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law], "FEMINIST (OR "FEMINIST") REFORM OF SELF-DEFENSE LAW: SOME CRITICAL REFLECTIONS," 93 Marq. L. Rev. 1475 (2010)

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

This is the moral forfeiture theory of self-defense.⁵³ As Hugo Bedeau has put the forfeiture theory, —[the wrongdoer] no longer merits our consideration, any more than an insect or a stone does.¶54 I don't deny that some people, even many, buy into this principle, but I prefer a society that does not treat humans as no better than noxious insects. We shouldn't let this be the basis for self-defense law. And, please notice, if we really accept the moral forfeiture doctrine, here is one effect: In Colorado, an abused woman once hired a contract killer to kill her husband; after the killing, she and he sought to justify the killing on the ground of self-defense (and defense-of-other).⁵⁵ If the abuser forfeits his right to life, then it shouldn't matter who kills the noxious insect. Abandonment of a temporal requirement invites us, sub silentio, to go down a very, very ugly road.

**REMOVING THE IMMEDIACY REQUIREMENT FROM SELF-DEFENSE BLURS THE LINE
BETWEEN AGGRESSOR AND DEFENDER**

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
“FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL
REFLECTIONS,” 93 Marq. L. Rev. 1475 (2010)

Two other reasons exist for rejecting this proposal. First, as Professor Kim Ferzan writes, “[s]elf-defense is uniquely justified by the fact that the defender is responding to aggression. Imminence, far from simply establishing necessity, is conceptually tied to self-defense by staking out the type of threats that constitute aggression.¹⁵⁶ In the absence of imminence there is no aggression, and thus—we blur the distinction between offense and defense.¹⁵⁷ One need only consider the American invasion of Iraq to see that so-called—preemptive self-defense¹⁵⁸ can easily result in a false positive (that Saddam possessed—weapons of mass destruction¹⁵⁹ that would be used to attack the United States) and convert the defender into the aggressor.

ABOLISHING THE IMMEDIACY REQUIREMENT FOR SELF-DEFENSE THREATENS THE RULE OF LAW

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
“FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL
REFLECTIONS,” 93 Marq. L. Rev. 1475 (2010)

Finally, a significant temporal requirement of imminence is defensible on political theory grounds. Generally speaking, the authority to use force in society is allocated to the state, rather than to the individual citizen. As Whitley Kaufman has put it, “[t]he basic idea is that the state claims a monopoly on force, under which no individual or non-state group is permitted to resort to force without the state’s authorization.”¹⁵⁸ This requirement of authorization, which serves to control the use of violence in society, —rests on the venerable natural law principle . . . that no one should be a judge in his own case; the decision to use force against another person must be made by an objective and disinterested authority.¹⁵⁹ The exception to this rule is when —danger is present and immediate, and there is no time to resort to a central authority.¹⁶⁰ Abolition of the temporal requirement threatens this principle. One should not accept an idea merely because it is old and has survived for centuries, but one should still respect tradition enough to place a heavy burden on those who claim that we have somehow become a society that no longer can live by these venerable rules.

THE IMMINENCE REQUIREMENT FOR SELF-DEFENSE EXPRESSES THE LIMITS OF GOVERNMENT COMPETENCE, NOT A MORAL RIGHT TO IGNORE THE RULE OF LAW

George P. Fletcher [Prof. of Jurisprudence, Columbia University School of Law], "Domination in the Theory of Justification and Excuse," *University of Pittsburg Law Review*, Vol. 57: 533 (1996), p. 570

The significance of the imminence requirement in cases of self-defense bears some resemblance to the account I have given imminence in necessity cases. In the latter context, the imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgments about which of the conflicting interests should prevail. Similarly, when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary. Individuals do not cede a total monopoly of force to the state. They reserve the right when danger is imminent and otherwise unavoidable to secure their own safety against aggression.

Several implications follow from this account of the imminence requirement. First, the requirement properly falls into the domain of political rather than moral theory. The issue is the proper allocation of authority between the state and the citizen. When the requirement is not met, when individuals engage in preemptive attacks against suspected future aggressors, we fault them on political grounds. They exceed their authority as citizens; they take "the law into their own hands." Precisely because the issue is political rather than moral, the requirement must be both objective and public. There must be a signal to the community that this is an incident in which the law ceases to protect, that the individual must secure his or her own safety.

THE USE OF DEADLY FORCE IS INDEFENSIBLE IF NONVIOLENT SOLUTIONS ARE AVAILABLE – THE PREMISE OF SELF-DEFENSE IS THAT ALL LIVES MATTER -

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

But also—and this is where Judy Norman comes in—the right to protect one’s autonomy by using deadly force is limited to cases in which such an extreme response is necessary. Stemming from the common law, a core feature of self- defense law is that *the life of every person, even that of an aggressor, should not be terminated if there is a less extreme way to resolve the problem*. Can we justifiably claim that a person’s right of autonomy extends to taking a human life while that person is asleep, because of his ongoing violent conduct? And, given that we are excluding syndrome consideration from this analysis, can we justify the use of deadly force in defense of one’s autonomy if there are nonviolent solutions available? Although reasonable minds will differ on this, I submit that we should hesitate at expanding the right to kill as far as the Judy Norman cases could take us.

THE IMMINENCY REQUIREMENT PREVENTS VICTIMS FROM HAVING A BLANK CHECK TO MURDER AFTER UNREASONABLE TIME-SPANS -

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

The traditional requirement of imminency—a temporal requirement, a relative closeness in time between the aggressor’s unlawful threat and the innocent person’s defensive efforts to repel it—serves an important, life-affirming, purpose. To suggest that a battered woman should be able to kill *today* because sooner or later the batterer will inevitably kill her strikes me as unacceptable. First, it is hard to imagine that it is necessary to kill to prevent deadly force from being inflicted far down the time-line. The greater the time span between the defensive act and the predicted act being defended against, the greater are the options available to the innocent person. *Some* reasonable temporal requirement is needed.²⁴

RELAXING THE IMMINENCE AND ALTERNATIVES STANDARDS IN CASES OF DOMESTIC VIOLENCE ENHANCES THE RISK THAT DEADLY FORCE WAS UNNECESSARY -

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

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

**THERE ARE NON-FORSEEABLE EVENTS THAT CANNOT BE ACCOUNTED FOR IF WE
RELAX THE IMMINENCY REQUIREMENT – INFINITELY JUSTIFIED PREEMPTIVE FORCE
WILL UNDERMINE THE SANCTITY OF LIFE AND INNOCENCE**

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

Beyond this, there is always the possibility that some other event will intervene to render an apparent necessity to use deadly force inoperative. Maybe the batterer will have a debilitating stroke. Or, maybe, as sometimes happens, the batterer will abandon the family, thus freeing the woman from further abuse, and rendering deadly, autonomy-protecting, force unnecessary. My point, simply, is that once the law gets away from a requirement of an immediate need to use force and begins to authorize preemptive strikes, we increase the risk of repeating on an individual scale what happened in Iraq—a claimed need to invade preemptively to get rid of weapons of mass destruction that proved non-existent.²⁶ So, in summary so far, I contend that we should not justify the Judy Normans who kill their tormenters in passive circumstances. To do so unduly expands the lawful use of deadly force to a point dangerous to the community and debilitating to our belief in the general sanctity of human life. Admittedly, it is a tempting direction to go when we look at evil persons such as J.T. Norman and when we see the “solution” of execution of the sleeping abuser as a way of relieving the victim’s agony. But it strikes me as a path we should be slow to condone. And, that is especially the case when there is another theory—another potential basis—for handling the issue. And, it is to that possible new solution to which I now turn.²⁷

**RELAXING SELF-DEFENSE REQUIREMENTS FOR VICTIMS OF DOMESTIC VIOLENCE
GIVES THEM AN UNFAIR ADVANTAGE AND REMOVES OBJECTIVE STANDARDS TO
PREVENT ERROR**

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

Despite making it easier to acquit battered women defendants who kill in nonconfrontational situations, Australia's relaxation of the traditional self-defense requirements still poses problems. First, by distinguishing and separating them from other persons who kill, laws like the one in Victoria encourage the perception that battered defendants need their own separate defense.¹⁸⁴ Such a legal defense gives battered women an unfair advantage simply because they are battered women, but this is not and should not be a justification for homicide.¹⁸⁵ A "battered woman defense" is based entirely on a battered woman's perceptions and completely removes the objective standard of reasonableness, thus creating a risk of encouraging conduct that might be completely unnecessary or erroneous.¹⁸⁶ It is dangerous to adopt a model that encourages the law to stretch the traditional concepts of self-defense to accommodate only battered women.

THE ELIMINATION OF THE IMMINENCE REQUIREMENT CATEGORICALLY JUSTIFIES THE TAKING OF UNNECESSARY LIVES – IT ENDORSES MURDER AND ENCOURAGES SELF-HELP

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

Second, Australia's elimination of the imminence requirement removes an important restraint on self-defense homicides.¹⁸⁷ By relaxing the imminence requirement, Australia's approach increases the possibility that battered women who kill out of revenge or anger, rather than fear of serious bodily harm or death, will successfully claim self-defense.¹⁸⁸ While in some cases the imminence requirement may seem unjust, it remains a "crucial limitation on the right to violent self-help."¹⁸⁹ If the use of deadly force is authorized other than as a last resort, there is a greater risk that the threat is actually non-existent, and thus deadly force is unwarranted.¹⁹⁰ According to Professor Joshua Dressler, such a radical change in the law could promote a "criminal defence that categorically justifies the taking of life before it is immediately necessary."¹⁹¹ No matter how morally reprehensible the conduct of the murder victim, to justify the taking of human life unnecessarily reduces the sacredness of human life.¹⁹² Ultimately, removing the imminence requirement is not the best solution because it undermines the criminal law's goals of promoting the value of human life and discouraging self-help.

THE IMMINENCE RULE IS DISTINCT FROM THE NECESSITY RULE AND REFLECTS THE IMPOSSIBILITY THAT THE STATE ALWAYS EXERCISES ITS MONOPOLY ON VIOLENCE -

R.P. Kaufman [Department of Philosophy, University of Massachusetts Lowell.] Self-Defense, Imminence, and the Battered Woman. Summer 2007. *New Criminal Law Review: An International and Interdisciplinary Journal*. Vol 10, No. 3. UC Press. JStor.

The central thesis of this essay is that the imminence rule is independent of the necessity rule, and that it derives not from morality but from political theory. As so often, George Fletcher correctly grasps this point: "the requirement properly falls into the domain of political rather than moral theory. The issue is the proper allocation of authority between the state and the citizen."³³ Fletcher here invokes what is traditionally called the "Public Authority" restriction on the use of force. The basic idea is that the state claims a monopoly on force, under which no individual or non-state group is permitted to resort to force without the state's authorization. There is, however, one major exception to the societal monopoly on violence. Where the danger is present and immediate, and there is no time to resort to a central authority, the individual is permitted to resort to force without seeking the prior authorization of the state. Self-defense thus remains a private right for just this reason. It is the one exception to the Public Authority requirement, on the grounds that the individual cannot reasonably be expected to submit passively to self-destruction. But all preemptive force—before there is an imminent threat—and punitive or restorative force—after the threat has ceased to be imminent—belongs entirely to the authority of the state.

THE STATE MUST RESERVE THE MONOPOLY ON COERCIVE FORCE; THE ONLY JUSTIFIED EXCEPTION IS OBJECTIVE IMMINENCE -

R.P. Kaufman [Department of Philosophy, University of Massachusetts Lowell.] Self-Defense, Imminence, and the Battered Woman. Summer 2007. *New Criminal Law Review: An International and Interdisciplinary Journal*. Vol 10, No. 3. UC Press. JStor.

This particular allocation of the authority to use force is a response to the fundamental political concern of regulating and controlling the use of violence in society. The first task of government is providing security to its citizens; internal security is no less important than external security. The self-defense rules developed in order to control private violence, which posed a constant threat of internal anarchy (nor was the problem of violence limited to the "barroom" paradigm of two strangers confronting each other in a public place, as Cynthia Gillespie and other battered women advocates suggest). As Grotius and others recognized, the deeper moral and political problem is the need to ensure as far as possible the objectivity and disinterest of those who are authorized to use force. Thus Grotius declares, "it is much more conducive to the peace of society for a matter in dispute to be decided by a disinterested person, than by the partiality and prejudice of the party aggrieved."⁵³ The Public Authority criterion thus ultimately rests on the venerable natural law principle (also dating back to ancient Rome) that no one should be a judge in his own case; the decision to use force against another person must be made by an objective and disinterested authority.⁵⁴ We go to great lengths to ensure the objectivity of such decisions: independent judges, unbiased juries, strict rules of evidence and procedure, the right to appeal, etc. The use of force must be justified by an objective authority in a position to decide without bias or interest in the case.⁵⁵ Thus the state reserves the right to the use of retaliatory (punitive) force against past harm, as well as preemptive/preventive force against future threats. The single exception to this principle is where the immediacy of the threat rendered it impossible to resort to external protection, and thus licensed self-help. Even in such cases, notably, the state has always reserved the right to be the arbiter after the fact as to whether the defensive force used was justified from an impartial perspective. Note that this analysis suggests a pragmatic standard for defining the imminence restriction: a threat is imminent when there is insufficient time to enlist the aid of the authorities to protect oneself.

EXEMPTIONS FROM THE IMMINENCY STANDARD CAN ONLY BE GRANTED IN SITUATIONS WHERE THE INDIVIDUAL CAN CLAIM AN OBJECTIVE INCAPACITY TO BE PROTECTED BY THE LAW

R.P. Kaufman [Department of Philosophy, University of Massachusetts Lowell.] Self-Defense, Imminence, and the Battered Woman. Summer 2007. *New Criminal Law Review: An International and Interdisciplinary Journal*. Vol 10, No. 3. UC Press. JStor.

However, any individual or group claiming a special exemption from the societal monopoly on force must meet a very high standard indeed. No society, of course, can ever be even close to perfectly effective in preventing illegal violence and guaranteeing justice, nor is the imminence restriction premised on any such utopian ideal. The declaration of a return to a "state of nature" is an extraordinary claim, appropriate only in the most extreme and unambiguous circumstances. The classic case is the true state of nature where there is no effective state presence at all and hence no access to judicial procedure, for example, as Hugo Grotius explains, "on the seas, in a wilderness, or desert islands, or in any other place where there is no civil government."⁵⁶ More pertinent to the battered woman, however, are two other kinds of cases. First, in kidnap cases where the victim is wholly in the power of her captors, it is widely accepted that, at least in some cases, a captive can use deadly force against her captor even in the absence of an imminent threat. Second, in cases where the state systematically and deliberately denies legal protection entirely to an individual or a group (for example, black slaves in the antebellum South or Jews in Nazi Germany), there is a strong case for declaring a return to the right to private violence.⁵⁷ The question for us then is whether the situation of battered women can be considered a return to the state of nature on either of these two grounds.

BATTERED WOMEN, ALTHOUGH SUBJUGATED, DO NOT MEET THE THRESHOLD TO BE EXEMPT FORM THE IMMINENCY REQUIREMENT SINCE THE STATE IS EFFECTIVE ENOUGH TO MAINTAIN ITS MONOPOLY ON COERCIVE FORCE -

R.P. Kaufman [Department of Philosophy, University of Massachusetts Lowell.] Self-Defense, Imminence, and the Battered Woman. Summer 2007. *New Criminal Law Review: An International and Interdisciplinary Journal*. Vol 10, No. 3. UC Press. JStor.

Others have suggested that battered women should be exempted from the imminence rule on the grounds of the wholesale denial of legal protection to battered women in our society. It is of course not at all obvious who comprises this group: all women who have ever been physically struck (or suffered psychological or sexual abuse, as Lenore Walker maintains)? All abuse victims whatever, male or female? Only those women who have been subject to repeated beatings? Only those women who are unable to leave the relationship, for whatever reason? Only those who have tried to avail themselves of the authorities but been refused? But even beyond the problem of delimiting the class of those exempt from the rule, there is a deeper issue here: the analogy with cases of total and systematic exclusion (slaves, Jews in Nazi Germany) is highly questionable. Indeed, given the extraordinary attention paid to protecting battered women since the issue became prominent three decades ago—including the passage of domestic violence reform statutes in all fifty states, the federal Violence Against Women Act, statutes authorizing mandatory warrantless arrests for misdemeanor assaults in domestic violence cases, specialized domestic violence courts in some states, statutes authorizing expert testimony on “battered women’s syndrome,” mass clemencies for convicted battered women killers (including twenty-five women freed in Ohio in 1991), and even the rise of an entire new tort for battered women—it would be difficult to defend the claim that women in general, or abused women in particular, are systematically excluded from the protection of the law. One can of course acknowledge the seriousness of the problem of domestic violence and the need for the government to do much better in protecting victims of abuse, without resorting to the “nuclear option” of declaring that battered women are in a state of nature and may resort to any force they see fit against their abuser.

A BATTERED WOMAN WOULD HAVE TO PROVE NOT ONLY THAT SHE IS SUBJECTIVELY STUCK IN THE OPPRESSIVE RELATIONSHIP, BUT THAT SHE IS ACTUALLY A HOSTAGE -

R.P. Kaufman [Department of Philosophy, University of Massachusetts Lowell.] Self-Defense, Imminence, and the Battered Woman. Summer 2007. *New Criminal Law Review: An International and Interdisciplinary Journal*. Vol 10, No. 3. UC Press. JStor.

It is in fact frequently suggested that battered women are in situations amounting to hostage or captivity, given the difficulties for women trying to leave an abusive relationship, including threats of retaliation if they try to leave. Martha Mahoney, for example, argues that a batterer's threats against a woman create an "imprisoning effect" that provides a "persuasive analogy" with "hostages or prisoners of war," hence helps shift the "paradigm" of the battered woman to the "image of a hostage resisting her own death."⁵⁸ It is true that, where a woman is genuinely held captive by her abuser with no possible escape or recourse to the authorities, she would legitimately be entitled to use force even absent an imminent threat. However, one should be cautious of relying on analogies or paradigms as the basis for allowing homicidal self-help. The woman who is *literally* held captive by her abuser and is unable to leave or call for help is in the state of a kidnap victim, and would be justified in using preemptive force to free herself. But difficulty in leaving is not equivalent to genuine captivity; as Ferzan explains, a woman is not a "hostage" simply "because social and economic factors make leaving more difficult."⁵⁹ Donald Downs similarly criticizes Lenore Walker and Judith Herman for using the "concept of captivity loosely, rendering it applicable to all or most battering relationships";⁶⁰ for example, "financial dependence or emotional dependence cannot" constitute captivity, he warns, "unless we unwisely stretch the legal notion of captivity or being kidnapped."⁶¹ It is doubtful whether we want juries making highly subjective judgments about what "image" fits a battered woman, for the tendency would be towards an inevitable loosening of the standards for the use of force, and hence a substantial erosion of the imminence rule.

NON-VIOLENCE AND THE AFFIRMATION OF HUMAN LIFE

FAITH IN THE IDEA THAT WE CAN KILL IN ORDER TO SAVE ENTRENCHES A CYCLE OF VIOLENCE BY JUSTIFYING THE VERY ACTIONS THAT MORAL SYSTEMS ATTEMPT TO PREVENT

Stephan Wink and Walter Wink [Ass. At Cleary, Gottlieb, S, and Hamilton; Prof. of biblical interpretation, St. Louis University Law Journal] Domination, Justice, and the Cult of Violence. Winter 1994. Lexis

Moreover, the discontented, dissident voices that take up arms to oppose the system usually end by strengthening it. Each use of violence further legitimizes violence and affirms its ultimacy. By making violence the alternative of "last resort," we insure its place as the definitive redeemer. In war, regardless of the victor, the domination system remains the fundamental construct for the victor's authority. Though the particular vantage point of the powerful may shift as a result of the struggle for power, the system of domination remains in place. Regardless of whether a struggle ends with power shifting to the left or the right, the game remains one of control and power over other peoples' lives. Thus, whether one remains complicit with the system or takes up arms against it, the system preserves its power and the cycle of violence retains the appearance of inevitability. People become resigned to this seemingly inevitable and invincible system of domination. Their resignation, in turn, drains any hopes of escape. Violent opposition to the dominating system risks perpetuating precisely the system it seeks to transcend. "Whoever fights monsters," warned Nietzsche, "should see to it that in the process he does not become a monster." For the most part, where movements of the oppressed lash out at the dominant group the cycle of violence escalates and it ends by either destroying or further marginalizing that movement in society, or by establishing that movement as the new oppressor. But if we sit passively by, we become accessories by our inaction to the injustice of the system. Somehow, we must swim against the tide of the current paradigm in an effort to find another way to oppose this system.

MAKING NON-VIOLENCE NECESSARY CRITERIA FOR MORALITY DISMANTLES THE CYCLE OF VIOLENCE

Stephan Wink and Walter Wink [Ass. At Cleary, Gottlieb, S, and Hamilton; Prof. of biblical interpretation, St. Lous University Law Journal] Ddomination, Justice, and the Cult of Violence. Winter 1994. Lexis

That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images, as Archibald MacLeish says in *The Metaphor*, have lost their meaning. The old images may yet have some meaning, but their grip has loosened sufficiently to allow us to consider alternatives. We are now faced with the opportunity to dismantle the myth of redemptive violence and break the cycle of domination. The fragmented exclusivity of our separate struggles for justice must be discarded for the common ground of opposition to the domination system in all its forms; it is the common enemy. Through the recognition and acknowledgment of each other's humanity, we can open a way to a new possibility for life. Life outside this cycle. In the legal context, this principle requires the recognition and rectification of inequality under the law. It requires the recognition of the humanity of those oppressed by the operation of law as practiced. It requires the acknowledgment by the legal system of the objectification and subsequent harm to women by pornography. It requires the recognition that the law's perspective remains that of men. It requires the recognition that the colorblindness of the constitution means that it mainly sees white. It requires that people acknowledge and celebrate their cultural and linguistic differences and support each other's full participation in society. How can violence be redemptive when it only begets more and more violence and exacts a continuing price from each participant. That is not the path to victory, only defeat. The battle we must fight is not against the dominators as individuals, but the system in which all are victims. The struggle must be joined, not against something so as to overcome or dominate it, but rather to transcend the domination system itself -- the paradigm of our existence. The choice between joining the system or fighting against it remains a choice that serves the system in either case -- it is a zero-sum game, a Hobson's choice. The alternative is to seek a third way in every human endeavor; a way that shifts the context from domination to a partnership among people; a way that affirms the humanity of one's enemies and seeks their well-being along with our own in a community of equals where the humanity of all is affirmed.

RIGHTS THEORY IS INSUFFICIENT TO REJECT PACIFISM

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 514-515

Nothing said here shows conclusively that a coherent case for the right to kill cannot be spelled out, but perhaps enough has been said to suggest the deceptive difficulty in doing this. In recent years, prompted largely by an article of Jan Narveson's, there has been a good deal of clucking about the "inconsistency" and "incoherence" of the pacifist position.⁵ Not one of the critics of pacifism has attempted to spell out the right to kill in a way that would meet the objections just noted; nevertheless their objections deserve some attention. Narveson's argument, in a nutshell, is that, if the pacifist grants people the right not to be subjected to violence, or the right not to be killed in my reading, then by logic he must accord them the right to engage in any actions (hence, those involving killing) to protect that right. This argument fails for a number of reasons,⁶ but the most interesting one involves the protective status of right. Possession of a right generally entitles one to take some actions in defense of that right, but clearly there are limits to the actions one may take. To get back the washcloth which you have stolen from me, I cannot bludgeon you to death; even if this were the only way I had of securing my right to the washcloth, I could not do it. What the pacifist and the nonpacifist disagree about, then, are the limits to which one may go in defending one's right to life, or any other right. The "logic of rights" alone will not settle this disagreement, and such logic certainly does not render the pacifist's restrictions incoherent. That position might be incoherent, in Narveson's sense, if the pacifist allowed no actions in defense of the right to life, but this is not his position. The pacifist's position does seem to violate a fairly intuitive principle of proportionality, that in defense of one's rights one may take actions whose severity is equal to, though not greater than, the threat against one. This rules out the bludgeoning case but allows killing so as not to be killed. The pacifist can respond, though, that this principle becomes rather suspect as we move to more extreme actions. It is not obviously permissible to torture another so as not to be tortured or to rain nuclear holocaust on another country to prevent such a fate for oneself. Thus when the pacifist rejects the proportionality principle in cases of killing, insisting that such cases are themselves most extreme, the principle he thereby rejects hardly has the status of a self-evident truth.

PACIFICISM IS THE MANIFESTATION OF A REFUSAL TO CREATE MORAL DISTANCE BETWEEN ONESELF AND OTHERS WHO THE LANGUAGE OF "JUSTICE" SAYS WE CAN KILL

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 520-522

Orwell tells how early one morning he ventured out with another man to snipe at the fascists from the trenches outside their encampment. After having little success for several hours, they were suddenly alerted to the sound of Republican airplanes overhead. Orwell writes,

At this moment a man, presumably carrying a message to an officer, jumped out of the trench and ran along the top of the parapet in full view. He was half-dressed and holding up his trousers with both hands as he ran. I refrained from shooting at him. It is true that I am a poor shot and unlikely to hit a running man at a hundred yards. Still, I did not shoot partly because of that detail about the trousers. I had come here to shoot "Fascists"; but a man who is holding up his trousers isn't a "Fascist," he is visibly a fellow creature, similar to yourself, and you don't feel like shooting him.¹¹

Orwell was not a pacifist, but the problem he finds in this particular act of killing is akin to the problem which the pacifist finds in all acts of killing. That problem, the example suggests, takes the following form.

The problem with shooting the half-clothed man does not arise from the rights involved, nor is it dispensed with by showing that, yes indeed, you are justified (by your rights) in killing him. But this does not mean, as some have suggested to me, that the problem is therefore not a moral problem at all ("sheer sentimentality" was an objection raised by one philosopher ex-marine). Surely if Orwell had gleefully blasted away here, if he had not at least felt the tug of the other's "fellow-creaturehood," then this would have reflected badly, if not on his action, then on him, as a human being. The problem, in the Orwell case, is that the man's dishabille made inescapable the fact that he was a "fellow creature," and in so doing it stripped away the labels and denied the distance so necessary to murderous actions (it is not for nothing that armies give us stereotypes in thinking about the enemy). The problem, I am tempted to say, involves not so much the justification as the possibility of killing in such circumstances ("How could you bring yourself to do it?" is a natural response to one who felt no problem in such situations). And therein lies the clue to the pacifist impulse.

The pacifist's problem is that he cannot create, or does not wish to create, the necessary distance between himself and another to make the act of killing possible. Moreover, the fact that others obviously can create that distance is taken by the pacifist to reflect badly on them; they move about in the world insensitive to the half-clothed status which all humans, qua fellow creatures, share. This latter point is important to showing that the pacifist's position is indeed a moral position, and not just a personal idiosyncrasy. What should now be evident is the sense in which that moral position is motivated by a picture of the personal relationship and outlook one should maintain toward others, regardless of the actions they might take toward you. It is fitting in this regard that the debate over self-defense should come down to the personal relationship, the "negative bond" between Aggressor and Defender. For even if this negative bond renders killing in self-defense permissible, the pacifist will insist that the deeper bonds of fellow creaturehood should render it impossible.¹² That such an outlook will be branded by others as sheer sentimentality comes to the pacifist as no surprise.

KILLING EVEN IN REVOLT AGAINST CRUELTY CONTRADICTS THE BASIC AFFIRMATION OF HUMAN DIGNITY AND SOLIDARITY AT THE HEART OF REBELLION

Albert Camus [Philosopher], The Rebel: An Essay on Man in Revolt. New York: Vintage International (1991, originally published 1954), p. 280-282

But are we still living in a rebellious world? Has not rebellion become, on the contrary, the excuse of a new variety of tyrant? Can the "We are" contained in the movement of rebellion, without shame and without subterfuge, be reconciled with murder? In assigning oppression a limit within which begins the dignity common to all men, rebellion defined a primary value. It put in the first rank of its frame of reference an obvious complicity among men, a common texture, the solidarity of chains, a communication between human being and human being which makes men both similar and united. In this way, it compelled the mind to take a first step in defiance of an absurd world. By this progress it rendered still more acute the problem that it must now solve in regard to murder. On the level of the absurd, in fact, murder would only give rise to logical contradictions; on the level of rebellion it is mental laceration. For it is now a question of deciding if it is possible to kill someone whose resemblance to ourselves we have at last recognized and whose identity we have just sanctified. When we have only just conquered solitude, must we then re-establish it definitively by legitimizing the act that isolates everything? To force solitude on a man who has just come to understand that he is not alone, is that not the definitive crime against man?

Logically, one should reply that murder and rebellion are contradictory. If a single master should, in fact, be killed, the rebel, in a certain way, is no longer justified in using the term community of men from which he derived his justification. If this world has no higher meaning, if man is only responsible to man, it suffices for a man to remove one single human being from the society of the living to automatically exclude himself from it. When Cain kills Abel, he flees to the desert. And if murderers are legion, then this legion lives in the desert and in that other kind of solitude called promiscuity.

From the moment that he strikes, the rebel cuts the world in two. He rebelled in the name of the identity of man with man and he sacrifices this identity by consecrating the difference in blood. His only existence, in the midst of suffering and oppression, was contained in this identity. The same movement, which intended to affirm him, thus brings an end to his existence. He can claim that some, or even almost all, are with him. But if one single human being is missing in the irreplaceable world of fraternity, then this world is immediately depopulated. If we are not, then I am not and this explains the infinite sadness of Kaliyev and the silence of Saint-Just. The rebels, who have decided to gain their ends through violence and murder, have in vain replaced, in order to preserve the hope of existing, "We are" by the "We shall be." When the murderer and the victim have disappeared, the community will provide its own justification without them. The exception having lasted its appointed time, the rule will once more become possible. On the level of history, as in individual life, murder is thus a desperate exception or it is nothing. The disturbance that it brings to the order of things offers no hope of a future; it is an exception and therefore it can be neither utilitarian nor systematic as the purely historical attitude would have it. It is the limit that can be reached but once, after which one must die. The rebel has only one way of reconciling himself with his act of murder if he allows himself to be led into performing it: to accept his own death and sacrifice. He kills and dies so that it shall be clear that murder is impossible. He demonstrates that, in reality, he prefers the "We are" to the "We shall be." The calm happiness of Kaliyev in his prison, the serenity of Saint-Just when he walks toward the scaffold, are explained in their turn. Beyond that farthest frontier, con-tradition and nihilism begin.

MURDER EVEN TO REJECT OPPRESSION UNDERMINES THE HUMAN SOLIDARITY ON WHICH THE REVOLT IS BASED

Albert Camus [Philosopher], The Rebel: An Essay on Man in Revolt. New York: Vintage International (1991, originally published 1954), p. 284-285

In a flash—but that is time enough to say, provisionally, that the most extreme form of freedom, the freedom to kill, is not compatible with the sense of rebellion. Rebellion is in no way the demand for total freedom. On the contrary, rebellion puts total freedom up for trial. It specifically attacks the unlimited power that authorizes a superior to violate the forbidden frontier. Far from demanding general independence, the rebel wants it to be recognized that freedom has its limits everywhere that a human being is to be found—the limit being precisely that human being's power to rebel. The most profound reason for rebellious intransigence is to be found here. The more aware rebellion is of demanding a just limit, the more inflexible it becomes. The rebel undoubtedly demands a certain degree of freedom for himself; but in no case, if he is consistent, does he demand the right to destroy the existence and the freedom of others. He humiliates no one. The freedom he claims, he claims for all; the freedom he refuses, he forbids everyone to enjoy. He is not only the slave against the master, but also man against the world of master and slave. Therefore, thanks to rebellion, there is something more in history than the relation between mastery and servitude. Unlimited power is not the only law. It is in the name of another value that the rebel affirms the impossibility of total freedom while he claims for himself the relative freedom necessary to recognize this impossibility. Every human freedom, at its very roots, is therefore relative. Absolute freedom, which is the freedom to kill, is the only one which does not claim, at the same time as itself, the things that limit and obliterate it. Thus it cuts itself off from its roots and —abstract and malevolent shade—wanders haphazardly until such time as it imagines that it has found substance in some ideology.

It is then possible to say that rebellion, when it develops into destruction, is illogical. Claiming the unity of the human condition, it is a force of life, not of death. Its most profound logic is not the logic of destruction; it is the logic of creation. Its movement, in order to remain authentic, must never abandon any of the terms of the contradiction that sustains it. It must be faithful to the yes that it contains as well as to the no that nihilistic interpretations isolate in rebellion. The logic of the rebel is to want to serve justice so as not to add to the injustice of the human condition, to insist on plain language so as not to increase the universal falsehood, and to wager, in spite of human misery, for happiness. Nihilistic passion, adding to falsehood and injustice, destroys in its fury its original demands and thus deprives rebellion of its most cogent reasons. It kills in the fond conviction that this world is dedicated to death. The consequence of rebellion, on the contrary, is to refuse to legitimize murder because rebellion, in principle, is a protest against death.

EXCUSE VERSUS JUSTIFICATION

KILLING IN SELF-DEFENSE IS MERELY EXCUSABLE, NOT MORALLY PERMISSIBLE IN THE SENSE THAT IT IS A POSITIVE MORAL GOOD

Cheyney C. Ryan [Prof. of Philosophy, University of Oregon], "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics*, Vol. 93, No. 3 (Apr., 1983), pp. 508-524, 515-516

This case helps us put the self-defense situation in perspective, since Victim's position seems to be analogous to the mayor's. When Aggressor threatens Victim, his actions have created a situation in which someone's life will be lost (he hopes Victim's). Victim is not responsible for this situation, it is merely presented to him. But given it, Victim can determine whose life is lost, and in choosing to defend himself Victim determines that it will be Aggressor's life. In this sense the true responsibility for the taking of life rests not with Victim, for Aggressor's actions have made this inevitable. In pointing this out, the appeal to self-defense shows that the real blame for Aggressor's losing his life rests with Aggressor himself.

We must still explain why Victim is justified in choosing to save his own life over Aggressor's, but first let me consider some respects in which this approach to self-defense is illuminating.

It reveals, I think, the true asymmetry of the self-defense situation. Victim decides which life is lost, and while he may decide incorrectly, his crime in so doing is infinitely less than the malicious Aggressor's. Interestingly enough, it is a mistake on this view to speak of a right to self-defense, for if the appeal to self-defense serves to absolve one of the responsibility for taking human life, as I have suggested, it cannot at the same time give one the right to take another's life (except, perhaps, in the weaker Hohfeldian sense of liberty). This approach also reconfirms earlier intuitions about the relevance, or rather irrelevance, of Aggressor's right to life. Think of it this way: when the mayor is asked to account for the killing of the resistance fighter he chose to kill, must he show that that person forfeited his right to life? Perhaps his choice would be easier if this could be shown, but the propriety of his action does not rest on it. In this same sense the propriety of Victim's actions need not presume any forfeit on Aggressor's part.

THE DEFENSE OF VICTIMS WHO KILL THEIR ABUSERS SHOULD BE BASED ON AN EXCUSE DEFENSE, NOT A JUSTIFICATION DEFENSE

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
“FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL REFLECTIONS,” 93 Marq. L. Rev. 1475 (2010)

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

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

BWS CANNOT JUSTIFY THE ACTION OF DEADLY FORCE, IT CAN MERELY EXCUSE ACTORS WHO USE IT –

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

Third, and most controversially, battered woman advocates have pressed the argument that BWS testimony should be used to inform the objective analysis required in self-defense law, namely, to show that a reasonable woman with BWS—not just the defendant, subjectively—would believe that the abuser, even in nonconfrontational circumstances, represents an immediate threat to her life. Thus, when the battered woman kills in such circumstances, she is responding to what a reasonable person would believe is an imminent threat. I submit that introduction of syndrome evidence to satisfy this third and essential feature of self-defense is undesirable. Self-defense, after all, is a justification defense, not an excuse defense. The claim of a defendant pleading self-defense is that she has acted properly or, at least, not wrongfully, in doing what she did. She is not claiming, as she would be if she asserted the defense of insanity or any other excuse defense, that her conduct was wrongful but that she should not be blamed for her actions. Put a little too simply, justifications focus on the act; excuses focus on the actor.¹³ Yet, BWS evidence—indeed, any syndrome evidence—speaks to the actor's state of mind, and not to the act itself. It explains to us why we should treat this actor differently than others, and not blame her when we would blame others who commit the same act.

**BWS IS NOT A JUSTIFICATION FOR SELF-DEFENSE BUT RATHER AN INSANITY
DEFENSE – IT CONFLATES BATTERED WOMEN WITH MENTAL INCAPACITIES**

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

But, let us ignore this problem. After all, if Judy Norman truly believed J.T. represented an immediate threat—whether because of BWS or for any other reason—then she *has* satisfied a key element of self-defense. Granting this, I would submit that there is no basis for claiming that such a belief is *reasonable*, unless we assume that the reasonable person suffers from BWS. But, that’s the rub. How can we say that a belief is reasonable when we are judging the reasonableness from the perspective of someone who, by definition, is experiencing a set of symptoms that renders her state of mind abnormal? As Professor Anne Coughlin has observed, the battered woman defense “defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.”¹⁴ It makes no sense, therefore, to describe a belief in “imminent deadly force” as reasonable—to say that killing a sleeping person is *justified* to prevent an imminent death—if the only reason for describing the situation this way is that the person suffers from emotional paralysis, learned helplessness, or is the victim of any other behavioral syndrome. BWS evidence essentially converts the battered woman’s claim from the justification of self-defense to a mental incapacity defense, such as insanity or diminished capacity. Indeed, in some jury simulations, BWS evidence caused “jurors to view the defendant as more distorted in her thinking, less capable of making responsible choices, and less culpable for her actions.”¹⁵ In short, if BWS is permitted to support self-defense, the bad-old-days of the she-is-crazy burning-bed approach to battered women are back,¹⁶ albeit now disguised in more elegant justification clothing.

ACTORS THAT ARE MORALLY EXCUSED ARE STILL USING IMPERMISSIBLE DEADLY FORCE –

Joshua Dressler [Professor of Law, Wayne State University Law School.] New Thoughts about the Concept of Justification in the Criminal Law: A Critique of fletcher's Thinking and Rethinking. 1984. UCLA Law Review. Vol 32:61.

Despite the paucity of scholarship, a general description of the modern understanding of justification is possible. We largely have abandoned the governmental-public justice factor dominant in the common law and in Blackstone's writing. Instead, as H.L.A. Hart writes, the difference between justified and excused acts is the difference between an act which "the law does not condemn, or even welcomes [justification]," and an act "which is deplored, but the psychological state of the agent. . . rule[s] out the public condemnation and punishment [excuse]."

²⁷ That is, a justified act indicates at least that the conduct is not wrongful; an excuse concedes the wrongfulness of the act, but asserts that the actor should not be punished for her wrongful behavior, primarily because of psychological ²⁸ or situational ²⁹ involuntariness. ³⁰ Although perhaps too simplistic,³¹ it generally is said that while "justification" speaks to the act, "excuse" focuses upon the actor. Justified conduct is external to the actor; excuses are internal.³² A justification implies that there is no need to excuse the actor; an excuse implies an earlier finding of lack of justification.³³

FLETCHER'S VIEWS ON JUSTIFICATION INCLUDE MORALLY PERMISSIBLE ACTIONS –

Joshua Dressler [Professor of Law, Wayne State University Law School.] New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking. 1984. UCLA Law Review. Vol 32:61.

It is here that Fletcher's analysis is murky. Does he equate "justification" with "right" conduct, or does he include within the justification concept merely "tolerable" or nonwrongful behavior? Some of his writing suggests that he takes the broader, more inclusive position. He writes, for example, that "the doing [of a justified act] is objectively right (*or at least not wrongful*). . . . Justification modifies a norm, "by carving out a limited field where the conduct is *not wrongful*."55 Justified conduct "is *not wrongful, but* neither is it perfectly legal "56 Also, in specifically discussing the justification of self-defense, he describes justified conduct in the more inclusive fashion.57 Another aspect of Fletcher's views lends itself to an interpretation consistent with the "not wrongful" language rather than with the "rightful" language. Fletcher speaks of justification as a "license" or "permission" to violate the prohibitory norm.58 He treats the terms "privilege" and "justification" as synonyms,⁵⁹ and he observes that other commentators do the same.60 One has a duty to obey prohibitory norms, but a privilege to violate them when justifying circumstances are present.6'

**THE COMMON SENSE DISTINCTION BETWEEN COURAGE AND COWARDICE IS
SUFFICIENT TO WARRANT THE DISTINCTION BETWEEN JUSTIFIED AND EXCUSED -**

Joshua Dressler [Professor of Law, Wayne State University Law School.] New Thoughts about the Concept of Justification in the Criminal Law: A Critique of fletcher's Thinking and Rethinking. 1984. UCLA Law Review. Vol 32:61.

Justifications in the law negate such injury. Since we punish harm rather than character, a justification need do no more than demonstrate that the reason for the criminal justice system's inter- vention-harm-is absent. It is not necessary that the conduct be affirmatively desirable or morally good. It is enough that it is not undesirable or not morally bad. We do draw distinctions between courageous people and cowards. We do draw distinctions be- tween those who make the world better and those who do not. But, as long as a person does not make it worse, then criminal stigmatization of the person's conduct is inappropriate. Nothing about our conception of the criminal justice system requires of us as narrow a conception of justification as Fletcher defends.

FLETCHER'S VIEW OF JUSTIFICATION CANNOT ACCOUNT FOR EXCUSABLE OR PERMISSIBLE ACTIONS AND THEREFOR EFAILS TO BE CONSISTENT WITH HOW WE USE LANGUAGE –

Joshua Dressler [Professor of Law, Wayne State University Law School.] New Thoughts about the Concept of Justification in the Criminal Law: A Critique of fletcher's Thinking and Rethinking. 1984. UCLA Law Review. Vol 32:61.

Yet, Fletcher's analysis precludes this possibility. To him, conduct is good or it is bad; it is right or it is wrong. Yet surely there is conduct for which those moral judgments seem too harsh, or too generous, and for which some other phrase is needed. We want to be provided with a language and a mode of analysis which permits such expression. More significantly, we do not want to be forced to reject a justification theory merely because our language constrains us. After all, the language of the law is a means to an end, not an end in itself. The world too frequently creates situations in which morally sensitive people perceive more gray than they do black and white. The law must provide a way to express such moral ambiguity. Fletcher's reasoning, then, fails his own test of validity. It becomes a moral Procrustean bed.

A2 BATTERED WOMAN SYNDROME

BATTERED WOMAN SYNDROME REINSCRIBES THE LABEL THAT ABUSE VICTIMS LACK THE MENTAL CAPACITY TO CHOOSE RATHER THAN EMPHASIZING THE REASONABLENESS OF THEIR CHOICES

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 425-426

Scholars on both sides of the "nonconfrontation" debate increasingly seem to agree that BWS only compounds the stereotype that these women are mentally unstable. Scholarship citing the Judy Norman case provides a good example. n61 Self-defense purists such as Joshua Dressler, who does not consider Norman's conduct an act of self-defense argue that BWS has become a placeholder for mental incapacity in nonconfrontational cases. n62 On the other side, those who argue that Norman acted in reasonable self-defense often concede that advancing the BWS theory has the negative consequence of reinforcing the old insanity label. n63 Whereas the two sides differ as to whether Judy Norman was legally justified under the doctrine of self-defense, both might agree that the BWS theory is insufficient to explain these cases.

A growing consensus has emerged among feminist legal scholars as to the severe limitations posed by the BWS model. n64 As a psychological approach, BWS addresses only a narrow measure of why the defendant had a reasonable belief in imminent harm and places emphasis on the individual perspective of the defendant. While references to the broader context of the abusive relationship are central to the syndrome analysis, they remain fundamentally tangential. The misuse of BWS evidence and the misconception that battered women defendants all suffer from psychological disorders, rather than responding to reasonable fears, becomes readily apparent in state court opinions compelling defendants [*426] who call BWS experts to undergo separate psychological exams at the request of the prosecution. n65 By opening the door to conflicting testimony from psychological experts, these decisions highlight the improper focus that BWS testimony places on the individual defendant and the pathology of her subjective state of mind. Understanding the defendant's actions as those that any reasonable person would take under the circumstances requires examination of the unique dynamics of one's relationship with the abuser, as well as the broader social and cultural contexts that foster those dynamics. n66 As a psychological mode of analysis directed at individual characteristics, n67 the BWS approach provides only a limited lens to examine the abusive patterns that lead some to reasonably fear for their lives.

THE STEREOTYPES UNDERLYING BATTERED WOMAN SYNDROME CAN UNFAIRLY HARM DEFENDANTS

Cara Cookson [2010 J.D. Candidate, Vermont Law School], "Note: Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense in Vermont," 34 Vt. L. Rev. 415, p. 426-427

Attempting to use BWS to inform the jury's understanding of abusive relationships when those relationships deviate from BWS norms poses even greater challenges. After several decades of exposure to popular legal discourse, a stereotypical "battered woman identity" has gained dominant acceptance and failure to conform to it has proven problematic. n68 The defendant who occasionally fights back against her abuser prior to the final altercation fails to conform to the "theory of learned helplessness" underlying the BWS model. n69 According to Leigh Goodmark, the rise of the BWS theory comes at a disadvantage to some defendants, because BWS invokes the image of the "passive, middle-class, white woman" victim who never fights back. n70 Goodmark finds that those who fight back tend to have the "fewest other options for addressing the violence against them." n71 The standard BWS theory "oversimplifies" experiences of battering. n72 Failing to closely conform to the paradigm of the "helpless victim" may prevent the defense from convincing the jury of the reasonableness of the defendant's fear of harm, despite the fact that these fears may be no less justified.

Women in non-heterosexual relationships, and men as well, may struggle with the BWS model due to its "wife abuse" premise. n73 Contemporary attempts to promote gender neutrality through use of the [*427] term "battered spouse" only contribute to this problem. n74 While traditional self-defense makes no distinctions relative to the parties' relationship to one another, the BWS theory brings this relationship into focus to the detriment of homosexual defend-ants who do not fit the heterocentric model. According to Goodmark, "battered lesbians often face hostility and disbelief when they report being abused by their partners." n75 Even as some states enact progressive same-sex marriage reforms, n76 the BWS model and the juries that apply it have not necessarily adapted accordingly.

BATTERED WOMAN SYNDROME EFFECTS THE WAY THE IMMINENCE AND REASONABLENESS REQUIREMENTS FOR A TRADITIONAL SELF-DEFENSE CLAIM ARE EVALUATED, BUT FAILING TO ACCOUNT FOR THE SPECIAL CIRCUMSTANCES OF ABUSE IS ALSO UNACCEPTABLE

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 770

For self-defense to justify a killing, the defendant must have genuinely and reasonably believed that the use of deadly force was necessary to protect herself from an unavoidable, imminent threat of death or serious bodily harm. n15 Evidence on Battered Woman Syndrome (BWS), a theory describing the effects of recurring abuse in domestic relationships, attempts to explain why conventional assumptions about reasonableness and imminence fail to account for the real-life circumstances of the battered woman defendant. n16 Some courts have used BWS to replace an objective standard of reasonableness with a primarily subjective standard, allowing battered women to more easily and, often-times, successfully argue self-defense even though no immediate threat would have been found under traditional legal theories. n17

[*771] However, the traditional reasonableness and imminence requirements are crucial components of self-defense law precisely because they help ensure that only unavoidable killings are justified. n18 One can hardly argue that a sleeping abuser presents a truly unavoidable threat. Hence, courts that stretch the traditional self-defense requirements to accommodate battered women distort the traditional elements of the law and may encourage violent self-help. n19 On the other hand, jurisdictions that refuse to allow battered women who preemptively kill to claim self-defense, thus resulting in murder or manslaughter convictions, may be out of step with notions of substantive justice. n20 The record number of pardons and commutations in recent years for battered women convicted of murder reveals that this is most likely the case. n21 Therefore neither approach is satisfying.

ALLOWING BATTERED WOMAN SYNDROME TO SUBJECTIVIZE TRADITIONAL SELF-DEFENSE REQUIREMENTS UNDERMINES THE AUTONOMY OF VICTIMS BY PORTRAYING THEM AS NOTHING MORE THAN A PATHOLOGY

Christine M. Belew [2010 J.D. Candidate, Emory University School of Law], "COMMENT: KILLING ONE'S ABUSER: PREMEDITATION, PATHOLOGY, OR PROVOCATION?" 59 Emory L.J. 769, p. 786-787

Professor Anne Coughlin, a critic of BWS, has observed that the syndrome "defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates." n141 Despite its best intentions, BWS reinforces the stereotypical idea that the battered woman is passive, helpless, and psychologically unable to escape a battering relationship. n142 Under BWS, a battered woman who kills her abuser is someone out of touch with objective reality who acts as she does because she suffers from a cognitive disorder. n143 Even the use of the term "syndrome" emphasizes the woman's abnormality. n144 [*787] This undermines the very purpose of BWS, which is to show how a battered woman's use of deadly self-help against her abuser is reasonable given the extraordinary circumstances. n145 As a result, even the Department of Justice has concluded that the term "BWS" fails "to reflect the breadth of empirical knowledge now available concerning battering and its effects" and is therefore "no longer useful or appropriate." n146

**BWS HAS BECOME SYNONYMOUS WITH DISORDER, IT HURTS RATHER THAN HELPS
SELF-DEFENSE WORK -**

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

Instead of focusing on the reasonableness of battered women's actions, BWS has instead become synonymous with psychological trauma or disorder, an unfortunate consequence: 'The phrase "battered woman syndrome" was intended to simply describe common psychological and social characteristics of battered women... Regardless of its more complex meaning, the term... has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting "normally.'" The language of a recent Illinois appellate court opinion in a battered woman syndrome self-defense case demonstrates this view: "The facts in this case leave no reason for doubt that [the defendant] was a battered woman imbued with all of the psychological and emotional impairments of what we all know and commonly call battered woman's syndrome." Some battered women may develop psychological disorders or cognitive distortions from abuse. However, many do not. Nonetheless, lawyers and experts in presenting BWS mainly stress the psychological response of learned helplessness. 66 Courts perceive this evidence as primarily going to why the battered woman did not leave the abusive relationship. 67 At the same time, courts minimize the value of the evidence in explaining how the battered woman's self-defense actions were reasonable. 68 As a result, the law "excuses" battered women's actions as a form of irrational behavior instead of "justifying" them as reasonable acts of self-defense. 169 Thus, rather than truly altering the traditionally sex-biased concept of self-defense, which is what BWS was supposed to do, BWS is becoming a kind of separate defense, one that is fearfully close to an insanity or impaired mental state defense. 170 This trend is probably the most damaging in women's self-defense work.

BWS EXCLUDES THOSE WHO DON'T FIT THE MOLD OF THE BATTERED WOMAN -

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmred Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

The legal system, by focusing only on the psychological traits of battered victims, has created the fiction that only women who suffer distinct psychological symptoms of post-traumatic stress disorder, as outlined in the Diagnostic and Statistical Manual of Mental Disorders, have BWS and can use the defense. As a result, an image of the stereotypical battered woman has emerged; if a woman does not fit the mold, the defense becomes inapplicable or unsuccessful. Not surprisingly, this image conforms to many of the pernicious stereotypes that have traditionally plagued women, such as that of the typically passive, mentally unstable, helpless victim. Furthermore, middle- to upper-class, white, heterosexual women better fit the image than do lesbian, poor, and minority women, whose domestic violence experiences continue to be misrepresented.

BWS EXCLUDES AFRICAN-AMERICANS-

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

Laura Reece describes the limitations of the current use of battered woman syndrome: "While the battered woman syndrome defense is an "accommodation" for some women, arguably the defense functions as "assimilation" for women with multiple "other" characteristics whose experience must be "force-fit" into such a special defense. Sharon Allard argues that Black women cannot use the battered woman syndrome theory successfully because the cultural stereotypes of "passive" battered women and "aggressive" Black women prevent judges and juries from seeing Black women as battering victims. Lisa Green suggests that battered homeless women are not viewed as battered women in need of protection.

BWS EXCLUDES LESBIANS AND POOR WOMEN-

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

Similarly, although lesbian battering has recently been recognized as a serious issue, judges and juries appear reluctant to view battered lesbians as battered women.¹⁷¹ Lenore Walker has found in her own work with battered women that black women who killed their abusers were twice as likely to have been convicted of murder, and were sentenced to longer prison terms, than were white women or women of other minority groups.¹⁷² She found similar biases against poor and uneducated women.¹⁷³ Ironically, those aspects of Walker's theory that emphasize passivity and learned helplessness have helped to create within the legal community the stereotype of the typically passive battered woman" that works against black, poor, and uneducated battered women.

**THE USE OF BWS IN COURT CAN PREVENT WOMEN FROM GAINING CUSTODY LATER –
DISINCENTIVIZING GOING TO COURT AT ALL**

Hope Toffel [Attorney and Former Editor of the USC Law Review] Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths About Battered People who Kill Their Abusers, and the Argument for Extending Battering Syndrome self-Defenses to All Victims of Domestic Violence. Southern California Law Review. Vol 70:337

Evidence shows that mothers who use BWS evidence in criminal cases, with its current characterization as a psychological disorder, may later be stigmatized in child custody disputes as mentally unstable, unfit parents. 8 5 For example, during a hearing on U.S. House of Representatives Concurrent Resolution 172, regarding presumptions of child custody, the issue of BWS arose. One prominent psychologist argued that women with BWS symptoms would have an impaired ability to parent due to their depression and lowered self-esteem. In his view, having BWS may be a sign of a psychologically unfit parent, and courts could deny custody on that basis, despite the fact that BWS comes from abuse.

THE DEGREE TO WHICH SELF-DEFENSE LAW IS INFORMED BY A MALE-CENTRIC PERSPECTIVE IS OVERSTATED

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
“FEMINIST (OR “FEMINIST”) REFORM OF SELF-DEFENSE LAW: SOME CRITICAL
REFLECTIONS,” 93 Marq. L. Rev. 1475 (2010)

Consequently, feminists have sought self-defense reforms. Before turning to their proposals, however, let's put things in perspective. The —boys' rules‖ label attached to self-defense law is an overstatement, as Professor Estrich has observed.¹³ Remember the message I suggested is at the core of common law self-defense law: Human life is deeply valued, even that of the aggressor. As Estrich has written, self-defense rules do not exist to —torment‖ women: —Unlike, say, the resistance requirement in rape law, [self-defense rules] are not born from a historic distrust of women, or a desire to keep them powerless. They exist, quite simply, to preserve human life where deadly force is not reasonably necessary.¹⁴ According to Estrich, —these rules were [not] designed to define ‘manly behavior.’ . . . In many cases, the rules exist not so much to define manly behavior as to limit manly instincts—in order to preserve human life.¹⁵ For example, when I am threatened by an aggressor, one non-violent solution might be for me to run—or, as the law puts it, to retreat to a place of known safety. Though, as I have noted, the retreat requirement has never been absolute, there was a retreat requirement outside the home in most American states during much of our nation's history. That is not a boys' rule. Real Men, Clint Eastwood Men, Macho Men, do not run from their attackers. That's —cowardly.‖ The retreat rule is, as one scholar put it, an —affront to . . . values of masculinity and bravery.¹⁶ Real Men stand their ground and tell aggressors, —Make my day!‖¹⁷ But, as Blackstone observed, —though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor.¹⁸ So, to the extent that traditional retreat requirements remain in force, the law resolutely rejects —boys' rules,‖ or if you will, —Real Men's rules.‖ Furthermore, retreat issues aside, the requirement that one not use deadly force if lesser force will do—that is, that innocent persons not use disproportional force against attackers—shows a gentility inconsistent with machismo. Indeed, even the imminent-threat requirement serves to punish one manly —instinct,‖ namely, a male's desire for —vigilante revenge for attacks on one's family that occurred hours or days before.¹⁹

BATTERED WOMAN SYNDROME DEFINES VICTIMS IN TERMS OF A SEXIST PATHOLOGY

Joshua Dressler [Prof. of Law, Ohio State University, Michael E. Moritz College of Law],
"FEMINIST (OR "FEMINIST") REFORM OF SELF-DEFENSE LAW: SOME CRITICAL
REFLECTIONS," 93 Marq. L. Rev. 1475 (2010)

Ironically, the practical effect of BWS evidence is to pathologize the battered woman. Indeed, a juror simulation study has reported that —the presence of expert evidence providing a diagnosis of [BWS], compared to a no expert control, [causes] the jurors to view the defendant as more distorted in her thinking, and less capable of making responsible choices, and less culpable for her actions.¹⁴⁵ As Anne Coughlin has wisely observed, BWS —defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.¹⁴⁶ Professor Coughlin characterizes use of BWS evidence in this context as a —misogynist defense.¹⁴⁷ Indeed, use of BWS testimony potentially brings courts back, full circle, to the early battered women cases, in which women sought to defend themselves on grounds of temporary insanity or diminished capacity.⁴⁸ The only difference is that the mental health testimony is now disguised in self-defense clothing.

BATTERED WOMANS SYNDROME IS A MISLEADING LEGAL CONCEPT BECAUSE THERE IS NO ONE PROFILE OF RESPONSE FOR VICTIMS OF ABUSE

Mary Ann Dutton [Prof. Psychiatry, Georgetown University Medical Center], "Critique of the "Battered Woman Syndrome" Model," *National Center for Crisis Management, Web* (no date given), Accessed Dec. 7, 2011. <<http://www.nc-cm.org/article138.htm>>

1. There is no single profile of a battered woman.

"Battered woman syndrome" signals a particular area of testimony or type of case. One advantage of a short-hand label is ease of communication. The disadvantage is related: "battered woman syndrome" has become a stereotype that often does not fit the current state of knowledge concerning battering and its effects. Further, the stereotypic image of "battered woman syndrome" is often clouded by other stereotypes such as those based on race, culture, social class, and sexual orientation, for example.

There is no single profile of the effects of battering although "battered woman syndrome" suggests that the psychological impact of battering is defined by a common set of symptoms. Nevertheless, battered women's reactions to violence and abuse vary; they include emotional reactions (e.g., fear, anger, sadness); changes in beliefs and attitudes about self, others, and the world (e.g., self-blame, distrust, generalized belief that the world is unsafe); and symptoms of psychological distress or dysfunction (e.g., depression, flashbacks, anxiety, sleep problems, substance abuse). A particular battered woman's reactions may or may not meet criteria to warrant a clinical diagnosis. Variations in women's traumatic response to battering are based on characteristics of (1) the violence and abuse, (2) the battered victim, and (3) the context or environment in which battering occurs and in which the battered woman must respond to and heal from it, e.g., based on racial and cultural factors, social class, social support.

THE TERM 'BATTERED WOMAN SYNDROME' IS VAGUE AND MISLEADING

Mary Ann Dutton [Prof. Psychiatry, Georgetown University Medical Center], "Critique of the "Battered Woman Syndrome" Model," *National Center for Crisis Management*, Web (no date given), Accessed Dec. 7, 2011. <<http://www.nc-cm.org/article138.htm>>

2. The term "battered woman syndrome" is vague.

There is no clearly defined set of criteria to define "battered woman syndrome." If the label "battered woman syndrome" is reserved only for battered women with specific types of reactions (e.g., posttraumatic stress disorder), then using it instead of the diagnosis term is confusing especially since battered woman syndrome is not a recognized diagnostic term in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (American Psychiatric Association, 1994). Further, other reactions to battering that are relevant to pending legal (or other) issues may be excluded from consideration. Alternatively, if the term is used more broadly to refer to a range of psychological reactions to battering, as it often is in actual testimony by experts, then its diagnostic utility is lost since there is no clearly defined criteria for inclusion. In this case, the question of whether a battered woman "suffers" from battered woman syndrome is not an appropriate question: its meaning is vague and can be misleading.

BWS IS OFTEN CONCEPTUALIZED AS A FORM OF POST-TRAUMATIC STRESS DISORDER, BUT THIS CONDITION IS NO MORE RELEVANT TO THE LEGAL UNDERSTANDING OF REACTIONS TO ABUSE THAN OTHER TYPES OF PSYCHOLOGICAL REACTIONS

Mary Ann Dutton [Prof. Psychiatry, Georgetown University Medical Center], "Critique of the "Battered Woman Syndrome" Model," *National Center for Crisis Management*, Web (no date given), Accessed Dec. 7, 2011. <<http://www.nc-cm.org/article138.htm>>

3. Posttraumatic stress disorder, compared to other psychological reactions to battering, is not uniquely relevant for understanding legal (or other) domestic violence-related issues. PTSD can result from exposure to domestic violence and it may be relevant for explaining a victim's fear or other behavior in a specific situation. However, there is no basis to suggest that PTSD has exclusive or even greater relevance, for either legal or clinical issues, than do other types of psychological reactions to battering. Importantly, the absence of PTSD does not signal the lack of other posttraumatic stress reactions nor does it negate the reasonableness of a battered woman's fear. To the contrary, posttraumatic reactions leading to diagnoses other than PTSD (e.g., Acute Stress Disorder, Dissociative Amnesia, Major Depressive Disorder), as well as those which do not constitute clinical diagnoses (e.g., fear, anger, transient dissociative reaction, shame, distrust), may in some cases be more salient for understanding pertinent legal or clinical issues. For example, understanding the battered woman's appraisal of specific batterer behavior as threatening is typically more relevant both for addressing specific legal issues and for victim advocacy than merely whether or not she meets diagnostic criteria for PTSD. As well, victim's depression or suicidal thoughts as a reaction to battering may be more salient for addressing victim's current safety or for understanding her previous actions.

BWS OVEREMPHASIZES THE ROLE OF PSYCHOLOGICAL REACTION TO ABUSE TO THE EXCLUSION OF OTHER IMPORTANT CONSIDERATIONS

Mary Ann Dutton [Prof. Psychiatry, Georgetown University Medical Center], "Critique of the "Battered Woman Syndrome" Model," *National Center for Crisis Management*, Web (no date given), Accessed Dec. 7, 2011. <<http://www.nc-cm.org/article138.htm>>

4. The relevant information relied upon for expert testimony in legal cases, advocacy, and clinical interventions involving battered victims extends beyond the psychological effects of battering. The various purposes of expert testimony (see "Review" above), advocacy, and clinical intervention typically require information in addition to the battered victim's psychological reactions to battering. This information includes (1) an analysis of the dynamics of violence and abuse, (2) the battered victim's strategic responses to violence (i.e., what she did in attempting to resist, avoid, escape, or stop the violence), (3) the short- and long-term outcome of those efforts, and (4) the social and psychological context in which the battering occurred (e.g., cultural and ethnic factors, economic factors, social network, the battered victim's prior traumatic experiences, the response of the police and other institutions to the battering) (Dutton, 1993 ; Gordon & Dutton, 1996). The body of knowledge that forms the foundation of expert testimony, advocacy, or clinical intervention cannot be adequately defined by a single construct or diagnosis, including battered woman syndrome.

WALKER'S EMPIRICAL EVIDENCE IS TERRIBLE – IT RELIES ON A POOR SAMPLE

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 236

Furthermore, the empirical evidence that claims to support Walker's theory of battered woman syndrome is problematic at best. As an initial matter, Walker's selection of subjects is at once both too narrow and too broad. All of her subjects were battered women, with no control group for comparison against women who had never been abused. 4 On the other hand, few of her subjects killed their abusers, and apparently none were accused of committing criminal behavior in cooperation with their abusers."5 Because the principal application of Walker's data is to battered women who are accused of violating the law, one would think that she would have designed her study to look at differences not only between battered and non-battered women, but also between battered women who use force and battered women who do not."6

WALKER'S EMPIRICAL RESEARCH IS FALSE – THE VARIABLES SHE IDENTIFIES DON'T ADD TO LEARNED HELPLESSNESS

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 237

David Faigman has thoroughly explored how additional flaws in Walker's research design call into question the validity of her theories of both learned helplessness and the cycle theory of violence.¹¹⁷ Walker's theory of learned helplessness is primarily an extension of Seligman's research on dogs.¹⁸ Her sole empirical evidence for this extension is that women currently in abusive relationships are more fearful, anxious, and depressed, and less angry, disgusted, and hostile than women no longer in battering relationships.⁹ Although the six variables she chose to measure may correlate with learned helplessness, nothing suggests that these are valid diagnostic indicators of the phenomenon.

THERE ARE FIVE PROBLEMS WITH THE INTERVIEWS USED TO SUPPORT BWS -

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81.

Faigman also critiques Walker's methodology for her cycle theory of violence, which Walker tested by interviewing battered women about four battering incidents: the first, the second, one of the worst, and the most recent. 2' Faigman notes five general problems permeating Walker's protocol.

First, Walker's interviewers used leading questions. 2 2 Leading questions can lead to hypothesis- guessing in subjects, provoking them to answer as they believe the experimenter wishes.'23

Second, evidence of the various cycles came from the interviewers' evaluation of subject responses, not from the subjects themselves.'24 This aspect of Walker's procedure opens the door to experimenter expectancies.'

A third problem with Walker's research is that her questions do not place the cycle of violence within any time frame. It is unclear whether the tension-building stage typically lasts ten minutes or several days. She simply states that the three stages exist in a cycle. She also does not explore whether a fourth stage of normality exists between a batterer's phase of loving contrition and the next tension- building phase, or whether the stages of the cycle mutate during the relationship.126 For example, research building on Walker's work suggests that what Walker describes as the contrition stage disappears over time in many battering relationships, and is wholly nonexistent in others. 27

A fourth problem is that no empirical evidence supports the extension of the hypothesized cycle of violence to Walker's claim that battered women therefore live in "cumulative terror."28 Although a disturbing number of Walker's subjects thought that their husbands were capable of killing them, fewer than half indicated so unequivocally.129 Significant numbers of subjects indicated that their husbands would be capable of killing them only if "mad enough" or "accidentally." At least for these subjects, then, there were moments within an abusive relationship that were not plagued by fears of imminent death, indicating that not all battered women live in a constant state of fear.

Faigman's fifth criticism of Walker's research calls into question whether the cycle even exists. Walker concluded that each of the three stages in the cycle was prevalent in a majority of her subjects. According to her data, sixty-five percent of the batterings were preceded by a period of tension building and fifty-eight percent were followed by a phase of loving contrition. However, Walker does not provide data exploring what percentage of her subjects experienced all three cycles. Based on Walker's data, the number of women experiencing all phases could be as low as twenty-three percent and, in any event, no higher than fifty-eight percent.'

BWS IS FAR TOO DEPENDENT ON TIMELINESS – IT HAS A POOR CONNECTION TO SELF-DEFENSE

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 240

Although the cycle theory of violence, if true, arguably explains why a battered woman's perception of danger might extend beyond a specific assault, it does not follow from the cycle theory that the woman's perception of an imminent harm is reasonable, even viewed from her distorted perspective. In light of the three distinct phases of the domestic violence cycle, the cycle theory itself seems to require knowledge of where the battered woman's allegedly defensive use of force fell within the cycle and how long each distinct phase typically lasted before one can determine the reasonableness of the perception of imminent harm. For example, if Judy Norman's husband had become contrite and apologetic immediately before he fell asleep intoxicated, it would follow from the cycle theory of violence that there was no imminent threat of harm-and no reasonable belief otherwise-until the contrition phase was complete and the tension-building phase was well under way.

BWS FOCUSES ON INDIVIDUALIZED SUBJECTIVE STANDARDS OF REASONABLENESS – THIS DEFENSE IS EXTENDABLE TO PARANOID SCHIZOPHRENICS KILLING INNOCENT PEOPLE -

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 242

Even if the battered woman syndrome theory were helpful in supporting a domestic violence victim's account of her subjective perceptions, the theory does little to support a claim that such perceptions were objectively reasonable. When an actor subjectively but unreasonably believes that her use of force is justified, she has at best a claim of imperfect self-defense, which mitigates punishment but does not wholly exculpate.³ The advocates of the battered woman syndrome theory argue that the jury must determine whether a "reasonable battered woman" would have perceived a threat of imminent harm, and that expert testimony is necessary for the jury to understand the reasonable battered woman.¹³⁵ From this perspective, then, the syndrome evidence is relevant to a contextualized standard of reasonableness, where the model for comparison is a reasonable person with the defendant's characteristics.³⁶ Not even under a contextualized standard of reasonableness, however, has the criminal law ever accepted the notion of a psychologically-individualized objective standard.¹³⁷ Although an actor's objective circumstances can sometimes be considered to determine whether a reasonable person would share the actor's perceptions, the law does not accept as reasonable a perception attributable to the defendant's own unique psychological abnormality.¹³⁸ Otherwise, the objective standard of reasonableness would become wholly subjective. For example, under a psychologically-individualized standard of reasonableness, the paranoid schizophrenic who crushes an innocent woman's skull with a brick¹³⁹ or throws her onto the subway tracks¹⁴⁰ would be entitled to a claim of self-defense on the basis that any "reasonable paranoid schizophrenic" would have believed that the victim was about to kill him. Even qualified standards of reasonableness have never been extended to include psychologically-individualized standards of objectivity.¹⁴¹

BWS CANNOT EXPLAIN ITS MOST IMPORTANT PREMISE – WHY A BATTERED WOMAN WOULD KILL HER OPPRESSOR:

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 245

Even setting aside the poor fit between a theory of psychological incapacitation and a legal defense of justification, Walker's battered woman syndrome ultimately fails to provide a satisfactory explanation for why the battered woman kills during a non- confrontational moment. If one believes the cycle theory of violence, then one believes that the victim of domestic violence endures a constant and heightened fear of abuse, even if her batterer is peaceful or even sleeping. If one also believes the theory of learned helplessness, then one believes that the domestic violence victim is not only living in a constant reign of terror, but also suffering from a cognitive incapacity to recognize any method of escape. One would expect, therefore, the domestic violence victim to remain passive even when her batterer is seemingly calm or even sleeping, because she nonetheless is fearful of an imminent attack and because of her incapacity to recognize the ability to do anything other than remain passive. 149

WALKER'S THEORY IS CONTRADICTORY – IT RELIES ON LEARNED HELPLESSNESS IN PERIODS OF THE CYCLE WEHRE THE VICTIM SUPPOSEDLY DOES NOT HAVE IT

Alafair S. Burke [Associate Professor, Hofstra University School of Law. B.A., Reed College; J.D., Stanford Law School] Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, out of the Battered Woman. 2002. North Carolina Law Review – Volume 81. Pg 246

More importantly, though, Walker's conclusion that a woman's passivity ends when she overcomes learned helplessness does little to assist women like Norman and Hennum. If the battered woman has overcome her learned helplessness and can appreciate exit options, then the syndrome fails to explain why she exercises the option of deadly force. Additionally, if Walker's explanation for the shift from passivity to action is that the woman's emotions have shifted to anger, disgust, and hostility, then the use of force would appear to be out of revenge rather than the need for self-protection.

**BWS PATHOLOGIZES THE VICTIM SO THAT SELF-DEFENSE IS IMPOSSIBLE – THE
ACTOR MUST BE IRRATIONAL**

Joshua Dressler [Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University.] Battered Women and Sleeping Abusers: Some Reflections. 2006. OHIO STATE JOURNAL OF CRIMINAL LAW Vol 3:457.

My point is more evident if we turn to Judy Norman's act of killing her husband while he slept. There is simply no basis for suggesting that J.T. Norman *in reality* represented an imminent threat to Judy Norman, as traditional law defines "imminence." It is hard to believe that she subjectively could believe this. Indeed, if Judy Norman *did* believe, because of BWS, that her sleeping husband represented an instantaneous threat, what would that suggest to us? It should suggest that there was something wrong with Judy Norman's psychological connection to reality. And, *that* is an argument of excuse, *not* justification by self- defense. In short, the syndrome evidence pathologizes Judy Norman.

BWS THEORY HAS SEVERAL CRITICAL FLAWS –

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

Notwithstanding the increasing use of BWS evidence by battered women defendants since the theory was first introduced into American courts, it has been subject to much censure. Critics have disparaged the theory for several key reasons: the theory (1) implies that battered women act as a result of a mental disorder rather than reasonableness; (2) suggests a stereotypical model for all women in battering relationships that does not, in fact, fit many women; and (3) uses a learned helplessness model that is inconsistent with the battered woman's use of self-defense.⁷⁴ Though BWS was designed to help jurors understand how a battered woman who killed her abuser might have acted reasonably, some commentators claim that BWS evidence has the overall effect of emphasizing the stereotype of the unreasonable, "pathological" woman.⁷⁵ As a result, it is questionable whether BWS is still helpful or appropriate.⁷⁶

BWS EVIDENCE ALLOWS SELF-DEFENSE BASED MERELY ON THE WORD OF THE BATTERED WOMAN. THIS IS INACCURATE AND MERELY EXCUSES THE ACTOR -

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

The court specifically found that the defendant's conduct should not be judged by what a "reasonably cautious person" would do under similar circumstances, but rather what the defendant herself "honestly believed and had reasonable ground to believe was necessary for [her] to do to protect [herself] from apprehended death or great bodily injury."¹¹² This standard requires a jury to consider the defendant's history of battering and to take into account the abusive relationship when deciding whether she acted reasonably.¹¹³ Thus, evidence of BWS could show that a battered woman might honestly and reasonably believe that her abuser would kill her when he awakened, given his threats and prior abusive actions.¹¹⁴ Such a standard potentially allows a battered woman to successfully claim self-defense largely on her word.¹¹⁵ If the jury believes her, and finds that other battered women in the same situation would have acted similarly, the defendant's actions could be seen as justified, and she could be acquitted on self-defense grounds, no matter how inaccurate or objectively unreasonable her belief that she was in imminent danger.¹¹⁶ Minimizing the objective element of self-defense law in this way can result in unjust outcomes because it emphasizes the defendant's state of mind while deemphasizing the severity of her actions.¹¹⁷ This has never been the intent of self-defense law; rather, this bears a strong resemblance to an excuse defense.¹¹⁸

PROVOCATION DEFENSES ARE PREFERABLE TO SELF-DEFENSE

PROVOCATION ACCEPTS BUT DOES NOT ENCOURAGE HUMAN FAILURE – MORAL EXCUSES ARE PREFERABLE TO BWS BLINDLY JUSTIFYING THINGS -

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

Accommodating battered women who kill within the law of provocation, rather than self-defense, is preferable for several reasons. First, in contrast to self-defense, which either wholly endorses or totally denies a justification of a battered woman's actions, provocation recognizes that the battered woman's actions were wrongful to some degree.²⁶¹ Yet it acknowledges that she should not be fully blamed for killing her abuser.²⁶² While provocation law recognizes human weakness, it does not encourage it.²⁶³ Thus, for a battered defendant, the partial defense appropriately distinguishes the circumstances surrounding a provoked homicide from the circumstances of a homicide that was either unavoidable or completely avoidable.

THE PROVOCATION DEFENSE PRESERVES THE IMPORTANCE OF RETRIBUTIVE PUNISHMENT AGAINST THE VICTIM WHO TOOK THE LAW INTO HER OWN HANDS -

Christine Belew [J.D. Candidate, Emory University School of Law] Killing One's Abuser: Premeditation, Pathology, or Provocation? 2010. Emory Law Journal. Volume 59

Third, using the partial defense of provocation allows the battered woman to escape a murder conviction while still imposing some punishment for her actions. This is necessary because by killing her abuser outside of the traditional rules of self-defense, the battered woman has broken the law; thus, the principle of retributivism requires that she be punished for her crime.²⁶⁸ Other principles of criminal law find that a person should be punished only to deter crime.²⁶⁹ Though it is unlikely that a battered woman who kills her abuser will ever commit such a crime again,²⁷⁰ the defendant must nevertheless be punished to send a message to society that the law will not condone such behavior.²⁷¹ No matter how egregious a person's conduct may be, human life—even a batterer's life—is not simply expendable.²⁷² By sending this message, the criminal law seeks to ensure that the sanctity of human life is respected.²⁷³ Imposing some punishment also makes it clear that violent self-help is not encouraged. Therefore, by mitigating a murder offense to manslaughter, which carries a lesser social stigma²⁷⁴ and a lesser sentence,²⁷⁵ the goals of the criminal law are more effectively achieved.