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Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man

Marina Angel
Temple University School of Law

WHY JUDY NORMAN ACTED IN REASONABLE SELF-DEFENSE: AN ABUSED WOMAN AND A SLEEPING MAN

BY MARINA ANGEL*

I. INTRODUCTION

The reasonable man has been replaced by the reasonable person, but that person still functions within legal doctrines conceived by men and interpreted to fit the facts of men's lives. To understand why it is sometimes reasonable for an abused woman to kill her abuser while he is asleep or otherwise incapacitated, basic criminal law doctrines do not have to be changed. They do, however, have to be applied to the facts of abused women's lives.

The issue of exit – why didn't she leave – must be explained. Concepts of time – immediate, imminent, and cyclical – must be reassessed. Discredited theories that label abused women who kill their abusers as suffering from insanity, a syndrome, or learned-helplessness, must be rejected. Only then can reasonableness under either the common law or the Model Penal Code be applied to the case of an abused woman who kills her sleeping abuser.

North Carolina v. Judy Ann Laws Norman[1] provides the facts of one abused woman who killed a sleeping man. The overwhelming numbers of abused women who kill their abusers do

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* Marina Angel, Temple University School of Law. Fall 2006, Kate Stoneman Visiting Professor of Law and Democracy, Albany Law School. B.A., Barnard College, 1965; J.D. Columbia University School of Law, 1969; LL.M., University of Pennsylvania School of Law, 1977. I first dealt with the topic of the abused woman who kills her sleeping abuser in *Criminal Law and Women: Giving The Abused Woman Who Kills* A Jury of Her Peers *Who Appreciate* Trifles, 33 AM. CRIM. L. REV. 229 (1996) [hereinafter *Criminal Law and Women*]. I thank my colleagues who made receptive comments at an Albany Law School Faculty Workshop, my Albany Law School research assistant, Rebecca Baldwin, 2007, for her invaluable help with research and organization, and the Library Staff of the Albany Law School.

[1] State v. Norman, 378 S.E.2d 8 (N.C. 1989).

so in "normal" confrontation cases.[2] The abused woman who kills a sleeping or otherwise incapacitated abuser presents the most dramatic and challenging situation.[3] *Norman* is the case which is included in most basic first year criminal law books.[4] I hope this short essay will assist both teachers and students in their examination of woman abuse, and specifically Judy Norman's case.

II. EXIT

The prevailing belief is that individuals are independent, autonomous beings, and therefore, free to leave, to exit, any situation at any time.[5] I disabuse the students in my Violence Against Women class of this notion on the first day by asking them if they have ever stayed in any situation – a job, a school, a living

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[2] Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony On Battering And Its Effects*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 225, 233 (Donileen R. Loseke et al., eds., 2d ed. 2005). (citing several researchers, estimate that between 70 and 90 percent of battered women's homicide cases are confrontation cases), Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 394-97 (1991) (hereinafter *Myths and Misconceptions*) (revealing that only 20 percent of the cases were non-confrontational in a study of appellate cases published between 1902 and 1991).

[3] *See*, *Trifles*, a play first produced by Susan Glaspell in 1916, depicting a wife who kills her sleeping abusive husband. Susan Glaspell, *Trifles*, PLAYS 1 (Small, Maynard & Co. Publishers 1920). A version of the play was shown on *Alfred Hitchcock Presents "A Jury of Her Peers"* (NBC Television Broadcast, Dec. 26, 1961). A short story version of *Trifles*, called *A Jury of Her Peers*, was published in 1917. See, Susan Glaspell, *A Jury of Her Peers*, in BEST SHORT STORIES OF THE CENTURY 256-282 (Edward J. O'Brien, ed. 1918). I have analyzed woman abuse in the context of Glaspell's works in several articles: *Criminal Law and Women*, supra note *; *Susan Glaspell's* Trifles *and* A Jury of Her Peers: *Explaining The Obvious*, 8 TEMP. POL. & CIV. RTS. L. REV. 283 (1999); *A Classical Greek Influences An American Feminist: Susan Glaspell's Debt to Aristophanes*, 52 SYRACUSE L. REV. 81 (2001); *Teaching Susan Gaspell's* A Jury of Her Peers *and* Trifles, 53 J. LEGAL EDUC. 548 (2003).

[4] E.g. Joshua Dressler, CASES AND MATERIALS ON CRIMINAL LAW (2nd ed. 1999).

[5] Martha R. Mahoney, *Exit: Power And The Idea Of Leaving In Love, Work, And The Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1283 (1992).

arrangement, a relationship – longer than they should have? And if so, why? I start with my own example. I have stayed at Temple Law School longer than I should have. I dislike the administration,[6] but I like my colleagues, friends and relatives in Philadelphia. I love my apartment, which I could not afford in New York City – where I would prefer to live. The reasons we have for not leaving are an unwillingness to abandon or hurt others, lack of money, lack of alternatives, and the belief that things will get better, e.g. that the current administration will be replaced by an improved model. Students also cite fear of change – the belief that the devil you know is better than the devil you don't know. In truth, the inability to exit is a common fact in all of our lives.

Abused women find it difficult to leave their abusers for many of the same reasons, aggravated by the fact that abusers are extremely controlling.[7] Abusers attempt to exercise total power over "their" women by cutting them off from friends and family, by making sure that they have no independent source of money, and by threatening them with more severe physical abuse and even death if they attempt to leave.[8] Abused women lack money to

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[6] Two examples will suffice. Firstly, Temple Law School was featured as the poster child for stalking and abuse in law schools in an article in the American Bar Association Journal. A law student was allowed to freely roam Temple Law School for two to three years stalking, harassing and assaulting at least fourteen law students. Debra Baker, *Plague in the Profession*, 86 A.B.A. J. 40, 40 (Sept. 2000). He was only expelled one week before his graduation, after having inflicted fear and pain on women students throughout the school. *Id.* at 41. Secondly, in an unpublished opinion, *Herbert vs. Temple Univ. School of Law*, Civ. A. No. 94-5765, 1996 WL 84849 (3d Cir. Feb. 23, 1996), the Third Circuit found that Dean Robert J. Reinstein deprived a student of due process rights in the course of a disciplinary hearing.

[7] Mahoney, *supra* note 5, at 1290; *see also*, Donna K. Coker, *Heat Of Passion And Wife Killing: Men Who Batter / Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 84-93 (1992); *Criminal Law and Women*, *supra* note * at 277-88.

[8] In January 1994, the Department of Justice supported these findings when it reported that of known violent offenders against women, "approximately 28% were intimates such as husbands or boyfriends.... In contrast, victimizations by intimates and other relatives accounted for only 5% of all violent victimizations against men." Ronet Bachman, *Violence Against Women: A National Crime*

escape and have nowhere to which they can escape. The United States has more animal shelters than women's shelters, and women's shelters are only short-term facilities.[9] The majority of homeless women with children in the United States are abused women with nowhere to live.[10] Recently termed separation

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Victimization Survey Report 1 (U.S. Dep't of Justice, Bureau of Justice Statistics Jan. 1994). "Three out of four offenders committing domestic violence against women were spouses (9%), ex-spouses (35%) and boyfriends or ex-boyfriends (32%). When only spousal abuse is considered, divorced or separated men committed 79% of such violence, and husbands, 21%." Caroline Wolf Harlow, *Female Victims of Violent Crime* 2 (U.S. Dep't of Justice, Bureau of Justice Statistics Jan. 1991). "Separated or divorced women were 14 times more likely than married women to report having been a victim of violence by a spouse or ex-spouse. Although separated or divorced women comprised 10% of all women, they reported 75% of the spousal violence." *Id.* at 5.

Two decisions exemplify the totally egocentric, controlling, and deadly behavior of abusers. In *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), Justice Scalia held that a wife had no constitutionally protected property interest in having the police enforce a restraining order against her abusive estranged husband. The order carefully regulated contact between the husband and the wife and their three children. *Id.* at 752. In violation of the order, he took the three children, killed them, and then committed "suicide by cop." *Id.* at 752-754. Similarly in *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), Angel Rodriguez threatened to murder his common law wife if she went to the police about his abuse. After they separated and she went to the police, he took their two young children, killed them, and killed himself. *Id.* at 1060-61. Despite the mandatory nature of Puerto Rico's domestic violence statute and the police's numerous violations of that statute and illegal falsification of wrongdoings, the First Circuit found no constitutionally protected rights. *Id* at 1072.

[9] STAFF OF S. COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA, (Comm. Print 1992) S. REP. NO. 118, 102d Cong., 2d Sess. 26, 26 (1992) (documenting tremendous risk of violence against women in America) (hereinafter JUDICIARY COMMITTEE REPORT).

[10] Legal Momentum.org, *Understanding the Effects of Domestic Violence, Sexual Assault and Stalking on Housing and the Workplace* (2006), http://www.legalmomentum.org/site/DocServer/statistics.pdf ?docID'556 ("Nearly half (50%) of the 24 cities surveyed in 2005 by the US Conference of Mayors identified domestic violence as a "primary cause of homelessness.... of all homeless women and children...63% have been victims of intimate partner violence as adults.")

assault,[11] there are two points in time when abused women are at most risk of death: as they prepare to leave their abusers, and once they have left, thus, making exit for some abused women a very dangerous alternative to staying.[12] Abused women are concerned not only for themselves, but for their children, other family members, and even their abusers. They fear both the known and the unknown.

III. THE FACTS OF JUDY NORMAN'S LIFE

The facts of Judy Norman's life illustrate why an abused woman cannot simply leave. For over twenty years, her husband, John Thomas Norman [J.T.], brutally beat and abused her, including regularly putting out cigarettes on her body and breaking glass against her face.[13] He did not work, but forced her to make money by prostitution. He beat her if she resisted prostituting herself or if he was dissatisfied with the amount of money she earned. He regularly deprived her of food and threatened on numerous occasions to maim and kill her. Judy exited by leaving several times, "but he had always found her, brought her home, and beaten her."[14]

Two days before his death, J.T. again forced Judy into midnight prostitution at a roadside rest stop, and yet again beat her.[15] Judy testified that he always beat her when he took her to the rest stop. J.T. was arrested for drunk driving after leaving the

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[11] Martha R. Mahoney, *Legal Images of Battered Women: Redefining The Issue Of Separation*, 90 MICH. L. REV. 1, 71 (1991) (hereinafter *Legal Images*); Martha R. Mahoney, *Victimization or Oppression: Women's Lives, Violence And Agency*, in PUBLIC NATURE OF PRIVATE VIOLENCE 59, 60 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) (hereinafter *Women's Lives*) (elaborating further on separation attack); Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2138-39 (1993) (discussing how "the most dangerous time for a battered woman is when she separates from her partner").

[12] Mahoney, *Legal Images*, *supra* note 11 at 65-66.

[13] State v. Norman, 378 S.E.2d 8, 10-11 (N.C. 1989).

[14] *Id.* at 11.

[15] *Id.* at 19 (Martin, J., dissenting).

rest stop and spent the rest of the night in jail. After his release the next morning, he "seemed angrier then ever [and] his abuse of the defendant was more frequent."[16] On the night before the killing, the police were called to the house because of the severity of the abuse, but they refused to arrest J.T. unless Judy filed a complaint. She was afraid to do so because he "would kill her if she had him arrested."[17] He had previously threatened to maim and kill her on numerous occasions. Within an hour, the police were again called to the house. Judy had attempted the ultimate exit, suicide.[18] She failed however, as she was taken to the hospital where her stomach was pumped. At the suggestion of a hospital therapist, the next day, the day of the killing, Judy went to the mental health center to discuss charges against her husband and his possible civil commitment. When she later confronted J.T. with the possibility of commitment, he "told her he would 'see them coming' and would cut her throat before they got to him."[19] Judy also went to the social services office that day to apply for welfare benefits, "but her husband followed her there, interrupted her interview, and made her go home with him."[20] One wonders why the social service workers failed to intervene.

Judy Norman presented fact witnesses to corroborate her testimony. "These witnesses describe circumstances that caused not only defendant to believe escape was impossible but also convinced *them* of its impossibility."[21] Felice, Judy's daughter, and Mark Navarra, Felice's boyfriend who had lived with the

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[16] *Id.*

[17] *Id.* at 10 (majority opinion).

[18] *Id.* at 19. A high percentage of abused women attempt suicide. *See* Evan Stark & Anne Flitcraft, *Killing the Beast Within: Woman Beating and Female Suicidality*, 25 INT'L J. HEALTH SERVICES 43, 43-44 (1995) (positing that battering may be most important cause of female suicide); *see also* Jean Abbott et. al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 J. AM. MED. ASS'N 1763, 1765 (1995) ("Eighty-one percent of women with a history of suicide attempts had experienced [domestic violence] at some time in their lives, compared with 19% of those with no history of suicide attempts ....").

[19] *Norman*, 378 S.E.2d at 11.

[20] *Id.*

[21] *Id.* at 18 (Martin, J., dissenting).

Normans for a year and a half, testified that J.T. had beaten Judy "all day long" and that he had forbidden her to eat for three days.[22] Judy complied in fear of another beating.[23] Mark Navarra testified that during the entire time he had lived with the Normans, "he had never seen defendant's husband madder than he was on 12 June" – the day of the killing.[24] Judy's mother testified that the night before the killing, J.T. threatened Judy, announcing, "I'll kill you, your mother and your grandmother."[25] Judy's mother believed him and, fearing he would kill the whole family, she armed herself with a gun – the gun Judy later used to kill J.T.[26]

Judy had increased her attempts to leave, but the police and the criminal justice system failed to help her exit, as did the hospital, the mental health center, and the social services office. It was clear that the state would not protect Judy by removing her abuser or by allowing her access to the money and benefits she needed to leave. Judy's ultimate attempt to exit by suicide was also thwarted by state intervention. She had no money to leave and nowhere to go. Every avenue of exit was blocked.

At the same time, the violence had increased in frequency and severity. This was attested to by Judy's daughter and her daughter's boyfriend, and by her mother who had armed herself. J.T.'s rage resulted in starvation for three days, threats of maiming and killings extended to Judy and her family, and severe beatings throughout the final day. A clinical psychologist testifying at trial analogized Judy's situation to that of a war prisoner under the Nazis,[27] and even the North Carolina Supreme Court majority recognized a "reign of terror."[28] Abused women are at most danger of death at the point of exit, when their abusers' anger escalates.[29] The severe beatings and forced prostitution would

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[22] *Id.* at 20.
[23] *Id.*
[24] *Norman*, 378 S.E.2d at 20.
[25] *Id.* at 19.
[26] *Id.* at 19-20.
[27] *Id.* at 17.
[28] *Id.* at 15.
[29] Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 424-25 (1988); *see also*, Harlow, *supra* note 8.

continue and Judy's own death was foreseeable – unless she killed her abuser first.

IV. TIME

There are no absolute meanings attributable to time, space, or causality,[30] just as there are none for early or late, big or little, and fast or slow. Yet we "rely on contingently reliable measurements of time, space, and causality in everything we do."[31] The measurement of time that should count in the cases of abused women who kill their abusers should not be men's "standard linear time" but women's "contingent, overlapping, multivalent time."[32] An example should ring true for both law students and law teachers. "[F]or men, education is a continuous practice, with family as a non-problematic adjunct to that pursuit. In contrast, women's future might involve a career, might involve a family, or might involve both, but in no set order or expectational pattern."[33] There are lineal futures for men, and contingent futures for women. Justice for an abused woman "requires the recognition of a version of time very different from, but just as objective and truth-telling as white-male standard time."[34] The traditional legal requirement of

> 'imminence' entails physical proximity of the woman and the threatening bodies or weapons. . . . From the woman's point of view, however, the space around need not be filled with flailing limbs and weapons in order to be threatening. The space need only be filled—by the man's definition of it, by his demonstrated ability to control it, by his need to fill it.[35]

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[30] Ann C. Scales, *Feminists In The Field Of Time*, 42 FLA. L. REV. 95, 99 (1990).
[31] *Id.* at 100. See also, BERNARD LEWIS, WHAT WENT WRONG: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE, 117-26 (Oxford Univ. Press 2002).
[32] *Id.* at 108-09.
[33] *Id.* at 109.
[34] *Id.* at 106.
[35] *Id.* at 112.

For abused women time is elongated. Provocation continues, as does the need for self-defense.

I demonstrate different notions of time to my Violence Against Women students by using a simple experiment. I ask them, what time is lunch time? For most staff in law schools, lunch time is when they are scheduled to take a midday break, usually anytime between 11 a.m. and 2 p.m. Law school maintenance staff on a midnight shift take a lunch break at 3 or 4 a.m. In Greece, where I taught for many summers, lunch can start anytime from 1 to 3:30 p.m., while Greek matinee performances start at 7 p.m., and evening performances at 10:30 or 11 p.m.

V. REAL WORLD FACTS

Blatantly sexist laws may have been changed, but both facts and laws are interpreted.[36] "[C]ulturally available narratives about sexualized violence are stories of provocation, passion, or deranged character or insanity."[37] But these are just the traditional and currently prevailing scenarios built on the unsubstantiated beliefs of men. Justice for an abused woman who kills requires recognition of scenarios built on the objective facts of woman abuse. Woman abuse is not an exception.[38] Statistical studies on intimate partner violence show extremely high levels of woman abuse.[39] I start my Violence Against Women class by presenting my students with the statistics regarding the number of women

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[36] Kim Lane Scheppele, *Just The Facts, Ma'am: Sexualized Violence, Evidentiary Habits, And The Revision Of Truth*, 37 N.Y.L. SCH. L. REV. 123, 125 (1992).

[37] *Id.* at 142.

[38] Mahoney, *Women's Lives*, *supra* note 11, at 63. ("The fiction that violence is exceptional is fundamental to stereotypes that portray battered women as helpless, dependent, and pathological. If it were understood that violence is really everywhere, then it would not be difficult to accept that violence happens to ordinary women."); JUDICIARY COMMITTEE REPORT, *supra* note 9. *See also* Scheppelle, *supra* note 36 at 141-42.

[39] *Domestic Violence Statistics*, NATIONAL CLEARINGHOUSE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET (3d ed. Sept. 1995), available at http://www.actabuse.com/dvstats_5.html (Last visited Oct. 9, 2006).

beaten and abused, harassed and stalked, raped, and killed by intimates and former intimates, acquaintances, friends, and family members.[40] Given the high numbers, I assume students in the class have experienced one or more of these crimes or know family members or friends who have. I ask the class to be sensitive in discussing the materials and announce that students who are not prepared to deal with difficult fact situations because of their own past experiences are not ready to take a course on violence against women. Our justice system assumes that all participants share the same stereotypical constructions of reality. The scenarios were developed by the same men who created our laws. Even if laws change, the scenarios remain.[41] It has always been recognized that it is difficult to separate substantive law from procedure and facts from law. Those applying the law – police, prosecutors, defense attorneys, judges, and juries – have done so in light of the scenarios developed at common law. Those scenarios embody traditional male notions of autonomy, time, space, and causality.[42] They reflect the view "that the truth is singular, immediately apparent, and permanent."[43]

Our homicide laws are based on a norm of two equal sized men engaged in single combat. From this scenario flow rules of equal force, provocation, and the immediacy required for reasonable self-defense and provocation. Obviously, the scenario places the abused woman, who is normally smaller and has less upper body strength then her male abuser, in a disadvantageous position. Now that women have begun to speak publicly about abuse, and high rates of abuse have been documented, scenarios based on fact rather than fiction must be recognized.

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[40] JUDICIARY COMMITTEE REPORT, *supra* note 9; *Susan A. Wilt et al., Female Homicide Victims in New York City 1990-1994*, New York City Department of Health—Injury Prevention Program (March 1997).

[41] Scheppelle, *supra* note 36, at 125.

[42] Scales, *supra* note 30, at 99-100.

[43] Scheppelle, *supra* note 36, at 127.

VI. LENORE WALKER

Lenore Walker performed a valuable service in bringing woman abuse to the public consciousness,[44] but her definition of abuse is unduly narrow and restrictive. Much of her work has been discredited.[45] The terms she created, "battered woman's syndrome" and "battered woman's defense," are inaccurate and misleading. The American Psychiatric Association recognizes no such syndrome, and no such defense is recognized by any jurisdiction.[46] She believes a woman suffers from battered woman's syndrome if she has gone through a three-stage cycle three times consisting of tension building, explosive violence, and reconciliation.[47] Only then does Walker consider a woman abused. Walker lost credibility when she was prepared to testify for the defense in O.J. Simpson's trial for the murder of his abused wife, Nicole.[48] However, it is clear that not all abused women go through Walker's three part cycle and, even those who do, may not necessarily go through the cycle three times.[49] Walker's paradigm fails to recognize that there is no "one free episode of domestic violence" before a woman can be considered abused.[50]

Furthermore, Walker's concept of learned helplessness – that an abused woman becomes more passive and controllable by her abuser as time goes on[51] – is internally contradictory in the case of an abused woman who kills her abuser. The theory of learned helplessness leaves triers of fact pondering, "how helpless could

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[44] See, LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (Springer Publishing Co. 2000) (1984).

[45] Fischer, *supra* note 11, at 2136 (documenting extensive help-seeking by battered women); *see generally*, Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, And The Distinction Between Justification And Excuse*, U. ILL. L. REV. 45 (1994).

[46] Osthoff & Maguigan, *supra* note 2, at 227.

[47] Walker, *supra* note 44, at 126.

[48] ELIZABETH M. SCHNEIDER ET. AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 404 (Foundation Press 2d ed. 2008).

[49] See, Myrna Raeder, *The Admissibility Of Prior Acts Of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1481 (1996).

[50] People v. Williams, 93 Cal. Rptr. 2d 356, 363 (2000).

[51] Walker, *supra* note 44, at 118.

she be if she managed to kill her abuser?" In fact, abused women increase rather than decease their attempts to exit.[52] The facts in the case of Judy Norman demonstrate that in the evening before and on the day she killed her husband, she had greatly increased her attempts to exit, and that all forms of exit, including suicide, were made impossible.

Judy Norman's actions and beliefs were reasonable. She had had no food for three days, and she knew that when J.T. awoke he would prostitute her and beat her as he had done in the immediate past. Is not forced prostitution, known as rape, grave bodily harm? Are not severe beatings grave bodily harm? Is not starvation grave bodily harm? She correctly perceived increased violence leading to grave bodily harm and possible death because J.T.'s abuse was more frequent and worse than ever.

VII. REASONABLE SELF-DEFENSE

The reasonable man appears in the criminal law as in every other area of law. In intimate partner homicide cases, the law knows the reasonable man and the insane woman. There is no question that the reasonable man is a man. In 1935, A.P. Herbert joked, but the truth is often told jokingly, "At common law a reasonable woman does not exist."[53] The reasonable man is the hypothetical human being who sets the standard of purportedly objective reasonableness, of legal and moral behavior for all of us.[54] Any deviation is labeled subjective, a bad word that conjures up images of chaos, of a world of no law and no moral standards. The reasonable man has been replaced by the reasonable person, but this reasonable person still appears to have the mental, emotional, and physical characteristics of a man, and, in intimate

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[52] *See* Fischer et al., *supra* note 11, at 2136-37 (citing KARLA FISCHER, THE PSYCHOLOGICAL IMPACT AND MEANING OF COURT ORDERS OF PROTECTION FOR BATTERED WOMEN 65-66 (1992) (unpublished Ph.D. dissertation) (on file with the author)).

[53] ALAN PATRICK HERBERT, MISLEADING CASES IN THE COMMON LAW 20 (Fred B. Rothman & Co. 1989) (1930).

[54] Oliver Wendell Holmes, Jr., The Common Law 51 (1881).

partner homicide cases, an irrational, jealous, and violent man at that.

Much has been written about, and cases litigated on, whether there should be a reasonable woman standard and even whether there should be a reasonable abused woman standard.[55] Because the reasonable man has always been a hypothetical human being, there is no reason why the reasonable person cannot be a totally hypothetical human being embodying both masculine and feminine views of the world. This hypothetical figure must struggle, as must we all, to function in an increasingly diverse society, to place her/himself in the shoes of a reasonable person with different physical characteristics and life experiences. Only if the reasonable person were defined so as to adopt all of the characteristics of the individual on trial, including that person's moral system, there would be no moral standard left in criminal law. Creating today's reasonable person requires us to carefully define the moral system under which this hypothetical reasonable person will operate. In a diverse society, that moral system must be developed through the inclusion of the viewpoints of all of our varied groups. It requires us to make clear choices as to what we will label right and wrong.

Morally blameworthy conduct is inherent in the definition of crime.[56] An excuse, such as insanity, finds something so wrong with an individual that the individual cannot be held criminally liable.[57] A not guilty by reason of insanity verdict usually results in long-term civil commitment.[58] A guilty but mentally ill verdict may result in long-term civil commitment until the individual

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[55] *See* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 129 (1992); *see also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1215-19 (1990); *see also* Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. LAW 203, 204-10 (1992). For a discussion on whether there should be a reasonable battered woman standard, see Kinports, *supra* note 29, at 415-22.

[56] Marina Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U. CHI. L.J. 61, 77 (1977) (describing common law principles of criminal law).

[57] *Id.* at 77 n.61.

[58] *See e.g.*, GA. CODE ANN. §17-7-131(b)(3)(A) (West 2006).

regains sanity so that individual can then serve the remainder of a long prison sentence for homicide.[59] On the other hand, a justification such as self-defense looks at the circumstances surrounding a killing and finds that an act that would otherwise be murder is not morally blameworthy and is therefore not criminal.[60] The verdict is a simple not guilty and the individual walks.

Because common law homicide was defined on the paradigm of the reasonable man and not the reasonable woman, women who killed abusive intimate partners were far outside the paradigm. Narrow interpretations of common law often forced abused women to rely on the excuse of insanity.[61] We can no

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[59] *See* 18 Pa. Cons. Stat. Ann. § 314 (2007); 42 Pa. Cons. Stat. Ann. § 9726 (2007); 50 Pa. Cons. Stat. Ann. § 7405 (2007); RICHARD S. WASSERBLY & BETSY MOORE, PENNSYLVANIA CRIMINAL PRACTICE 340 (Thompson West 2005); SUMMARY OF PENNSYLVANIA JURISPRUDENCE 2D: CRIMINAL LAW 90-95 (Thompson West 2008). *See also,* Marina Angel, *'Guilty but Mentally Ill' Debuts*, PENNSYLVANIA LAW JOURNAL-REPORTER, Mar. 14, 1983, at 1; Marina Angel, *Guilty but Mentally Ill: It's a Bad Law*, THE PHILADELPHIA INQUIRER, Mar. 14, 1983 at 11-A. *See also*, GA. CODE ANN. 17-7-131(b)(1)(D) (2007); GA. CODE ANN. 17-7-131(g) (2007); Logan v. State, 352 S.E.2d 567 (Ga. 1987) (holding that 17-7-131(g) is clear that the "mentally ill" verdict has the same force and effect as any other guilty verdict, with an additional provision that the Dept. of Corrections or other incarcerating authority provide mental health treatment for a person found "guilty but mentally ill."); US v. Bankston 121 F.3d 1411 (11th Cir. 1997), cert. denied, 522 U.S. 1067 (1998) (holding that a felony conviction for a crime based on a plea of "guilty but mentally ill" under 17-7-131 qualifies as a predicate offense to establish career offender status under the federal sentencing guidelines.).

[60] Angel, *supra* note 56, at 77 n.61.

[61] However, a recent statistical study of intimate partner homicide in New York City and Denver, Colorado, from 1880 to 1920 showed that men who killed their intimate partners were often treated severely, "whereas women charged with similar crimes were treated leniently." Carolyn B. Ramsey, *Intimate Homicide: Gender And Crime Control, 1880-1920*, 77 U. COLO. L. REV. 101, 101 (2006). It may be that informal mechanisms and communal knowledge of circumstances historically moderated the severity of common law interpretations of abused women who killed. Unduly rigid modern interpretations of both law and facts may be increasing the severity of punishment today, for example, the disparity in punishment between women who kill their batterers and men who kill an intimate partner. When a man kills his partner, the average prison sentence is two to six years, while a woman who kills her batterer receives an average prison sentence of twelve to sixteen years. Margaret A. Cain,

longer view the behavior of all abused women who kill their abusers as irrational or insane in light of the widespread existence of woman abuse and the fact that many women who kill do so because of a reasonable fear of continuing severe abuse or death. Woman abuse, separation attack, and marital rape have existed for a long time but only recently have they been named and recognized as common, interrelated, and widespread offenses against women.[62] Lenore Walker's early definition of battered woman syndrome included rigid descriptions of abuse, learned helplessness, and lack of capacity for rational self-control. Walker's "syndrome" plays into the traditional belief that abused women who kill their abusers are mentally unbalanced, rather than acting reasonably in response to a threat of imminent death or great bodily harm. Most abused women who kill their abusers have exhausted all avenues of escape and acted reasonably in self-defense.

The issue of reasonableness comes into play in common law homicide in the doctrines of provocation and self-defense. Both doctrines were built on assumptions that validated the conduct of men. Criminal law courses deal with the question whether that paragon of virtue, the hypothetical reasonable man, would ever be so provoked as to lose control and kill in the heat of passion. The common law's answer was "yes," and the circumstances under which this could occur were carefully defined to include only sustaining physical blows or discovering his wife in

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Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 380 (1999), (citing RAOUL FELDER & BARBARA VICTOR, GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE 175-76 (1996) and NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET 15 (3d ed. 1994)).

[62] Mahoney, *Separation Assault*, *supra* note 11, at 6 (noting that many assaults on women "were not cognizable until the feminist movement named and explained them"); Mahoney, *Women's Lives*, *supra* note 11, at 59 (stating that many aspects of female oppression were traditionally hidden). Jane Mills describes traditional male definitions of words for woman and about woman. For example, a synonym for woman is bitch. JANE MILLS, WOMANWORDS—A DICTIONARY OF WORDS ABOUT WOMEN 27-28 (1989).

the act of adultery.[63] Traditionally, the husband had to actually see the act of adultery, but the law was extended to mere words, to being told of a wife's adultery.[64]

At this point, I ask my students to describe what they would really do if they came home unexpectedly and found the person they loved, the person with whom they had planned to spend their lives, having sex with someone else. The most common answer I get is "cry." I also get "leave," "get a divorce," and "hide in a closet." I don't get "blow them away."

Adultery as provocation validates the angry and violent homicidal actions of abusive men, who use stereotypical reasons and explanations to legitimize their assaults and homicides on "their" women. The abuser perceives himself as the real victim and the woman as the assaulter who has provoked him into killing her.[65] She deserved to die; he was only acting in emotional self-defense.[66] However, abusing a woman and killing a woman are not entirely different actions, but rather parts of the same "continuum of violence."[67]

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[63] MODEL PENAL CODE § 210.3 cmt. 5 (1962) (listing categories of adequate provocation, including physical contact, unlawful arrest, and witnessing adultery). *See also* Herbert Wechsler, as the author of the Model Penal Code, explaining the rationale for provocation:

> [T]he more strongly [most persons] would be moved to kill by the circumstances of the sort that provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 701, 1281 (1937).

[64] WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 657-58 (2d ed. 1986).

[65] Coker, *supra* note 7, at 98 (describing standard pattern of blaming female victim for provoking violent behavior).

[66] *Id.* at 106-11 (describing "male innocence/female guilt story" that is used to justify spousal abuse).

[67] *Compare* Coker, *supra* note 7, at 84 (describing significant overlap between wife abuse and murder), *with* Susan S. M. Edwards, *A Socio-Legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 VICTIMOLOGY 186 (1985) (categorizing domestic violence and spousal homicide

Having established these purportedly objective standards under which the reasonable man would kill, the law went on to ask whether there was sufficient cooling time.[68] Time is a key element in both provocation and self-defense. At common law, provocation caused the reasonable man to act quickly in the heat of passion before the blood had cooled, which negated malice aforethought and reduced murder to manslaughter. Because the purportedly objective standards were built on the actions of the average abusive male, individual abusive males normally fit these standards, and thus, met both objective and subjective standards.

Reasonable self-defense is a complete justification resulting in a not guilty verdict, while an unreasonable belief in the need for self-defense can reduce murder to manslaughter or negligent homicide. Again, the hypothetical reasonable man sets the purportedly objective standard. If the individual reasonably believed there was an imminent danger of death or great bodily harm to himself or others, he was justified in killing, and thus, not guilty. Time, for the reasonable man, as it existed at common law, focused on events immediately before the killing.

Even if faced with an immediate danger of death or great bodily harm, the reasonable man could use only equal force to repel the danger. A narrow reading of the doctrine of equal force, developed on a prototype of two males of equal size and strength, held that, if attacked without a deadly weapon, one could not respond with a deadly weapon. This doctrine obviously ignores the social reality of most women,[69] and places them at a disadvantage, as they are generally smaller and lack the same upper-body strength as men. Traditional self-defense imposes no duty to retreat, except for co-occupants of the same house. Most men are assaulted and killed outside their homes by strangers, while most women are assaulted and killed within their homes by intimate

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as single and related species). Donna Coker, studying battering husbands who killed in the United States, and Susan Edwards, researching in England, reached similar conclusions.

[68] MODEL PENAL CODE § 210.3 cmt. 5 (1962).

[69] Maguigan, *Myths and Misconceptions, supra* note 2, at 416.

partners.[70] Requiring retreat within the home disadvantages women. If the individual acted unreasonably under the objective standard but in good faith under the subjective standard on any of the common law self-defense factors, the convictions could still be reduced from murder to manslaughter or negligent homicide.

Men's emotions, men's realities, and men's stories formed doctrines of provocation and self-defense. Provocation required quick anger caused by infidelity or perceived infidelity.[71] Self-defense required an attack, or a reasonable belief of an immediate attack, evidence of which immediately preceded the killing.

The stories of abused women are much different. Fear, not anger, is the primary emotion. This fear increases as abused women realize that it is impossible to escape. Both provocation and self-defense extend over time for the woman who is subjected to repeated abuse by an intimate.

The Model Penal Code [MPC] clarified the substantive criminal law in a way that acknowledges the world of abused women. Using "extreme mental or emotional disturbance" as a reductive factor, the MPC eliminated rigidly defined instances of provocation, heat of passion and cooling time.[72] Because its definition of self-defense included actions "immediately and necessary on the present occasion," the MPC extends time.[73]

Under the MPC, murder becomes manslaughter when committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."[74] Reasonableness is "determined from the viewpoint of a person in the actor's situation under circumstances as [s/he] believes them to be."[75] This MPC formulation is more flexible than the purportedly objective common law standard because it

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[70] A study on female homicide in New York City found that of all studied cases, 49% percent of abusers were intimate partners, 14% were family members, 15% were acquaintances, and 17% were strangers. Wilt et al., *supra* note 40, at 8.

[71] Coker, *supra* note 7, at 103 (For men, "if adultery is the 'paradigm' heat of passion event, anger is the paradigm heat of passion emotion."). *Id.*

[72] MODEL PENAL CODE § 210.3(1)(b) (1962).

[73] *Id.* at § 3.04(1).

[74] *Id.* at § 210.3.

[75] *Id.*

places the reasonable person in the defendant's situation. The Commentary explains that the term "situation" was "designedly ambiguous."[76] Personal handicaps and some external circumstances, such as blindness, shock, and grief, can be considered but "idiosyncratic moral values" cannot.[77]

The MPC recognizes self-defense "when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."[78] A belief that is reasonable results in acquittal. A reckless or negligent use of self-defense reduces the degree of criminality.[79]

It is sometimes argued that there is a difference between the common law and the MPC regarding the concept of time, and that the difference is reflected in the terms "immediate" and "imminent."[80] It is the concept of time, not the word used, which is important. Common law immediacy was usually interpreted to focus on the instant of the defendant's actions.[81] The MPC's imminence clearly places its focus on the defendant's actions in a context of past, present, and future events.[82] The MPC's example of an extended time frame justifying the use of deadly force is "to prevent an assailant from going to summon reinforcements, given a

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[76] *Id.* at § 210.3 cmt. 5.

[77] *Id.*

[78] MODEL PENAL CODE § 3.04(1)

[79] Model Penal Code Section 3.09(2) deals with reckless or negligent use of deadly force in self-defense. This section refers back to sections 2.02 (c) and (d), defining "recklessly" and "negligently." The two definitions are identical except that when acting "recklessly" the individual "consciously disregards" a risk and when acting "negligently" the individual "should be aware" of a risk but is not. Both sections require a "gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation." Recklessness as to the need for self-defense permits a conviction of manslaughter; negligence permits a conviction of negligent homicide. MODEL PENAL CODE §§ 3.09(2), 3.02(2), 2.02(10).

[80] MODEL PENAL CODE § 3.04 cmt. 2(c) (1962); *see also* Kinports, *supra* note 29, at 422-26 (discussing imminence in context of battered women's self-defense claims).

[81] Maguigan, *Myths and Misconceptions, supra* note 2, at 423-26.

[82] *See id.* at 414 n.119 (criticizing inconsistent use of terms "immediate" and "imminent").

belief that it is necessary to disable him to prevent an attack by overwhelming numbers – so long as the attack is apprehended on the 'present occasion.'"[83] Instead of this strained hypothetical, the MPC should have used the more common situation of an abused woman who finds all exit blocked and who reasonably anticipates a severe assault which she would not have the strength to repel, and therefore, kills her abuser at a time when the abuser is asleep or otherwise incapacitated.

The MPC also gives some relief from the rigid application of the common law rules of equal force and retreat. It makes clear that equal force does not necessarily mean that unarmed force can only be met by unarmed force. Rather, the amount of force used "must bear a reasonable relation to the magnitude of the harm [the attacked] seeks to avert."[84] The MPC, however, gives abused women assaulted within their own homes relief from the retreat doctrine, which states that the individual is not required to retreat within her own home. [85]

We must uncover the facts on which legal doctrines are based in order to understand the value systems underlying those legal doctrines. [86] Heat of passion based on adultery legitimizes the reasons abusive men give to explain their violence: they claim

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[83] MODEL PENAL CODE § 3.04 cmt. 2(c) (1962). Professors Kadish and Paulson in their leading criminal law text gave the following example:

> In an English motion picture, a cuckolded husband imprisons and chains his wife's latest lover in an abandoned cellar with the announced intention of killing him after the passage of sufficient time for the stir over his absence to quiet down, probably several months. Must the intended victim wait until the final moment when the husband is about to commit the fatal act, or may he kill the husband in self-defense at any time during the period of imprisonment if he can succeed in laying hands upon him?

SANFORD KADISH & MONRAD PAULSON, CRIMINAL LAW 498-99 (3d ed. 1975). This hypothetical does not use the typical situation of an abused wife but rather a bizarre situation based on a traditional stereotype of the cuckolded husband.

[84] MODEL PENAL CODE § 3.04 cmt. 4(a) (1962).

[85] MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (1962).

violent loss of control when provoked by sexual unfaithfulness; they use "'socially approved vocabularies of female provocation and male victimization.'"[87] This scenario, developed over centuries and repeated so often that it is accepted as true, legitimizes violence rather than regret or forgiveness.

Men who abuse women and men who kill their wives and female intimates significantly overlap. Rather than unexpected and unpredictable emotional explosions, men who kill have a history of violence. A pattern is clear. Police are called multiple times; stalking, a sign of premeditation, is frequent; and death often occurs at or after separation.[88] Approximately 60% of men who kill their wives or female intimates allege sexual unfaithfulness, and 50% claim desertion.[89]

Women and men kill their intimate partners for different reasons and under different circumstances.[90] Abused women who kill their abusers account for about half of all women who kill.[91] Women who kill their abusers are not crazy or deviant[92] but rather are rational people acting in self-defense. Women's self-defense is often viewed as female aggression.[93] A woman's need for a weapon to meet deadly unarmed male force, a woman's need to act during a lull in the violence when the batterer is asleep or otherwise incapacitated, and a woman's knowledge of her batterer's patterns of behavior and signals are not read as leading

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[86] Scheppele, *supra* note 36, at 125. ("[T]he law is still sexist, but now in the name of fact rather than doctrine.).

[87] Coker, *supra* note 7, at 98 (quoting James Ptaeck, *Why Do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 133, 148 (Kertsi Yllö & Michelle Bogard eds., 1988)).

[88] *Id.* at 91.

[89] *Id.*

[90] Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121 (1985).

[91] Phyllis Chesler, *Women in the Criminal Justice System: A Woman's Right to Self-Defense: The Case of Aileen Carol Wuornos*, 66 ST. JOHN'S L. REV. 933, 936 (1993).

[92] *Id.* at 936; *see also* Kinports, *supra* note 29, at 463-64 (stating that few juries have acquitted battered women by reason of insanity).

[93] Chesler, *supra* note 91, at 938.

to a reasonable fear of death or serious bodily injury. Instead, they are read as evidence of premeditated murder.[94]

A woman's need for self-defense requires reinterpretation of time, equal force, and the duty to retreat in light of the realities of abuse. Expert testimony can help judges and juries unfamiliar with facts of abuse recognize these realties. The action of the abused woman who kills when her abuser is asleep or otherwise incapacitated can be justified as an immediately necessary response "on the present occasion" if she acted in self-defense with reasonable fear of a future attack, which she cannot escape and which she does not have the strength to repel.

VIII. CONCLUSION

Judy Norman was entitled to a charge on reasonable self-defense. She had long been severely beaten, forced into prostitution, and threatened with death. The severity of the beatings and the death threats had significantly increased in the thirty-six hours preceding the killing. All avenues of exit had been blocked. She, and any objective reasonable person in her situation, would have perceived the need to kill her abuser before he woke up, overpowered her yet again, and caused even more grievous bodily harm and possibly death.

Reasonable people agreed at the time that Judy Norman deserved a reasonable self-defense charge, even under North Carolina's common law. A three judge panel of the intermediate appellate court, in a unanimous opinion written by the only woman on the North Carolina's appellate courts, Judge Sarah Parker, and joined by her two male colleagues, held that there was sufficient evidence to support a charge of reasonable self-defense.[95] Notably, Sarah Parker is now the Chief Justice of the North Carolina Supreme Court.[96]

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[94] Gloria Killian, *Equal Justice for Some*, 2 S. CAL. REV. L. STUD. 7-8 (1992).
[95] State v. Norman, 366 S.E.2d 586 (N.C. Ct. App. 1988).
[96] Sarah Parker Biography, http://www.nccourts.org/Courts/Appellate/Supreme/Biographies/Biography.asp?Name'Parker.

The opinion of the Supreme Court of North Carolina,[97] written by Justice Burley Mitchell, Jr., for an all male court, demonstrates a complete lack of understanding of the facts of an abused woman's life, exhibits empathy for abusive men, and misstates the State's common law definition of self-defense. Justice Harry C. Martin dissented.[98] The majority rejects Judy Norman's reasonable fears as "speculative beliefs concerning the remote and indefinite future."[99] The majority misstate the common law of their own jurisdiction when they demand "life-threatening injury"[100] and either ignore or forget that severe beatings and forced prostitution constitute grievous bodily harm. The majority express concern for abusive men when they state that a reasonable self-defense charge on the horrendous and somewhat unique facts of Judy Norman's case

> would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.[101]

Judy Norman's fears were reasonable, not merely subjective. Others in the house that day and night, including her mother, her daughter, and Mark Navarra corroborated both Judy's statement of facts and the reasonableness of her fears. What the majority of the North Carolina Supreme Court describes as an "opportune killing"[102] was a self-defense killing to avoid real grievous bodily harm and possible death, not "subjective

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[97] *Norman*, 378 S.E.2d 8 (N.C. 1989).
[98] *Norman*, 378 S.E.2d at 16 (Martin, J., dissenting).
[99] *Norman*, 378 S.E.2d at 14 (majority opinion).
[100] *Id.* at 15.
[101] *Id.*
[102] *Id.*

speculative" fear of "future felonious assaults."[103] What the court majority characterizes as "homicidal self help"[104] was reasonable self-defense. The reasonableness of Judy Norman's fear and her need to act during a lull in the violence when her abuser was asleep were recognized by a unanimous panel of the North Carolina Court of Appeals and by dissenting Supreme Court Justice Martin.

The Supreme Court of Canada, our northern neighbor that shares our common law heritage, acknowledged the world of abused women in 1990, the year after the *Norman*.[105] In *LaValle*, a woman who had endured several years of severe abuse shot her abuser in the back of the head as he was leaving the room.[106] Interpreting Canada's common law based self-defense statute,[107] Justice Wilson, another woman, found that a verdict of not guilty was justified.

I hope that seventeen years after the all male North Carolina Supreme Court failed to understand the realities of woman abuse, police, district attorneys, public defenders, judges, members of the public, and even law school professors, get it. At some point, the facts of woman abuse will become a part of our cultural understanding and realistic scenarios of intimate partner homicides will be based on those facts. When that happens, the help of expert witnesses will no longer be needed to bolster the testimony of abused women.[108]

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[103] *Id.*
[104] *Id.*
[105] LaValle v. The Queen, [1990] 1 S.C.R. 852 (Can.).
[106] *Id.* at 856.
[107] Criminal Code, R.S.C., 1985 c. C-45s.34(2)(a), (b) (Can.).
[108] Scheppele, *supra* note 36, at 171.