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Battered Women, Self-Defense, and the Law

Joshua Dressler

Holly Maguigan

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TRANSCRIPT

BATTERED WOMEN, SELF-DEFENSE, AND THE LAW

MODERATOR

Matthew Termine
Fordham Law Review

PANELISTS

Professor Holly Maguigan
New York University Law School

Professor Joshua Dressler
Fordham University School of Law

MATTHEW TERMINE: I would like to welcome everyone to the first-ever event hosted by *Res Gestae*, *Fordham Law Review's* Online Companion.

My name is Matt Termine, and I'm Volume 79's Online Editor.

I'm honored to introduce Professors Holly Maguigan and Joshua Dressler.

Professor Maguigan is Professor of Clinical Law at New York University Law School. She teaches a criminal defense clinic and one in comparative criminal justice, as well as a seminar in global public service lawyering and a course in evidence. She is an expert on the criminal trials of battered women.

Professor Joshua Dressler is Bacon-Kilkenny Distinguished Visiting Professor of Law at Fordham University Law School. He holds the Frank R. Strong Chair in Law at The Ohio State University's Michael E. Moritz College of Law. Professor Dressler is one of the country's most respected authorities on the subjects of criminal law and criminal procedure.

Today's discussion will provide an opportunity for two experts in this field to discuss doctrinal treatment of battered women defense cases. The discussion will focus on whether and when we should justify or excuse battering victims when they go beyond what is accounted for in Model Penal Code and common law self-defense doctrine.

Four fact patterns will be used to structure the discussion, but the professors are free to let the discussion flow beyond the four scenarios. As the discussion moves from one fact pattern to the next, Professor Dressler or Professor Maguigan will read the facts that pertain to each scenario.

I will let the discussion begin. Thank you.

PROF. DRESSLER: I'll read Fact Pattern #1: "The Batterer is currently beating or obviously threatening imminent attack." While this is a straightforward self-defense case and does not raise perhaps the more interesting issues, I think it is helpful to provide some context as we go into the later fact patterns.

I think we can agree that that is a fairly straightforward self-defense case. The attack is taking place. Under any definition of traditional self-defense, requiring a reasonable belief that a threat is imminent,¹ or the Model Penal Code,² that there is an immediate necessity to use deadly force, that, since the attack is occurring, it's a straightforward self-defense case.

PROF. MAGUIGAN: That's assuming, Joshua, that she didn't start—we're assuming a cross-sex adult couple for all of these hypos, right?

PROF. DRESSLER: Yes, I guess so.

PROF. MAGUIGAN: So I think we are also—just to get the definitions straight that we agree on—we are assuming that she was not the initial aggressor and that she didn't violate a duty to retreat, that, even if they're in a jurisdiction where there would be ordinarily a duty to retreat in your home from a co-dweller, she wasn't the initial aggressor, so it doesn't kick in. So, I just want to get those things on the table, because they will be more important, as you said, in the later fact patterns.

PROF. DRESSLER: Yes. That's good.

What strikes me as the interesting question in that context is whether or not the battering victim should be permitted to use a deadly weapon, a gun or a knife, to repel the batterer, who we will assume is merely using his fists—because there certainly are cases that one can find that would argue that that is disproportional force, that she's using the gun to respond to fists.

To the extent that that is a position taken by some courts, my position—and I'll leave it to you to discuss—is that she should be permitted, in that context, if she cannot respond to his fists in any meaningful way—and, again, we're assuming no retreat, etc.—that she should be permitted to use a gun or a knife, if that's available to her, at that moment.

PROF. MAGUIGAN: Right, I agree.

1. See *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (stating that common law self-defense requires that, "[t]he defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom").

2. See Model Penal Code § 3.04(1) (Official Draft and Revised Comments 1981) (stating the "immediately necessary" requirement); see also Robert F. Schopp, Barbara J. Sturgis & Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 66–67 (providing an example that illustrates a potential difference between the common law requirement of imminence and the Model Penal Code requirement of immediate necessity).

And I think actually very few courts have required like force, identical force. The question is almost always one of proportional force, as you said.

It's actually interesting, the fact patterns. These cases happen so often in the kitchen, because so often what has triggered the confrontation at that moment has to do with food. So you often see a response with a knife when the initial attack is with fists.

In some jurisdictions for a while, courts had difficulty realizing that his fists were weapons and that proportional force for her would be a knife or whatever else might be at hand. But I don't think that's a big issue now. I mean you and I can agree, and I think most courts agree, now. I don't think that's really a big problem.

PROF. DRESSLER: Yes.

PROF. MAGUIGAN: But a problem that does occur for people is, in the situation where the initial use of a weapon could be seen as proportional, is her carrying on with it after he is disabled. For instance, there are cases involving several stab wounds, to stick with the knife situation.

In a situation where it's a gun—it's interesting that it's almost always his gun and almost never her gun. Where it's his gun, she keeps firing after he has stopped.

Those pose an interesting problem for courts because they start out as confrontations, continue to be confrontations, through at least the first responsible action on her part, and the question is then: Is it reasonable for her to fail to realize that she has been effective in stopping the attack? Those are kind of interesting wrinkles. But most courts have held that she is, as long as she was justified in the beginning.

PROF. DRESSLER: And it would seem to me that in that scenario, if it were to be concluded that she should have reasonably understood that he was no longer a threat, that then the issue would either become an incomplete self-defense claim, or perhaps a provocation argument that would reduce it to manslaughter, if you would not have the full self-defense claim in that situation.

PROF. MAGUIGAN: Yes, maybe. Although what it seems to me we're seeing is that most courts recognize that it's a different version of the famous aphorism, detached reflection is not required in the face of an upraised knife, that in the midst of an ongoing attack the defendant is not required to assess success so long as the first action to repel the attack is justified.³

PROF. DRESSLER: Well, we're in general agreement.

PROF. MAGUIGAN: We are. How nice is that?

PROF. DRESSLER: Okay.

You want to do the second one?

PROF. MAGUIGAN: Sure.

3. *See Brown v. United States*, 256 U.S. 335 (1921) (Holmes, J.) ("Detached reflection cannot be demanded in the presence of an uplifted knife.")

The second pattern we are asked to consider is one where the batterer comes into the kitchen—they're married, I guess, in this; they say "the wife is," so I assume his wife. He's drunk and angry because his favorite football team is losing on the television, and he has an empty beer bottle in his hand. He holds the bottle by the neck and says something along the lines of "Hey, bitch." Objectively, it is unclear whether he is there to demand another bottle of beer or whether this is a precursor for attack. The victim kills the batterer. We are left to fill in the details about how she does that.

You want to take it first?

PROF. DRESSLER: Okay.

It seems to me the issue there is whether or not her belief that he is about to attack her is a reasonable belief, because there is ambiguity about whether he is merely demanding another bottle of beer or not.

It seems to me that that ought to be able to entitle her to a self-defense instruction to go to the jury.

The greater question in my mind is allowing her to contextualize the situation by permitting her to introduce evidence of prior beatings by him, of her, that are similar enough to this that we could say it's relevant. Whether it's the fact that when he's drunk and uses words like "bitch" that it often is a precursor to a beating, or that he seems to regularly beat her right after his favorite football team loses and they lost in this game—something that would allow her to introduce that prior battering experience.

I don't see it as a need to bring in Battered Woman Syndrome testimony. It seems to me prior beatings would be important and relevant.

PROF. MAGUIGAN: And they would be in any circumstance. I mean this is not particular to this particular fact pattern.

The law of self-defense developed in the context of people who know each other. The overwhelming majority of assaults or homicides in this country happen between family members and acquaintances. For as long as there has been a law of self-defense, it has been recognized that the history between the two parties is relevant.⁴

So I go even beyond, Joshua, where you are and say even dissimilar attacks are relevant to inform the defendant's judgment about a sense of danger. That's standard self-defense law.

The question you raise at the end, Joshua, is whether expert testimony is necessary. It might be or it might not be.

The interesting question to me about that—first, let's say you and I have discussed this before—in my view, the correct way to characterize modern testimony that is being offered in these cases is testimony about battering

4. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW § 5.7, at 649 (1986); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 407–08 (1991).

and its effects. Modern witnesses currently testifying in the main don't use the phrase "Battered Woman Syndrome."⁵

Sometime it's necessary, even in cases that look pretty much like a self-defense case—if it were a bar brawl between neighbors, you'd think it was self-defense—because of the biases that jurors bring into the courtroom.

As Mary Ann Dutton says—Mary Ann Dutton is one of the wonderful experts who is testifying now; she's clear and she's straightforward and she's smart. She says the issue really isn't that judges and juries don't know about domestic violence; it's that they think they do.⁶

So what you might expect to see in a case like that is the defense lawyers offering expert testimony on battering and its effects to counter the expectation that jurors will blame her somehow for the whole dysfunction of the situation—for not having left, for having stayed with him, for not having managed to escape in advance. That's a judgment call.

It's often seen as necessary, even though the issue is not why she didn't leave. I mean if there's an issue of retreat in some circumstances—not this one, but in some—it's did she violate a duty to get out of there right then.

But a lot of times you may see expert testimony even in these cases. When you have a situation where there is a history of past abuse, where she sees things that are in her experience triggers of escalating violence, you may see expert testimony just to provide that social context, so that jurors don't blame her for being in the situation in the first place.

PROF. DRESSLER: I guess I'd like to go back to your earlier comment—that is, about even introducing factually dissimilar ones. Do you see that as peculiar to the family situation, or would that apply in your view outside the family context?

PROF. MAGUIGAN: It would be general. My experience is that in the area of the law of self-defense, which, as you have written many times and as we know, was developed in cases involving men, the history between the two is relevant to inform the defendant's sense of danger.

So if I am the decedent in our hypo and I have attacked you in a variety of ways, the fact that the prior attacks are not exactly like this may be something to argue to the jury about the strength of the testimony, the weight to be given it, but they do inform your assessment that I am dangerous to you and that I mean to do you harm and that when I say, "I'm going to hurt you," I mean to hurt you, even if one time it is with my fist

5. Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing in CURRENT CONTROVERSIES IN FAMILY VIOLENCE* 232–37 (Donileen R. Loseke, Richard J. Gelles, Mary M. Cavanaugh, eds., Sage 2005).

6. Mary Ann Dutton, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Women*, in U.S. DEP'T OF JUSTICE, *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 5* (1996); Biography of Mary Ann Dutton, GEORGETOWN UNIVERSITY MEDICAL CENTER, <http://explore.georgetown.edu/people/mad27/?action=viewgeneral&PageTemplateID=121> (last visited May 9, 2011).

and another time it is with a bully buddy and another time it's with a pencil. Do you see what I mean? I don't think they need to be similar.

PROF. DRESSLER: Okay.

What I was thinking about—and of course this would take us beyond the whole battering women context, but as long as I've got you here to ask you the question—would the factual dissimilarity also apply to a different aggressor?

I am thinking about the Bernhard Goetz-type situation, where the New York Court of Appeals said that the fact that Goetz had been mugged before, supposedly, could be relevant in determining what his reasonable belief was in this context.⁷ Would it make any difference whether his prior mugging was in a subway in New York City versus being mugged in Topeka, Kansas, and he has now moved to New York City?

PROF. MAGUIGAN: That's a great question. *Goetz* is such a hard case. People joke about the fact that the *Goetz* case is a hard case for feminists. But it's actually not a hard case because it is, as you quite correctly remarked, a case where the New York Court of Appeals makes clear that the standard of reasonableness to be applied in this jurisdiction, which is characterized by a lot of people as objective, is actually, as is the case across the country in most states, a mix of subjective and objective.⁸

My sense is the Court of Appeals has said—and we're in New York—that Goetz's description of his experience at the hands of other people can be taken into account as he is assessing the danger in the subway. I think reasonable people can debate that forever.

My sense is that completely dissimilar attacks in a dissimilar location are not going to be that informative. They sometimes are used to explain why certain triggers go off, and *Goetz* is a great example of that. But a lot of times what the courts consider there is, not that it is a straightforward self-defense, but that it is some other version of an excuse rather than a justification.

PROF. DRESSLER: I guess we can move on to Fact Pattern #3, which I know we will have some disagreements regarding.

PROF. MAGUIGAN: With any luck at all, yes.

PROF. DRESSLER: This is based on the famous, or infamous, Judy Norman⁹ case in North Carolina, where for over twenty years the batterer, who was J.T. Norman specifically, brutally beat and abused—I would even say dehumanized as far as he was concerned—the victim, Judy Norman, including putting out cigarettes on her body, breaking glass against her face, and so on.¹⁰ She made many attempts to exit the relationship, but on each

7. *People v. Bernhard Goetz*, 497 N.E.2d 41 (N.Y. 1986).

8. *Id.* at 29 (stating that the reasonableness test is objective but “must be based on the ‘circumstance’ facing a defendant or his ‘situation’”).

9. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

10. *Id.* at 10 (“His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. The defendant described other specific incidents of

occasion the batterer finds the victim and beats her for attempting to leave. Then, during a particularly aggressive sequence of beatings, the victim shoots the batterer while he is asleep.¹¹

My position, at least in the Judy Norman context, fact pattern, as I have written, is that she should not be entitled to go to the jury on self-defense, that the traditional position of self-defense would not allow the case to go to the jury because the argument is that no reasonable person can reasonably believe that this man who is asleep represents an imminent threat or, a little less clearly but probably under the Model Penal Code, that it was “*immediately necessary*”¹² on the present occasion for her to take that action. Therefore, under current law, this should not go to the jury as a self-defense claim.

I’ll just throw in before you respond that I have argued that she should be entitled to go to the jury on an excuse theory, somewhat similar in concept to a broad version of duress via the Model Penal Code, even though it doesn’t fit the paradigm. But it should be an excuse claim rather than a self-defense claim.

PROF. MAGUIGAN: Let me start there and then we’ll go back to self-defense.

I love it that you want there to be a defense for her. Duress ordinarily doesn’t apply in cases where you take a life, right? Duress is normally not a defense to a charge of homicide, whether it’s murder or manslaughter, and it’s not a mitigating factor. So it’s interesting that there is some moral sway that this case holds for you. Am I right?

PROF. DRESSLER: Oh, absolutely.

PROF. MAGUIGAN: I think it’s why the Norman case is so interesting. It’s in a tiny minority, as you know. The overwhelming majority of cases that involve battered women who kill involve battered women who kill in some version of a confrontation. The sleeping man cases are a very small, small group.¹³

I think the Norman case is interesting to teach because it’s right at the edge—but not because, as people keep saying, it’s the general situation or it illuminates the way in which self-defense law cannot apply. I mean *Norman* is a very unusual situation, partly because of the brutality to which he subjected her, and partly because it falls in that small minority of cases.

Now, that said, let’s go to the question of whether she should get to the jury.

The North Carolina intermediate Appellate Court had reversed her conviction in the grounds, not that she had acted in self-defense, but that it

abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face.”)

11. *Id.*

12. See Model Penal Code § 3.04(1) (Official Draft and Revised Comments 1981).

13. Maguigan, *supra* note 4, at 396–97.

was error not to let the jury decide that.¹⁴ That was the decision that the Supreme Court of North Carolina overturned.¹⁵

There is an interesting debate in this country about what the standards are for getting to the jury on the question of self-defense.

In some jurisdictions—and I think this would be the rule you—well, I shouldn't speak for you, but from what you've said about *Norman* I'm thinking you would agree with this rule—in some jurisdictions, there must be evidence on every element of the claim of self-defense. Within those jurisdictions, there is some difference about whether each piece of evidence has to come from the defendant or whether it can be developed on cross of prosecution witnesses. And there is an issue about how strong the evidence has to be—is it just prima facie; does it have to be substantial?

Your rule, if I understand you correctly, would say there has to be evidence in the case to show that she was not the initial aggressor, that she violated no duty to retreat, that either the imminence requirement of most state codes or the immediately necessary requirement of the Model Penal Code, and the proportionality of force, and the reasonable of her belief, and all—am I right you'd require evidence on all of those things?

PROF. DRESSLER: That's right.

PROF. MAGUIGAN: Would you let the judge decide the credibility of that evidence? The judge is the one who decides whether to instruct them.

PROF. DRESSLER: No. I would say that as long as there is—well, that's a good question. I guess I'm not sure.

I want the case to go to the jury as long as it is possible for a reasonable juror to believe that all of the elements are satisfied by whatever ultimate burden of proof for self-defense the jurisdiction has. So I guess, having said that out loud, I think that the credibility issue should be left to the jury; that is, that as long as, again, any reasonable credible argument for each of the elements is there, that it should go to the jury.

PROF. MAGUIGAN: In my view, I agree with you that the judge should not pass on credibility. I think that's a very hard thing to ask judges to do, however. Unless we tell them that the standard that has to be satisfied is the very lowest, something like prima facie, it's very hard for them not to make an assessment about the credibility when they are asked to judge weight. It's almost impossible.

So I'd say if we have the lowest possible standards and the judge not permitted to make any credibility determination—so if there is evidence in the case, disputed or not, on each of these elements—we would agree it should get to the jury. What I would say is if there is evidence on any of the elements, the self-defense claim should go to the jury and they should be instructed.

14. *State v. Norman*, 366 S.E.2d 586, 391 (N.C. App. 1988) (holding that *Norman* was entitled to argue a self-defense theory to the jury).

15. *State v. Norman*, 378 S.E.2d 8, 8 (N.C. 1989) (reversing the decision of the intermediate court).

I think the difference between us there is something about confidence in juries, and also something about a distrust of judges. My inclination is to send it to the jury. I would say if there's no evidence on any of the elements of self-defense, it's very hard to make the case that it should go to the jury, except on some nullification theory.

But there are jurisdictions—this is not just my lunatic fringe theory—there are many jurisdictions in which the law is on any defense, not just self-defense and not just in family violence cases, that if there is evidence in the case, disputed or not, on an element of the asserted defense, then the case goes to the jury with instructions on what has to be satisfied.¹⁶

As you say, in some jurisdictions—few, but some—self-defense is an affirmative defense.¹⁷ In most, it's that the prosecution must overcome each of the elements beyond a reasonable doubt. But you don't like that.

PROF. DRESSLER: Well, you've put me in a very awkward position—

PROF. MAGUIGAN: I'm sure I have not done that.

PROF. DRESSLER: —because I have written how much I have faith in the jury system.¹⁸

PROF. MAGUIGAN: I know. That's not awkward, though, that's good.

PROF. DRESSLER: I will say that I am far more inclined—well, I am more inclined—to want, all else equal, excuse defenses to go to juries faster than I do justifications, from the perspective that excuses are about moral blameworthiness, and it seems to me nobody is better than a jury to determine whether somebody deserves on the facts of this case to be excused; whereas justification defenses are setting out more cardinal rules about when it is appropriate to kill and where the legislature has set down certain elements to be present.

From watching your body language, I know that you're not persuaded.

But in a particular case of—for example, the Judy Norman-type situation—I am particularly worried about giving the jury the self-defense claim even where one or more of the elements has not really been even remotely proven by the facts—and if I understand it, you would give it to the jury—because I really think that in this kind of a case you are inviting jurors to take a revenge position, to sort of say, “Now that we've heard what J.T. Norman is like”—I mean they won't say it—maybe they'll say it even in the jury deliberation room—but “now that we know what a miserable s.o.b. this man is, he deserved to die, and I don't care about the elements that I have just been instructed by the judge to consider. Good. I'm glad she did it.”

And so I'd be especially concerned about letting these kinds of cases go to the jury on self-defense grounds where there is absolutely no evidence in

16. Maguigan, *supra* note 4, at 461–86 (1991) (providing a chart summary of states that do not require a showing on every element before the jury is instructed on self-defense).

17. *See Moran v. Ohio*, 469 U.S. 948 (1984) (denying certiorari on defendant's appeal which argued that a jury instruction placing burden of proving self-defense on defendant violated due process rights).

18. Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 470–72 (2006).

the facts to support the claim of the temporal requirement. The thing that is really the obstacle in our case is the fact that he is asleep.

PROF. MAGUIGAN: Right, the temporal requirement.¹⁹

Before we get to the temporal requirement, though, because I think we can imagine ways in which there could be some evidence, even in Judy Norman's case—but I'm interested in your saying that you are willing to give more deference to jury decisions when the defense is excuse (which is to say "this is a crime but this actor is not morally blameworthy for having committed the crime") versus justification ("this act is not a crime").

PROF. DRESSLER: Yes, I think I believe that.

PROF. MAGUIGAN: If we use your duress example, then it might not even be just a mitigating excuse, it could be a complete excuse.

PROF. DRESSLER: I believe it should be.

PROF. MAGUIGAN: All right. So in the situation where it's duress you're going to follow Bobby Lee Cook's maxim.²⁰ Do you remember that one? Bobby Lee Cook was this great lawyer from Georgia—still is. In his heyday, which was thirty or forty years ago, he used to go around the country training young lawyers. He would say, "In any homicide case there are two questions, always two questions, and only two questions: did the decedent deserve to die and was your client the right man for the job?"

In a rough-justice way, that's exactly what you are talking about, right, that the jury would say, "J.T. Norman, and Judy Ann Laws Norman had this right." You would let the jury come to that head-on conclusion.

But what Bobby Lee Cook is expressing, I think, is a general sense that we have about the underpinnings of self-defense claims, any self-defense claim, "He deserved to die." That is, the valid self-defense claim is, "I gave you no choice. I'm attacking you. You had no choice." So there is a rough-justice sense.

You'd let the jury decide that in a duress case. You'd let them say, "Okay, he deserved to die, she was the right man for the job"—although a battered woman is never the right man for the job really when you think about it, nobody thinks that—but not in a self-defense case.

There are legislative imperatives, and excuse defenses also—every state that has a penal code has excuse defenses and every one of them is articulated. Why does it matter more to you that the jurors be limited when the question is "was it a crime?" than when the question is "should this person be locked up for it?"

PROF. DRESSLER: First of all, using the dichotomy that "this person deserved to die and she was the one who should do it," that to me should clearly not get to the jury in anything that even invites that kind of response.

19. See *supra* notes 1–2 (explaining the temporal requirements in common law and Model Penal Code jurisdictions).

20. Mark Curriden, *Bobby Lee Cook*, A.B.A. J. (Mar. 2, 2009, 12:00 AM), http://www.abajournal.com/magazine/article/bobby_lee_cook (last visited May 9, 2011) ("[T]here are two things a lawyer must prove to a jury in order to win a murder case: That the victim was a bad person who deserved to be killed, and that your client was just the man for the job.").

PROF. MAGUIGAN: No. It was kind of a joke.

PROF. DRESSLER: No, I understand.

PROF. MAGUIGAN: But it does tap a nerve, right?

PROF. DRESSLER: But part of self-defense is there's a question in my mind as to whether the reason why self-defense is a justification. Is it because the aggressor deserves to die, in some sense has forfeited his right to live, at least in this context; versus the issue of just whether or not the innocent person has a natural right of some sort of autonomy to protect one's own life—more the question, “I had no choice,” type of situation rather than, “you deserve to die.”

For me an excuse theory—well, to try to answer your question, I guess, I think that it is appropriate for the legislature, if we could imagine an actual thinking, thoughtful legislature—we're in a fictional world here; after all, we're in academia—that the legislature should decide when it is right to take human life and to set down the criteria for when it is that exceptional case where taking human life is justifiable. We should not be too quick to let juries, inadvertently or advertently, expand on the justifiability of taking life.

But it seems to me that when we create excuse defenses, which are personal, that really what legislatures are doing is setting up general characteristics of when we think people are morally blameless, and the factual context of whether the defendant deserves to be punished is more appropriately a jury question.

Particularly in the context we are talking about, the way I imagine the duress claim to be a full defense is that what makes her claim an excuse claim is that basically what she is saying to the world and to the jury, even though the defense might not be framed exactly this way, is, “I didn't have a fair opportunity to conform my conduct to the law because of the way he has treated me over time, etc., etc.—fair opportunity. It's not that I didn't have the capacity to obey the law—I'm perfectly mentally healthy—but I didn't have a fair opportunity.”

Of course, “fair” is the normative term that belongs with the jury to decide: “Did she have a fair opportunity; could she have solved this problem in some other way—yes, no?” And in some cases, the answer will be, “she didn't have a fair opportunity.” That is just to me classically a jury question.

In my perfect world, maybe we would define the defense in that context, and that would explain why it belongs with the jury.

PROF. MAGUIGAN: I can understand why that belongs with the jury. What I'm not worried about to the same extent as you is—you used the phrase “the jury's expansion.” A jury doesn't expand a definition of self-defense. I mean the expansion, if it comes, comes when the supreme court of a state reviews a decision made by lower courts, or it could come with the appellate-level court, but it's going to come up in the context of the refusal to give an instruction.

If an instruction is given, that won't be the issue on appeal. If she is convicted, there won't be an appeal at all, except in Kansas where the appeal won't affect her.²¹

I don't understand exactly why it's not fine to say, "We have these elements of self-defense"—assume your perfect world and a legislature that actually has defined them quite clearly—"and we're going to give this case to the jury and let them decide whether it was a crime." That's a classic jury question, as long as we instruct them on what the law is and give them a chance to their job. Whether it's a crime or not is a perfect question for the jury.

PROF. DRESSLER: I would also imagine that you are an ardent believer in jury nullification.

PROF. MAGUIGAN: Do I believe they have the right to do it? Sure, of course I do. They do have the right to do it.

PROF. DRESSLER: Well, they have power to do it. But do they have the right to do it?

PROF. MAGUIGAN: I think they have the right to do it. They certainly have the power to do it. I think they have the right to do it. The interesting question is when, if ever, they are told about that right.²²

PROF. DRESSLER: Yes.

PROF. MAGUIGAN: That is, I think, inherent in the jury system. But that's a different question. That question comes up whether it's a self-defense case or a bank robbery case or an extortion case. That comes up all the time.

The jury, in my view, has not just the power but the right to say, "In this case we are not going to follow the absolute dictates of the court." I understand the court doesn't want to tell them that. I don't blame them really. I can disagree and I can argue, but I understand that.

But the possibility of nullification is not peculiar to self-defense law.

PROF. DRESSLER: No.

PROF. MAGUIGAN: It comes up everywhere. So I think we can in a way put that aside, because that's always from your point of view a danger, from my point of view, a possibility.

PROF. DRESSLER: But the danger or possibility, as the case may be, is greatly expanded if we follow your approach that essentially these cases will get to the jury even if one of the elements of the defense has clearly demonstrably not been proven.

PROF. MAGUIGAN: But why don't you trust that the jury will say, "They didn't prove that"? Why don't you trust that the jury will say, "I'm convinced beyond a reasonable doubt that there was no satisfaction of the requirement of proximity of danger"?

21. See *State v. Stewart*, 763 P.2d 572, 578–79 (Kan. 1988).

22. See, e.g., *People v. Dillon*, 668 P.2d 697 (1983) (exploring the question of whether the jury should be informed of jury nullification when the jury inquires whether it is within their power to do so).

PROF. DRESSLER: I'm going to wonder whether twenty years from now, if I had watched the videotape of this in the archives, whether I am going to regret what I am about to ask or say.

PROF. MAGUIGAN: Oh, I hope so. I'd love that. Yes, go ahead.

PROF. DRESSLER: I assume you do not believe that the prosecutor should have the same right to get to the jury on the elements of the crime, and to trust the jury that that element that hasn't been proven—that we can trust the jury that clearly it has not been proven beyond a reasonable doubt, that that element has been proven, so we acquit.

PROF. MAGUIGAN: Right, I don't believe that. But that's because of the different functions of the prosecution and the defense, not because of some sense of the jury's inherent capacity. It's more that the prosecutor shouldn't get to go because they're the prosecutor. That makes total sense to me.

PROF. DRESSLER: And I don't disagree with that. It's just that my own sense is that if we think of the defenses as elements of the defense, as we do elements of the crime, whatever the burden of proof should be, whether it's an affirmative defense or however it is framed, that the defense should be—we're back to where we started, that we should be required to prove all those elements.

PROF. MAGUIGAN: Let's move on then. We're not going to agree on this.

But let's go back to your hypothesis, your characterization of *Norman* as one in which there is no evidence that the danger was imminent or that her action was immediately necessary.

Let me ask you to imagine that she testifies that this time when he went to bed—let me step back.

As we know from the facts of the *Norman* case, she was worried enough about the safety of the children that she got everybody else out of the house.²³

Let's assume that she had not done that and that he has the youngest child in the bed with him, and he says to her before he goes in, "You see this gun? I'm sleeping with it under my pillow. The second I wake up I'm going to blow the baby away." He's asleep when she kills him. Is that enough to get to the jury?

PROF. DRESSLER: Yes.

PROF. MAGUIGAN: All right. And why?

PROF. DRESSLER: I'm assuming a Model Penal Code jurisdiction. I think that a jury could, depending on the facts, reasonably believe that she could reasonably believe that it was immediately necessary, that she couldn't wait until he woke up, given his threat. You can quibble about, "Well, did she do it at 12 midnight or 4:55 a.m. when his clock is set to go off at 5:00?" or something. But it's enough to go to the jury.

23. *State v. Norman*, 378 S.E.2d 8, 18 (N.C. 1989).

PROF. MAGUIGAN: Now supposing she has gotten the kids out and he says to her, "You're going to lie down here with me, and the gun is under my pillow, and as soon as I wake up I'm going to blow you away." He falls asleep. He's snoring gently. She has another gun and she kills him.

PROF. DRESSLER: You're going to have to run that one past me again.

PROF. MAGUIGAN: He says, "I'm tired. You're going to come in and sleep with me now. Lie down on the bed. I've got this gun." He shows her the gun under his pillow. "As soon as I wake up I'm going to kill you."

She has stashed another gun—or a knife, or I don't really care, some weapon—someplace else about the bedroom, or maybe he has and she knows it's there. He falls asleep. He's snoring, he's clearly asleep. May she shoot him, or may she get to the jury on the question of immediately necessary?

PROF. DRESSLER: I think so. Not under the imminence requirement, but under—

PROF. MAGUIGAN: Well, she might even under the imminence, right? I mean if imminence is read to mean danger not immediately facing her, but imminence is the way it is read in a lot of jurisdictions, which is fairly flexible, an amount of time that takes into account the Model Penal Code's notion of the period of time²⁴ within which you must act or be acted upon—assuming it's quite short; we're not talking about hours—she might even get to the jury on an imminence question, right?

PROF. DRESSLER: If a jurisdiction defines it the way you're describing, yes, because then the Model Penal Code and the common law are not—

PROF. MAGUIGAN: That blurry, right?

PROF. DRESSLER: Yes.

PROF. MAGUIGAN: And would that trouble you?

PROF. DRESSLER: That it goes to the jury on those facts?

PROF. MAGUIGAN: Yes.

PROF. DRESSLER: No. I trust the jury enough to look at those facts and make the determination. The longer the period of time during the night between when she did it and when he was going to wake up, and whether or not she should have really believed his threat, given everything we know about them, etc., etc., I would let the jury make that determination. Where there is a specific statement, essentially that "when I wake up I'm going to kill you," then I think that would be a different situation.

PROF. MAGUIGAN: What about if she says she knew this time was different and you could cite to various things about this event that let her know; that was why she had to get the kids out of the house, that was why she had to send the police away, because this time he was really going to hurt her, and he says to her, "Lie down next to me," and he doesn't say, "I'm going to kill you." But she says, "I knew, I could tell from the look in

24. *See supra* note 1.

his eye, I knew. He had never done this before. I knew that when he woke up he was going to blow me away.”

PROF. DRESSLER: I think your case is obviously weaker than the preceding one.

PROF. MAGUIGAN: Does the jury get to decide?

PROF. DRESSLER: Yes, I think so.

My criticism of that case both is the infusion of the Battered Woman Syndrome evidence as the way to prove imminence—and we have left the syndrome stuff aside, which I’m pleased.

PROF. MAGUIGAN: We can get there.

PROF. DRESSLER: All right, we’ll get there.

But, based on just the facts of their life experience, her case is weaker in your most recent hypothetical but enough to go to the jury.

PROF. MAGUIGAN: Okay.

I think we should talk more about the expert testimony stuff.

The fourth scenario is a contract killing, and I think we can both imagine scenarios where it might well be self-defense—“I hire you to walk with me because I’m scared of the person who has been abusing me.” He comes and I say, “Please, Joshua, please,” and you kill him. You know, probably you’re defending me, you’ve got a claim, and I can probably claim self-defense.

PROF. DRESSLER: You picked the wrong person to help you, by the way.

PROF. MAGUIGAN: Either one of us would probably be not much use to the other unless the abuser is really incapacitated. But that’s okay.

Then, I think we can both think of scenarios, like the ones that have been in the press recently, where people, unbelievably dimly, try to take out contracts with undercover police officers.²⁵

I think probably actually in terms of contract killing cases we can see the difficulties in getting to the jury, even with my more generous standard, but the possibility, even under your stricter one, right—there would be things that might look like a contract killing but actually could get to the jury in a self-defense theory. Is that right?

PROF. DRESSLER: I guess so. We could imagine a possibility.

PROF. MAGUIGAN: Yes, we could.

So let’s talk about the expert testimony part. I want to understand why you don’t like it. If you think of it as providing social context and helping jurors understand, not supplanting the evidence of imminence—although actually you said it did, so I’d like to understand why you think it does that.

PROF. DRESSLER: Well, I think that—if you go back to the Judy Norman case and the reason why the intermediate court overturned her

25. See, e.g., Scott McCabe, *Woman tried to hire hit man to kill husband, police say*, WASH. EXAMINER, April 5, 2011, available at <http://washingtonexaminer.com/local/crime-punishment/2011/04/woman-tried-hire-hit-man-kill-husband-police-say> (describing one such situation).

conviction, they thought that the expert testimony in that case, that was basically syndrome testimony²⁶—

PROF. MAGUIGAN: Well, she was tried in [1985] . . . ?²⁷

PROF. DRESSLER: Yes. But I think they termed it in terms of Battered Woman Syndrome.²⁸

PROF. MAGUIGAN: Yes, I think they did. In the 1980s they would still have called it that.

PROF. DRESSLER: That was the basis. They felt there was sufficient expert testimony on the imminence issue to allow the case to go to the jury, and therefore they reversed.²⁹

Then, when it went to the state supreme court and they reversed that, their point was, as I understood it, that if you looked carefully at the expert testimony, what the experts were saying was that Judy Norman, because of BWS, could have reasonably believed that it was necessary to kill him while he slept—not that it was immediately necessary or that it was a threat of imminence, and, because North Carolina had the strict rule, there wasn't expert testimony there that could, at least plausibly, get the imminence issue to the jury.³⁰

So the question for me is: When you say “expert testimony,” I need to know what the expert testimony is.

PROF. MAGUIGAN: On battering and its effects. It's the sort of next generation. Even Lenore Walker has changed her early formulations of Battered Woman Syndrome,³¹ and the next generation of expert witnesses talks much more in terms of social context than of pathology. They talk about the dynamics of the relationship and the way it affects both of them, but not in terms of her psychological responses as pathological responses being foregrounded but the power dynamic being foregrounded. There obviously are psychological consequences for both of them living in that kind of relationship.

But it's a different emphasis. So it's still about the relationship and how it works.

PROF. DRESSLER: Well, first of all, my criticism in the prior writings of mine were Lenore Walker's type of testimony, which it does seem to me pathologized the battered women. So in some sense it's odd that feminists at that time were grabbing onto it. I can sort of understand why, but when one looks at it, it was not very attractive from that perspective.

I guess for the new generation of expert testimony I would want to ask—this goes back to the earlier point—in what way would that expert

26. *State v. Norman*, 366 S.E.2d 586, 590–92 (N.C. App. 1988).

27. *Id.* at 586.

28. *Id.* at 591.

29. *Id.* at 586.

30. *Id.* at 591.

31. See generally Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *Hofstra L. Rev.* 1191, 1191 (1993); Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing in CURRENT CONTROVERSIES IN FAMILY VIOLENCE*, *supra* note 5, at 228–31.

testimony inform the jury about the essential elements of self-defense and, more specifically in this context, the temporal requirement?

PROF. MAGUIGAN: It would vary enormously case to case, of course. But, in general, what the testimony would do would provide the jury with an explanation of various phenomena so that they could see whether the defendant actually and honestly held a certain belief, whether somebody in her circumstance could reasonably share that belief. One of the things she has to believe, obviously, is that she is faced with imminent danger, or in an MPC jurisdiction that action is immediately necessary.³²

The expert is not allowed to offer her own opinion on those elements, she is not allowed to testify that in her opinion the defendant was reasonable, but she can explain the ways in which the defendant becomes a credible reporter—she can't say she's credible, but she can explain why it is that the defendant becomes an expert in assessing the dangerousness of a particular event.

One of the things we know about people who live with family violence, any kind of intimate violence—not just intimate partner but any kind of intimate living situation violence—is that people who are victimized often do develop a very acute sense of when the situation is about to get out of hand and when, if they can escape, they'll escape, and if they can't, they have to fight.

PROF. DRESSLER: I think our disagreements here are relatively thin. Even with the old Lenore Walker-type testimony, I was of the view that it would have admissibility purposes to demonstrate the defendant's subjective beliefs about any of the elements.³³ So certainly here too the crux of it will be whether or not it is relevant to the objective portion of the standard, whether it was a reasonable belief. And, as you say, it depends on the facts and it depends on exactly what the nature of the testimony is.

I think that the idea that she is able to observe something about him that would not be noticeable to other people—the hyper-vigilance idea—is something that juries are entitled to be made aware of.

Now, I have suggested, in a different context, as you know, that to some extent the hyper-vigilance argument is something that perhaps doesn't require expert testimony in one sense.³⁴ That is, to the extent that the expert is providing information that the jurors' common understanding would be missing, I think that jurors understand, even in closing arguments can be reminded of the fact, that we all know the people around us—our spouses, our children, the people around us, our siblings—and how they behave, that little twitches can mean something that to nobody else would have any meaning, and therefore Judy Norman could see something that would demonstrate why this is that moment.

But I do think that having an expert say that is better, in the sense that from the defense perspective it makes it more persuasive than otherwise.

32. *See supra* note 12 and accompanying text.

33. *See supra* note 31.

34. *See* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 216 (2d ed. 1995).

So to that extent, to explain why a battered woman would have, or perhaps have, this special skill, normal but special to the situation, I have no problems with that.

I would be troubled if the purpose of the expert testimony is to make something appear reasonable that under any credible basis could not seem to be reasonable. And again, that may depend on what the temporal requirement is, whether it's the "absolutely it's going to happen right now" versus "immediately necessary," which is so much broader in my view than "it's happening right now."

PROF. MAGUIGAN: Credible? Who decides credible?

PROF. DRESSLER: Well, I am willing, as I said before, to let that go to the jury, not have the judge do it, as long as there is any way that a juror could find certain testimony credible on the particular issue.

I mean if our expert isn't an expert, or our expert says that she learned it from a Martian who came down, obviously a judge has to pull that case from it. But at that very, very, very low level of judge involvement, it goes to the jury.

PROF. MAGUIGAN: Terrific. I think we've found a point of agreement even there.

PROF. DRESSLER: I think that's wonderful.

PROF. MAGUIGAN: I think we might be done. That's great.

PROF. DRESSLER: Let me just ask you, though, on Fact Pattern #4: "Victim hires a contract killer to kill the batterer"—and I'm going to take this to mean—well, I guess we don't have to take it to mean that the batterer is asleep when the contract killer does it, although perhaps that's when the contract killer might choose.

PROF. MAGUIGAN: Oh, please. That's too much.

PROF. DRESSLER: Okay.

So Judy Norman hires a contract killer to kill her husband. You are in agreement that if he does it, he should not be able to claim defense of third party, and, to the extent that she is charged along with that, she should not be able to gain a justification defense in that context?

PROF. MAGUIGAN: No. I think in most fact patterns there won't be a way for him to claim defense of a third person or her to claim justification. But that's the reason I used the kind of "will you be my bodyguard" hypo, because you can imagine a circumstance that from the outside might at first look like making a contract but that could develop into one where he would have a defense of third person's claim and she would have a self-defense claim. But I think in the standard case it's going to be very hard, even under my much more generous standard of getting to the jury.

PROF. DRESSLER: Let me just throw one thing in, make it more attractive for her: She goes to her brother and says, "I can't do it; you've got to help me." He understands the whole story. He's not doing it out of money, he's doing it out of love. The plan is, since he's not a contract killer, that she will let him in so that he can do the killing while J.T. is asleep. So he kills J.T. while he is asleep and then claims defense of other.

PROF. MAGUIGAN: I think that's going to be very hard.

PROF. DRESSLER: And should not go to the jury?

PROF. MAGUIGAN: Well, on those facts. But you can see how the facts could change. He comes over to help her stay safe. He observes the same thing she observes. He's sitting there not knowing what to do. He says, "Boy, tonight is really the night." You can imagine a circumstance.

But I think there needs to be some evidence on at least one of the elements before you go the jury. I do believe that.

PROF. DRESSLER: And if, just for fun, we switch the case to the wonderful Francine Hughes burning-bed case, where Francine Hughes, being battered, pours gasoline on her sleeping husband and lights him up, and he wakes up, smells the gasoline, sees her about to light the match, puts two and two together and comes up with four, and pulls out that trusty gun that apparently we all have under his pillow to kill her, should he have a right of self-defense there?³⁵ So if she killed him, if she had succeeded, she would be justified in killing him, and if he kills her—

PROF. MAGUIGAN: I'm sure she's justified in killing him on the facts. Francine Hughes is still in this tiny little category of people, right?

PROF. DRESSLER: Yes, of course.

PROF. MAGUIGAN: I mean we're not talking about the majority of the cases.

But on the facts that you've given, I'm not sure she's justified. But I do believe that if he—I shouldn't say "sure" so quickly. If he had been the initial aggressor and had not sufficiently withdrawn from the conflict, if he—

PROF. DRESSLER: He says at night, "I'm going to kill you in the morning." I'll take your set of facts.

PROF. MAGUIGAN: Okay, so he hasn't withdrawn from the conflict. Then he probably isn't justified if he really started it and this is just a temporary rest for him to gather his strength to finally kill her, because the notion is if you are the initial aggressor, you can get to the jury on self-defense, but the jury is not going to buy it if you are the initial aggressor.

PROF. DRESSLER: I just want to be clear. So he would or would not, with that hypothetical where we have changed the facts enough that he threatens to kill her when he wakes up the next morning—

PROF. MAGUIGAN: And then he wakes up just as she is about the strike the match.

PROF. DRESSLER: That's right.

PROF. MAGUIGAN: Then I think the jury question is had he withdrawn.

PROF. DRESSLER: All right. But it would get to the jury?

PROF. MAGUIGAN: Yes.

35. See LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989) (describing the case of Francine Hughes).

PROF. DRESSLER: So he could get to the jury as to whether he has withdrawn, and he therefore plausibly has a justification claim. Similarly, if she gets off the match faster than he gets off the gun, she would get to go to the jury on a justification defense.

PROF. MAGUIGAN: If we change the facts and she's got enough to get to the jury, yes. And I think that's true of a lot of fights that end up in death. In a lot of homicides I think either side could—the survivor could get to the jury on self-defense. I think that's just one of the things we know about people who have a history with each other where the horrible conflict ends in a death.

PROF. DRESSLER: And if she would be justified in killing him, at least plausibly justified in killing him, then she represents a lawful threat, a lawful rather than unlawful threat, against him. So would the jury in deciding his case, where he kills her and where the element requirement is whether or not you reasonably believed you were repelling an imminent unlawful deadly attack, be required to determine whether or not her decision to kill him was unlawful?

PROF. MAGUIGAN: In a way, yes, they would. But they have to make that kind of decision in any self-defense case.

I think the way the question would be put to them would be slightly more practical, and that would be—we're assuming facts in which he was the initial aggressor. I think then the question for the jury would be did he withdraw from the combat, because if you are the initial aggressor and you haven't withdrawn, your self-defense claim is going to be defeated, even if it has other elements that look fine.

So I think, yes, the question as you put it would get to them, but not in that theoretical frame; it would get into the more practical, "on these facts did he withdraw from the combat having been the initial aggressor?" If he did, then he may well be able to satisfy the jury of his self-defense claim. If he didn't, he probably won't.

PROF. DRESSLER: Okay.

MATTHEW TERMINE: I'd like to thank our participants for their excellent discussion.

This concludes the event. Thank you.