Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine With The Battered Woman Syndrome

Several years have now elapsed since I first became aware that I had accepted, even from my youth, many false opinions for true, and then consequently what I afterwards based on such principles was highly doubtful; and from that time I was convinced of the necessity of undertaking once in my life to rid myself of all the opinions I had adopted, and of commencing anew the work of building from the foundation, if I desired to establish a firm and abiding superstructure in the sciences.¹

INTRODUCTION

When a theory yields results that seem counter-intuitive, the theory itself must be examined in order to determine if it is the theory or our intuition that is flawed. Recent cases attempting to reconcile the Battered Woman Syndrome and self-defense law raise this question. This paper will examine self-defense law, particularly its imminence requirement, in an attempt to determine whether self-defense doctrine is flawed in a fundamental way.

The application of traditional self-defense law to situations where battered victims have killed their attacker has proven problematic and resulted in a lack of uniformity regarding the disposition of these cases.² Since the late 1970s,³ courts have been forced to deal with the question of whether and how the Battered Woman Syndrome can be used in a defense when a battered victim kills her abuser.⁴ Many courts have refused to give a self-defense instruction to the jury in these cases when the killing occurred in a non-

². Walter W. Steele, Jr. & Christine W. Sigman, Reexamining the Doctrine of Self Defense to Accommodate Battered Women, 18 AM. J. CRIM. L. 169, 181 (1991) ("Since the circumstances surrounding a battered woman's plea of self defense do not always fit within traditional notions, a great disparity is present in the treatment of these women in the legal system. Some women are never indicted. Others are found guilty of everything from manslaughter to first-degree murder. Some are acquitted.").
⁴. See infra Part III for a description of the Battered Woman Syndrome.
confrontational situation and the danger was consequently not imminent.\(^5\) Other courts have admitted evidence of past abuse to help the jury assess the reasonableness of a battered woman's belief that harm was imminent in the context of a traditional self-defense claim,\(^6\) and some legislatures have codified this view.\(^7\) Another approach is to allow Battered Woman Syndrome evidence to support an insanity defense.\(^8\) Such evidence has also been accepted when the defendant interposes duress as a defense to other types of charges.\(^9\) Commentators have similarly recommended different approaches to the question of whether, and how, to use this sort of evidence. Scholars have criticized traditional self-defense law as being gender biased.\(^10\) Conversely, the application (or misapplication) of the law, rather than its substance, has been found to be the problem.\(^11\) When a theory seems incapable of dealing with situations for which it was purportedly developed, a reexamination of the theory is warranted. Circumstances near the fringe of a theory's scope typically reveal weaknesses, for theories are designed to deal with the ordinary situations for which they have been crafted.\(^12\) The inability

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5. See, e.g., State v. Stewart, 763 P.2d 572, 577 (Kan. 1988); State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989). See also BLACK'S LAW DICTIONARY 750 (6th ed. 1990) (defining "imminent" as "impending, on the point of happening," "[s]omething which is threatening to happen at once.").

6. See, e.g., State v. Thibeaux, 366 So.2d 1314, 1317 (La. 1978) (construing the admission of such evidence to be a question of relevancy); People v. Erickson, 67 Cal. Rptr. 2d 740, 745 (Ct. App. 1997) (finding such evidence relevant to determine the reasonableness of the defendant's belief in both self-defense and imperfect self-defense cases).

7. See, e.g., WYO. STAT. ANN. § 6-1-203 (Michie) (allowing the introduction of expert testimony concerning the Battered Woman Syndrome "to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force."); OHIO REV. CODE ANN. § 2901.06 (West 1998).

8. OHIO REV. STAT. ANN. § 2945.392; see also Neelley v. State, 642 So.2d 494, 507 (Ala. Crim. App. 1993) (listing duress, insanity, diminished capacity and mitigation as four issues where evidence that the defendant suffered from Battered Woman Syndrome would be relevant).

9. United States v. Marenghi, 893 F.Supp. 85, 96 (D. Me 1995); but see United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994) (rejecting evidence regarding the Battered Woman Syndrome because duress calls for an objective determination of whether a "person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances").

10. Steele & Sigman, supra note 2, at 177 ("A battered woman starts at a disadvantage whenever the right to self defense arises because the concept is grounded in a masculine model. . .").

11. Holly Maguigan, Battered Women and Self-defense: Myths and Misconceptions in Current Reform Proposals, 140 U. PA. L. REV. 379, 383 (1991) (concluding "that the most common impediments to fair trials for battered women are the result not of the structure or content of existing law but of its application by trial judges").

12. See WILLIAM POUNDSTONE, LABYRINTHS OF REASON 30-31 (1988). An example of this phenomenon can be found in early confirmation of the theory of relativity. Nineteenth
of traditional self-defense law’s to handle situations where a victim kills a batterer in a non-confrontational situation in a manner that is morally and intuitively acceptable suggests that a look at its theoretical underpinnings is appropriate. This comment will focus on whether imminence is a necessary condition in a claim of self-defense or if there are other legitimate ways to prove that a killing was necessary such that we, as a society, would consider it justified.\textsuperscript{13}

Professor Richard Rosen addressed this question and concluded that "imminence has no significance independent of the notion of necessity."\textsuperscript{14} Imminence, according to Professor Rosen, is a "translator" for necessity, which is to say that imminence is a way in which we determine if an action is truly necessary.\textsuperscript{15} Imminence is a "condition precedent for a finding of necessity."\textsuperscript{16} Professor Rosen further argues that when imminence and necessity conflict, imminence must give way, for the whole purpose of making an inquiry regarding imminence is to determine if an action was necessary.\textsuperscript{17}

In certain situations, a jury would receive a self-defense instruction with necessity replacing imminence as the condition that would justify the homicide.\textsuperscript{18} This approach is sensible, yet it may seem quite drastic as imminence has been an integral part of an assertion of self-defense for so long. Professor Rosen proposes to limit the situations where necessity replaces imminence by placing the burden of production on the defendant to present evidence that the killing was necessary despite the lack of an imminent threat.

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\textsuperscript{13} The reasonability of the defendant’s belief and the requirement that an attack be met with proportionate force are also problematic when a defendant attempts to invoke the doctrine of self-defense in a non-confrontational situation and introduce evidence of the Battered Woman Syndrome; however these concerns are beyond the scope of this paper.


\textsuperscript{15} \textit{Id.} See infra note 20.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} at 405.
before such an instruction would be given. If imminence, however, is merely a "translator" for necessity, there is no reason for it to retain its dominant position in self-defense jurisprudence.

This comment will accept Professor Rosen's analysis of the relationship between imminence and necessity as a starting point. After reviewing traditional imminence based self-defense law, other doctrines will be examined which indicate that there is more to necessity than merely imminence. These doctrines will be compared and certain principles will emerge. Finally, these principles will be applied to a claim of necessity arising in the context of a non-confrontational killing by a battering victim.

I. TRADITIONAL SELF-DEFENSE LAW STANDARDS

Traditional self-defense doctrine has been crafted with three distinct principles in mind: necessity, proportionality, and reasonable belief. To justify a use of force, such force must be necessary to prevent the harm sought to be inflicted. Proportionality requires that the force used in defense not be excessive compared to the harm threatened to be inflicted. The reasonable-belief requirement means that this defense is available only if the defendant subjectively believes the proportional force is necessary and that this belief is objectively reasonable. While these principles provide the theoretical basis for the doctrine, certain qualifications have been developed which guide their application in various jurisdictions.

Before examining these qualifying principles, a definition of necessity should be developed. "Necessity", in common vernacular, is used to signify two distinct but related sets of circumstances. The first sense that "necessity" is used in is unconditional. In this sense, necessity is defined as "absolute physical necessity or inevitability." Alternatively, "necessity" connotes a conditional, means-ends relationship. In this sense it means "something which in the accomplishment of a given object cannot be dispensed with..." The latter definition is applicable to self-defense law, for it is always possible that

19. Id. at 405, 406.
20. "Translator" is probably not the best term to use to describe the relationship between imminence and necessity. The more familiar term "test" would seem to be a better choice. When a defendant responds to an attack and the circumstances make the harm sought to be inflicted imminent, the defendant's response is then necessary.
22. Id.
23. Id.
24. Id.
26. Id.
the defendant allow the attacker to proceed unopposed and kill or severely harm the defendant. Necessity is thus relative to the interest sought to be protected, that is, an action is necessary in the self-defense context to the extent that the harm sought to be avoided would occur absent the defensive act. A second characteristic of necessity is that options that are available to achieve the desired result have been reduced to one. Third, as a corollary not inherent in the definition of necessity itself, is that the situation requiring the use of defensive force must have been brought about by the person against whom it is sought to be used. This definition describes necessity in its pure form; however, many jurisdictions have modified this principle in some way.

One such modifying principle is that a defendant who is the initial aggressor is not allowed to put forward a claim of self-defense. Aggressor is defined as one whose "affirmative unlawful act [is] reasonably calculated to produce an affray foreboding injurious or fatal consequences." This principle is often attributed to the idea that one seeking to invoke the doctrine of self-defense must be free from fault. Thus, this qualification seems to be based on moral considerations to some extent. Another way to view this requirement is as a recognition that, in situations where the defendant is the initial aggressor, the killing done is not truly necessary. In other words, the defendant could have chosen at an earlier time a course of action that would have allowed him to avoid killing the victim. For the purposes of this paper,

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27. See Anthony J. Sebok, Does an Objective Theory of Self-Defense Demand Too Much?, 57 U. Pitt. L. Rev. 725, 726-27 (1996) ("A self-defense rule has two tasks: (1) it must identify the harms to him or herself that a citizen may protect through deadly force, and (2) it must set out a test for recognizing when deadly force may be used to protect those interests."); Professor Sebok also suggests as a solution for the problem a battered woman faces in introducing evidence of the syndrome that we could broaden the definition of harm sufficient to allow one to respond with deadly force. Id. at 753-54.

28. Cf. Arthur Ripstein, Self-Defense and Equal Protection, 57 U. Pitt. L. Rev. 685, 686-87 (1996); actually, other options could potentially be available as long as those chosen are the least drastic available.

29. See MODEL PENAL CODE § 3.04(1) (allowing one to use force "for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.") (emphasis added); See also infra section IV.D.

30. DRESSLER, supra note 21, at 201.

31. Id. (quoting United States v. Peterson, 483 F.2d 1222, 1233 (D.C. Cir. 1973)).

32. Id.

33. See Cammack v. State, 261 N.E.2d 862, 865 (Ind. 1970) (stating that Indiana law requires a defendant to be "without fault" as a condition for the use of self-defense).

34. See State v. Millett, 273 A.2d 504, 509-10 (Me. 1971) ("Self-defense is grounded on necessity and one cannot provoke a difficulty, thus creating a necessity, and then justify the resulting homicide as an act of necessity in self-defense. . . . The law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by a necessity not of his own making.").
it is important to note that such a modification of the necessity requirement has nothing to do with imminence. Rather the concern addressed here seems to be one of causation. Thus, in the rules regarding aggressors, there is an implicit recognition that there is something more than imminence inherent in the concept of necessity.

Another doctrine that some jurisdictions use to qualify their law of self-defense is the duty to retreat. Like the rule against aggressors claiming self-defense, the retreat rule also acknowledges that necessity is a broader concept than its equation with imminence would hold. This doctrine requires that a person retreat, if it is possible to do so in complete safety, before one is allowed to use deadly force in response to an attack. The duty to retreat arises because, by definition, if one can take some action other than using deadly force to avert threatened harm, the use of deadly force is not necessary. Thus, the retreat rule is built upon the principle of necessity. Furthermore, the retreat rule recognizes that there may be circumstances beyond the temporal which would allow one to retreat. These additional circumstances can perhaps best be categorized as spatial. Again, in the retreat rules, there is a recognition that imminence is not all there is to necessity.

Finally, many jurisdictions impose some sort of temporal requirement regarding the proximity of the harm sought to be inflicted and the act taken by the defendant to prevent that harm. Typical formulations of a temporal requirement include “imminent”, “immediately necessary” and “on the present

35. That causation as involved here would explain the moral import explicit in some analyses of these situations; see supra note 33 and accompanying text.

36. DRESSLER, supra note 21, at 203-04 (the majority view is to not require retreat, even if it can be done safely, in the face of an unlawful deadly attack).

37. Id. at 204. Most jurisdictions do not require retreat if one is attacked in one’s home. Id. at 205. See also MODEL PENAL CODE § 3.04(2)(b)(ii) (“The use of deadly force is not justifiable... if... the actor knows that he can avoid the necessity of using such force with complete safety by retreating...”).

38. Cf. DRESSLER, supra note 21, at 203.

39. See State v. Abbott, 174 A.2d 881, 884 (N.J. 1961) (“Self-defense is measured against necessity. From that premise one could readily say there was no necessity to kill in self-defense if the use of deadly force could have been avoided by retreat.”) (citations omitted).

40. DRESSLER, supra note 21, at 204 (there is no requirement to retreat “unless there is a place of complete safety to which the non-aggressor can turn.”) (emphasis in original).

41. See infra section IV.B.

42. This comment will use the term imminent in analyzing the question of what the appropriate standard is for a defendant to be able to use self-defense as a defense; however, any criticism of imminence as a condition to finding necessity applies generally to any attempt to temporally qualify the principle of necessity.
occasion. These restrictions, as a matter of law, limit the situations where a jury will be allowed to assess available evidence in the context of a self-defense instruction. Whatever formulation such qualifiers take, they serve as a direct limitation on when an act, taken in self-defense, can be found to be necessary. The three principles discussed in the last three paragraphs all serve to limit the availability of an assertion of self-defense, and the differences between them, though one of degree, have significant effects in the application of self-defense law. This lack of uniformity leading to varying results suggests that something is amiss. Necessity clearly has a temporal component, and that is what is reflected in the imminence requirement. The question to be decided is whether self-defense laws that limit necessity in this manner are conceptually sound or if imminence is merely one factor that should be taken into account in assessing whether a use of deadly force in self-defense is necessary.

43. 2 Paul H. Robinson, Criminal Law Defenses § 131(c) (1984) (this section provides a list of jurisdictions using the various formulations).

44. See Rosen supra note 14, at 380.

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

46. See Maguigan supra note 11, at 414-16 (finding that jurisdictions that use “imminent” as opposed to “immediate” are more likely to instruct the jury that evidence of a decedent’s past violence is relevant to evaluating the defendant’s state of mind at the time of the killing). But see Robinson, supra note 43, § 131(c) (arguing that “immediately necessary” is a broader standard than “imminent”).

47. One could argue that the difference in treatment that defendants in different jurisdictions experience in these situations was merely a matter of various legislatures expressing different judgments about what constitutes necessity in the context of a self-defense claim. The purpose of this comment is, however, to question whether placing a universal temporal restriction on necessity is ever sound. This differing treatment is pointed out solely as evidence that there may be a conceptual problem with the overall doctrine.

48. Robinson, supra note 43, § 131(c); cf. Rosen, supra note 14, at 382-88 (Professor Rosen provides a historical analysis of the imminence requirement and concludes that “the imminence requirement does not have an unquestioned historical lineage as a fundamental requirement for a finding of self-defense.” Self-defense, according to Rosen, “has two historical roots in early common law.” The first, se defendendo, involved a killing taken to defend oneself after a sudden argument had broken out. The sudden argument requirement may have made an imminence requirement redundant. Se defendendo was not truly a defense, for the defendant was incarcerated and a king’s pardon was required to spare his life. It was rather more a finding by the jury that the defendant had acted in self-defense. The second involved killing to prevent certain felonies, although not murder, and contained no imminence requirement, only a showing of necessity. Imminence requirements did not appear until later when these two doctrines merged into the doctrine of self-defense).
II. SCOPE OF THE PROBLEM

Some may wonder whether any change in self-defense doctrine is necessary or even desirable. The answer to that question has two parts. First, it is necessary to assess whether there is a problem with the way that these laws are written. To do so, it is worthwhile to examine some cases involving the Battered Woman Syndrome that apply the doctrine. If the results turn out to be counter-intuitive, it is an indication that the doctrine is flawed. Second, the problem should manifest itself as more than an occasional anomaly in the application of the law. If these problems occur only in rare and atypical cases, little reason exists to change an otherwise successful doctrine.

In order to assess this problem properly, it is necessary to have a general understanding of the Battered Woman Syndrome. The Syndrome is classed as a sub-category of Post Traumatic Stress Disorder. Most abusive relationships go through a three-part cycle. The first phase is the tension building phase. During this phase, minor abusive incidents occur which both parties seek to control, and, ultimately, the tension builds and the syndrome moves to the second phase. The second phase is that of an acute battering incident. The abuse becomes more severe during this phase. Most injuries occur at this time. The third phase is a "period of loving-contrition or absence of tension." This third phase "often revives and reinforces a battered woman’s hopes that her mate may reform and thus keeps her emotionally attached to the relationship." In cases where the violence has become extreme, the third phase may not be apparent. As the Syndrome progresses, the cycle repeats and assaults become more frequent and severe.

50. See Walker, supra note 3, at 327.
51. Id. at 330.
52. Id.
53. Steele & Sigman, supra note 2, at 170.
56. Steele & Sigman, supra note 2, at 171 (citing Lenore E. Walker et al., Beyond the Juror's Ken: Battered Women, 7 Vt. L. Rev. 1, 6 (1982)).
57. Walker, supra note 3, at 330.
60. Steele & Sigman, supra note 2, at 171.
As a consequence of this cycle, the victim develops what Dr. Walker refers to as "learned helplessness." This theory "attempts to demonstrate how a seemingly normal functioning woman loses the ability to predict that what she does will have an impact upon her safety." Dr. Walker found certain factors of adult battering relationships to be correlative of the development of learned helplessness. This condition makes it likely that a battered woman will not attempt to leave the situation that she is in. From a self-defense standpoint, learned helplessness explains why the battered victim simply did not leave the relationship before resorting to using deadly force.

A. BATTERED WOMAN SYNDROME CASES DECIDED UNDER TRADITIONAL SELF-DEFENSE STANDARDS

Two cases in particular have been the source of much scholarly debate concerning the relationship between the Battered Woman Syndrome, self-defense and the concept of imminence -- in fact, it is difficult to do even a modicum of reading on this subject without encountering them. Both cases have a tendency to leave one uncomfortable with the rulings the two courts
ultimately made. Using these results of these cases as evidence, a res ipsa loquitur-like argument emerges. Something must be wrong with the doctrine that leads to such counter-intuitive results. Although these cases are familiar to many, for the purpose of providing this evidence, the facts and holdings of these two cases will be given in detail.

Perhaps the best known case where the imminence requirement served as a bar to a claim of self-defense being made by a battering victim is State v. Norman. In this case, the defendant, Mrs. Norman, presented evidence showing a history of abuse by her alcoholic husband spanning almost twenty years. The physical portion of the abuse inflicted upon her by Mr. Norman included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. Additional incidents of abuse included "her husband putting out cigarettes on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face." He also forced her to engage in prostitution and would beat her if she resisted doing so or if he felt she did not make enough money. He often called her "dog", "bitch" and "whore." He forced her to eat pet food from pet bowls, to bark like a dog and frequently to sleep on the floor. Mrs. Norman attempted to leave on several occasions, but her husband "had always found her, brought her home and beat her." The defendant's husband also repeatedly threatened to kill her.

In the days immediately prior to the killing, the abuse inflicted upon the defendant escalated. Mr. Norman was arrested for driving while impaired as he was returning home in the early morning from a rest area where he had gone to assault the defendant. The following evening, police were called to the Norman's residence and the defendant told them that Mr. Norman had been beating her all day. She stated that she was afraid to fill out a

68. Or reductio ad absurdum, if one is of a philosophic bent.
69. Of course, if one considers the resulting convictions in these cases to be just, then there is no problem with the doctrine that produces them.
70. 378 S.E.2d 8 (N.C. 1989).
71. Id. at 9-10.
72. Id. at 10.
73. Id.
74. Id.
76. Id.
77. Id. at 11.
78. Id. at 10.
79. Id.
81. Id.
complaint against him, and the police left. 82 They were summoned back later after the defendant consumed a bottle of pills. 83 Mr. Norman obstructed paramedics that were tending to his wife until a police officer intervened. 84 The following day Mrs. Norman went to a mental health center to discuss the possibility of filing charges against her husband and having him committed. 85 When she told her husband what she was contemplating, he said that he would ”see them coming” and would cut her throat before they got to him.” 86 Mrs. Norman also went to social services that day to obtain welfare benefits, but Mr. Norman “followed her there, interrupted her interview and made her go home with him.” 87 After they returned home, Mr. Norman “continued his abuse of her, threatening to kill and to maim her, slapping her, kicking her, and throwing objects at her.” 88 He also put out a cigarette on her. 89 He refused to let her eat or to get food for their children. 90 Later that evening, Mr. Norman went to bed and made the defendant lie on the floor by the bed. 91 One of their children brought her baby to sleep with the defendant. 92 When the baby started to cry, Mrs. Norman took it to her mother’s house to keep it from waking her husband. 93 Mrs. Norman took a pistol from her mother’s house, returned to her home and shot Mr. Norman three times in the back of the head while he was sleeping. 94

At trial, two expert witnesses testified that Mrs. Norman fit within the profile of the Battered Woman Syndrome. 95 One stated that, in his opinion, Mrs. Norman believed she had no choice other than to use deadly force against her husband. 96 The trial court refused to allow the jury to consider the question of self-defense, and Mrs. Norman was convicted of voluntary manslaughter. 97 The North Carolina Supreme Court agreed, holding that a self-defense instruction is not required unless the defendant introduces evidence “tending to show that at the time of the killing the defendant

82. Id. at 11.
83. Id.
84. Id.
85. Id.
87. Id.
88. Id.
89. Id.
90. Id.
92. Id.
93. Id.
94. Id. at 9.
95. Id. at 11.
97. Id. at 9.
reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from imminent death or great bodily harm."

The Supreme Court of Kansas confronted a similar situation in State v. Stewart.99 In this case, the trial court gave a self-defense instruction to the jury and the defendant was acquitted.100 The State, however, appealed the question of whether the giving of a self-defense instruction was appropriate in this case.101 The Kansas Supreme Court found that “[i]n order to instruct a jury on self-defense, there must be some showing of an imminent threat or a confrontational circumstance involving an overt act by an aggressor.”102 Absent a showing of an imminent threat, a sufferer of the Battered Woman Syndrome is not entitled to plead self-defense.

As in Norman, a long history of abuse was also present in the Stewart case involving both the defendant and her children.103 Mike and Peggy Stewart had been married for about twelve years at the time of the killing.104 Shortly after their marriage, Mike began abusing Peggy by hitting and kicking her.105 Peggy was hospitalized for psychological problems, and after she was released, Mike would encourage her to take more of her medication than was prescribed.106 Peggy received reports from social workers that Mike was sexually abusing her twelve year old daughter, and Mike would taunt her that her daughter “was ‘more of a wife’ to him than Peggy.”107 When the daughter was placed in a detention center, Mike forbade Peggy to visit her.108 When the daughter returned home in the summer, Mike “forced her, [the daughter,] to sleep in an un-air conditioned room with the windows nailed shut, to wear a heavy flannel nightgown, and to cover herself with heavy blankets.”109 He then would wake the daughter at 5:30 a.m. and force her to do all the household chores.110 Later, the daughter, still in her teens, was thrown out of

98. Id. at 12.
100. Id. at 574.
101. Id.
102. Id. at 577.
103. Id. at 574.
105. Id. at 574.
106. Id.
107. Id.
108. Id.
110. Id.
the house by Mike. The family later heard she was in Colorado, but Mike refused to allow Peggy to try and contact her.

Mike repeatedly threatened to kill Peggy, holding a gun to her head several times. One Christmas, “Mike threw the turkey dinner to the floor, chased Peggy outside, grabbed her by the hair, rubbed her face in the dirt, and then kicked and beat her.” He once kicked her in the ribs hard enough to require hospitalization. On another occasion, he came to the restaurant where Peggy was working and ran the customers off with a gun because he wanted Peggy to come home and have sex with him. Another time, Mike woke Peggy by beating her with a baseball bat. He also shot one of Peggy’s cats and then pointed the gun at her head and threatened to shoot.

The killing was precipitated by an attempt by Peggy to get away from Mike. She left and fled to her daughter’s home in another state. Her daughter had her admitted to a hospital because she was suicidal. Subsequently, Mike called and said he was coming to get her and she agreed to return with him. He told her that he would kill her if she ever left him again. When they arrived home, “Mike forced Peggy into the house and forced her to have oral sex several times.” Peggy found a loaded pistol the next morning and hid it in a spare room because she was afraid of it. As she did housework that morning, Peggy testified, “Mike kept making remarks that she should not bother because she would not be there long, or that she should not bother with her things because she could not take them with her.” Later that day, Mike again forced Peggy to perform oral sex. They went to bed that night about 8:00p.m. and after Mike had fallen asleep, Peggy got the gun from the spare bedroom and killed him. At trial, the defense introduced

111. Id.
112. Id.
113. Id. at 574-75.
115. Id. at 574.
116. Id. at 575.
117. Id.
118. Id.
120. Id.
121. Id.
122. Id.
123. Id.
125. Id.
126. Id.
127. Id.
128. Id.
expert testimony that Peggy suffered from Battered Woman Syndrome. The defense’s expert testified that “loaded guns, veiled threats, and increased sexual demands are indicators of the escalation of the cycle.” She believed that Peggy “had a repressed knowledge that she was in a ‘really grave lethal situation.’”

These two courts’ holdings, that a self-defense instruction will not be given absent an imminent threat, are unsettling, particularly when, despite the lack of such a threat, the defendants’ responses appear to be the only way to avoid the harm sought to be inflicted upon them. In other words, the two defendant’s actions were necessary to avoid the harm. The trial court and jury in Stewart apparently felt self-defense was appropriate in that case, for the court gave the self-defense instruction and the jury acquitted the defendant. The widespread granting of executive clemency in Norman and similar cases indicates that many governors must have felt results like these were unjust. It is difficult to precisely articulate reasons for the discomfort many feel with these results. For the purposes of this argument, it is enough

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130. Id.; see infra Part III for a description of the cycle referred to.
132. See Rosen supra note 14, at 404-05 (Jury instructions would include a necessity requirement, and juries in cases like this would still have to find necessity before concluding that the defendant’s use of deadly force was justified).
134. See Developments in the Law: Legal Responses to Domestic Violence (pt. 5), 106 HARV. L. REV. 1574, 1590 (1993). “Some of these convicted women are now making headlines throughout the country, as governors in at least eight states have granted clemency to thirty-eight women.” Id.; see also Rosen supra note 14, at 391 n.56 (Ms. Norman’s sentence was commuted to time served after she spent two months in prison) (citing Mark Barrett, Norman Set Free, ASHEVILLE CITIZEN-TIMES, July 8, 1989, at 1.).
135. See David McCord and Sandra K. Lyons, Moral Reasoning and the Criminal Law: The Example of Self-defense, 30 AM. CRIM. L. REV. 97, 110-11 (1992). In analyzing the Norman case, the authors found the following:

There are at least ten significant facts which our common sense and life experience tell us are highly significant in this case but which seem not to be considered by the traditional law. In no particular order these ten are: (1) J.T. [Mr. Norman] and Judy [Mrs. Norman] were not equally matched in terms of physical prowess, as J.T. apparently was significantly more powerful; (2) Judy was distraught because of the actions of J.T.; (3) Judy’s mental state was colored not merely by one single incident of abuse, but by the culmination of twenty years of abuse; (4) Because J.T. lived in the same house as Judy, he had virtually constant access to her to inflict abuse on her; (5) Having Judy at his disposal in this manner, J.T. was thus able to decide when, where, and how to inflict the abuse—he took advantage of the option which the law apparently ceded to him to launch nondeadly attacks on her at his whim, without fear of a justifiable deadly response; (6) Judy’s future was bleak—there was no basis for her
that the results run counter to the outcome that many would regard to be just. Given this uneasiness, a close look at the alternatives some commentators have proposed is warranted, and consideration should be given to taking these approaches seriously.

B. IS THE PROBLEM OF SUFFICIENT MAGNITUDE TO WARRANT A CHANGE IN SELF-DEFENSE LAW?

There are two ways of looking at the magnitude of the problem, and consequently, two answers emerge. First, and in the more limited sense, the question is whether the imminence principle acts as an irrational obstacle to a claim of self-defense in situations where a battered victim has killed an attacker in circumstances that appear necessary. Second, the issue is whether self-defense law is inherently flawed in a very basic sense regardless of the particular situation to which it is applied. If it is flawed in this manner, then unjust results may follow in a variety of types of cases which are difficult to foresee.

Evidence regarding the Battered Woman Syndrome has been admitted in many cases for various reasons. The common assumption that most killings of a batterer by a battered victim occur in a non-confrontational setting has been questioned, and it has been argued that the opposite is true. In cases where the defendant acted during an immediate confrontation, imminence does not serve as a bar to a claim of self-defense, for in these cases, the threatened harm is imminent. Thus, imminence may not, in practice, have much of an effect on the administration of justice in these cases.

to believe that J.T. would be content to live without her or that he had any intent to stop abusing her; (7) Judy apparently had no viable alternative but to stay in the vicinity---she had no job skills to support herself elsewhere, and her support network was in that community; (8) Judy had no reasonable prospect of being able to stay in that community outside the presence of J.T., since he would find her anywhere in the vicinity; (9) The governmental authorities failed to take any action to protect Judy despite having been contacted by her; and, (10) J.T.'s actions prevented Judy from doing anything further to invoke the help of the governmental authorities. These ignored facts have no place in the moral reasoning mandated by the traditional law of self-defense, yet they cause us to suffer moral disquiet with the result.

Id. 136. See infra Part I for a discussion of Professor Richard Rosen's solution to this problem; see also ROBINSON, supra note 43, §§ 131(c), 132 (1984) (proposing eliminating the imminence requirement from self-defense law and replacing it with the consideration of whether the defensive action was necessary).

137. See infra Part I.

138. See Maguigan, supra note 11, at 388-401.
These considerations, however, are really beside the point. Regardless of the actual proportions between confrontational and non-confrontational killings of this sort, there are a significant number of battered victims who do kill in non-confrontational situations. If there are a significant number of defendants who are unfairly disadvantaged by the way the law is constructed, the presence of another group not so situated is irrelevant. Furthermore, the problem that this comment addresses is not the plight of battered women who kill their abusers generally, but whether self-defense law as it exists is inherently flawed.

The fact that evidence regarding the Battered Woman Syndrome has been admitted in many cases does not support the conclusion that imminence does not act as an impediment. In many cases, evidence concerning the syndrome is admitted to help the jury assess the reasonableness of the defendant's perceptions while still assessing the defendant's claim in terms of traditional self-defense law. One of those traditional standards is imminence, of course. If the jury is constrained from finding that the defensive act was necessary by an instruction incorporating the imminence standard, the jury is addressing the wrong question. Barring jury nullification, it is hard to see how a defendant who kills in a non-confrontational situation can successfully claim self-defense in the face of the imminence requirement. In cases like these, imminence may be improperly impairing the function of the true principle -- necessity -- despite the admission of Battered Woman Syndrome evidence, and when this happens necessity should prevail. These concerns are not limited to the use of the Battered Woman Syndrome.
Syndrome, or other such syndromes, in self-defense claims; any criminal
defendant interposing self-defense to a homicide charge could be
disadvantaged, depending on the factual circumstances, by the application of
a flawed doctrine. This problem is of sufficient scope to warrant a
modification of existing doctrine both because it affects a significant group of
criminal defendants and it makes the application of the law irrational.

IV. ALTERNATIVE CONCEPTIONS OF NECESSITY

Proposals have already been made to modify the role that imminence
plays in assessing whether a defendant's actions constitute self-defense and
are hence justifiable. There are two basic alternatives which would allow a
jury to focus on necessity, rather than imminence, in evaluating a self-defense
claim. One alternative is to eliminate imminence entirely as a condition, and
it would then function as a factor to be considered but would possess no
greater significance than any other relevant factor. A more limited approach
is to allow imminence to retain its normal place but to make provisions for its
elimination in cases where it interferes with the functioning of the necessity
principle. Both alternatives may seem unpalatable to some; imminence is
a fairly well-accepted principle in self-defense law. The balance of this
comment will examine other uses the law makes of necessity unbridled by
imminence, other situations where defensive action appears necessary despite
the lack of imminence and make some comparisons of how necessity functions
with and without imminence in an effort to argue that these proposed changes
are not really that dramatic.

A. THE DEFENSE OF NECESSITY IN TORT AND CRIMINAL LAW

Both criminal and tort law recognize a defense or privilege of
necessity. These defenses differ from self-defense in several aspects. Most
notably, it is unclear whether they are available to a defendant who has taken
generally the law requires that a person avoid using force, especially
lethal force, if an alternative to avoiding a threat is available, even if the
threat poses an imminent danger. The law does not, however, allow a
person to use force of any degree to ward off a danger that is not deemed
imminent, no matter how necessary the protective action may be.

Id.

144. See Rosen, supra note 14, at 404-05 (1993).
145. ROBINSON, supra note 43, § 124; RESTATEMENT (SECOND) OF TORTS §§196, 197,
262, 263 (1965).
a life. Some of these defenses do not prevent a jury from finding that an act was necessary when the harm sought to be prevented was not imminent. Although imminence is likely a consideration, in these jurisdictions it is not a necessary precondition to a finding of necessity. In criminal law, these defenses are sometimes referred to as lesser evils defenses or choice of evils defenses.

In criminal law, about half of American jurisdictions recognize the defense of necessity. Many jurisdictions do impose a temporal limitation on a finding of necessity; however, some do not. The Model Penal Code contains no requirement that the threatened harm be imminent in its version of the necessity defense; however, its version of self-defense modifies the necessity requirement and makes it "immediately necessary." In State v. Spaulding, a Minnesota court allowed a jury to consider a necessity defense without instructing the jury on the issue of imminent harm. The Minnesota Supreme Court found that the instruction was proper and that it was not necessary to further define necessity in the jury instruction. The defendant was a felon who wrestled a gun away from an attacker and was subsequently

146. Compare DRESSLER, supra note 21 at 270 (arguing that "it is at least plausible that a court might justify a homicide of an innocent person in necessitous circumstances"), with State v. Tate, 477 A.2d 462, 465 (N.J. Super. Ct. Law Div. 1984) (finding that "when deliberate homicide was involved, (and except for self-defense and defense of another or of one's home) common law courts did not allow necessity as a justification for the criminal act").

147. ROBINSON, supra note 43, § 124.

148. Id.

149. ROBINSON, supra note 43, § 124(f). Compare Toops v. State, 643 N.E.2d 387, 390 (Ind. Ct. App. 1994) (setting forth the elements of a necessity defense as: "(1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good-faith belief that his act was necessary to prevent greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must not have substantially contributed to the creation of the emergency"), with TEX. PENAL CODE ANN § 9.22 (West 1994) ("Conduct is justified if: (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear").

150. MODEL PENAL CODE § 3.02.

151. Id. at § 3.04.

152. State v. Spaulding, 296 N.W.2d 870, 877 (Minn. 1980) (the courts actual instruction read as follows: "If you find that the defendant obtained a pistol in defense of himself or another, that is justified and the defendant has not violated the law. However, once the necessity for his possession is reasonably over he no longer may possess the pistol. It is for you to determine if continued possession is reasonably justified.").
The jury apparently found that the defendant's possession of the firearm continued for a period longer than what was necessary. This case illustrates two important points. First, courts can and do sometimes allow the jury to consider the question of whether an act was necessary without forcing them to first determine that a threat of harm was imminent. Thus, there are some precedents for this approach to adjudicating the issue of necessity. Second, even absent an instruction containing an imminence requirement, a jury will consider the question of necessity and can find that such necessity does not exist. In this case, the defendant possessed the weapon for no more than fifteen minutes and surrendered it to the police when they arrived on the scene. The jury convicted nevertheless.

Tort law, similarly, does not always make imminence an explicit part of the defense of necessity. The Restatement (Second) of the Law of Torts contains several sections where the concept of necessity is used without explicitly limiting a finding of necessity to situations involving imminent threats. At other times, the drafters of the Restatement expressly did include an imminence requirement, or some other sort of temporal limitation, as a condition precedent to a finding of necessity. As the drafters explicitly included a temporal limitation in some sections of the Restatement while not doing so in others, they must have concluded that imminence is not a necessary precondition to allow a finding of necessity in all cases and its inclusion in some sections was more a matter of policy than logical necessity.

The point of this departure into the criminal defense of necessity and the tort privileges of necessity is twofold. First, it demonstrates that necessity is

154. *Id.* at 876.
155. *Id.*
156. *Id.*
159. *Restatement (Second) of Torts* § 197 (1985) (private necessity to enter land), § 260 (privilege to commit a trespass to chattel or conversion if reasonably necessary to protect actor's land or chattels), § 261 (privilege to commit a trespass to chattel or conversion if reasonably necessary to defend actor or a third person), § 262 (privilege to commit a trespass to chattel or conversion if necessary to avert a public disaster), § 263 (similar privilege created by private necessity).
160. *Id.* at § 196 ("One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster"), § 63 (privilege to use non-deadly defensive force to avert harm "that another is about to inflict intentionally upon him"), § 65 (privilege to use deadly force to avert death or serious bodily harm another is "about to inflict").
not logically dependent on imminence. It is possible for a jury to assess the
issue of necessity without explicitly instructing them on imminence, even if
they do consider imminence in making their ultimate determination. Second,
although the approach taken by courts in a majority of self-defense situations
involves an imminence requirement, there are some precedents to support not
constraining the jury in this manner.

B. SPATIAL NECESSITY

Although no case has addressed the issue of whether necessity can arise
to prevent a threatened harm due to spatial rather than temporal
considerations, the question has been the subject of several hypotheticals.161
The requirement that some jurisdictions impose that a defendant retreat if able
to safely do so before using deadly force recognizes spatial elements.162 This
is a spatial consideration because, if the physical situation is such that there
is a place available to which the defendant can move and avoid the threatened
harm, the use of deadly force is not necessary to avoid it.163 Keeping the
existence of the retreat rules in mind and what they represent, it is worth
looking at some of the hypotheticals dealing with the issue of spatial
necessity.

The first such hypothetical has been advanced by two scholars with
minor variations.164 In this situation, the defendant has been kidnapped and
imprisoned by the victim in a very secure cell.165 The victim announces his
intention to kill the defendant at some point in the future.166 Each morning,
the victim brings some food and water into the defendant’s cell.167 The
defendant’s only opportunity to escape occurs during these morning visits.168
One morning when his captor enters, several days before the killing is
supposed to take place, the defendant strikes him over the head, killing him,
and escapes.169 The question, of course, is whether the intended victim must
wait until the killing is about to take place before he may use deadly force to
defend himself.170 Giving imminence its normal meaning, the defendant’s

161. No case, in any event, that I am aware of has addressed this subject.
162. See infra notes 36-41 and accompanying text.
163. See infra note 39.
164. SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES 832 (1995); ROBINSON,
supra note 43, § 131(c)(1).
165. KADISH, supra note 164, at 832.
166. Id.
167. Id.
168. Id.
169. Id.
170. KADISH, supra note 164, at 832.
actions would not be justifiable until the threat to his life was about to come to fruition.\textsuperscript{171} Requiring the defendant to wait until the last moment in this situation, however, could significantly reduce his chances of success when he finally attempts to escape.\textsuperscript{172} The problem with an imminence based necessity analysis in this case is that it focuses on the immediacy of the threat rather than the immediacy of the action necessary to avert the threat.\textsuperscript{173} If the harm cannot be avoided or the risk that the harm will occur will increase if the intended victim delays action, “the principle of self-defense must permit him to act earlier — as early as required to defend himself effectively.”\textsuperscript{174} Allowing a jury to evaluate this defendant’s actions in terms of necessity rather than imminence would allow them to acquit on a legal theory that is both consistent with morality and intuition. If the defendant’s acts were not necessary to avoid the threatened harm, the jury would still be free to convict.\textsuperscript{175}

A second hypothetical problem illustrates similar points. In this situation, the crew of a passenger ship finds a slow leak in the vessel shortly after leaving port.\textsuperscript{176} The ship’s captain refuses to turn back.\textsuperscript{177} The leak is slow enough such that it poses no risk of sinking the vessel for two days.\textsuperscript{178} May the sailors mutiny now while still close to land or must they wait until sinking is imminent even though they will be too far out to sea to reach shore

\begin{itemize}
\item \textsuperscript{171} ROBINSON, \textit{supra} note 43, § 131(c)(1).
\item \textsuperscript{172} Analogously, a retreat jurisdiction does not require retreat if doing so would increase the threat to the person acting in self-defense. \textit{See} DRESSLER, \textit{supra} note 21, at 204.
\item \textsuperscript{173} ROBINSON, \textit{supra} note 43, § 131 (c)(1).
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. “If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be ‘necessary.’” \textit{Id.}; Rosen, \textit{supra} note 14 at 392.
\item \textsuperscript{176} ROBINSON, \textit{supra} note 43, § 124(f)(1). Robinson raises this hypothetical in discussing imminence in the context of the necessity or choice of evils defense, where he also raises the following hypothetical in discussing “immediately necessary” as a modification of the necessity requirement: “Consider the case of the bomb-maker X, whose construction plans require a ten-day period for building the weapon. Suppose further that the actor, D, knows that X is going to set off the bomb in a school. He also knows that X’s construction plans require ten days to build the weapon, and that police and other authorities are unavailable to intervene. Under the simple requirement that the conduct be ‘necessary,’ the actor could trespass upon X’s property and abort the plan by disabling the bomb at any time, including the first day, as long as such action was the least drastic means of preventing the project’s completion. Under the ‘immediately necessary’ restriction, the actor would be obliged to wait until the last day, presumably until the last moment that intervention would still be effective.” \textit{Id.} at § 124(f)(3). This hypothetical is less compelling than the ship hypothetical because waiting, in this case does not worsen the actor’s situation in the same way that waiting puts the sailors in a more precarious situation.
\item \textsuperscript{177} ROBINSON, \textit{supra} note 43, § 124(f)(1).
\item \textsuperscript{178} Id.
when this occurs? 179 Again, necessity is shown to have non-temporal components, for it is the worsening of the sailors' position in relation to the shore rather than the temporal proximity of the harm that is the impetus for action. The imminence requirement interferes with the proper necessity analysis that should be made here. 180

One response to this hypothetical is that the danger actually is already imminent at the time that the sailors discover the leak. Being forced to travel into the middle of the ocean in a vessel that is not seaworthy surely is extremely risky; however, the threatened harm is not "on the point of happening." 181 In fact the harm may never occur; they may survive despite the leak either by successfully crossing the ocean or by being picked up later in a lifeboat. It is worthwhile comparing this hypothetical to Mrs. Norman's situation. 182 Like the sailors, had Mrs. Norman not taken action when she did, the harm she sought to avert would have most likely materialized and she would have been in a worse position to prevent it from occurring. She would have almost certainly been subject to further abuse at the hands of her husband, and once he was awake and abusing her, her defensive options would have been limited and risky.

As is demonstrated by the above two hypotheticals, not only is necessity a broader concept than imminence would allow, imminence can actually interfere with the appropriate necessity analysis that should be made in these situations -- an analysis which gives due regard to the spatial elements present. As imminence is merely a way of measuring necessity, in situations like these where the two concepts conflict, imminence should not be permitted to interfere. 183 Situations like Mrs. Norman's may contain neither spatial nor temporal elements from which the necessity of the defensive action arises; however, this cannot end the analysis of these situations just as an imminence analysis cannot properly end the inquiry when spatial elements cause the defensive action to be necessary.

179. Id.
180. Id.
181. BLACK'S LAW DICTIONARY 750 (6th ed. 1990). See infra note 5 for a definition of "imminent."
182. See supra Part III.A for a description of Mrs. Norman's situation.
183. Rosen, supra note 14, at 380 ("If action really is necessary to avert a threatened harm, society should allow the action, or at least not punish it, even if the harm is not imminent").
C. NECESSITY AND BATTERED WOMEN

The question remains from where, in a non-confrontational killing such as that which occurred in Mrs. Norman's case, does the necessity of the use of defensive force arise? Necessity has two bases in these situations. First, learned helplessness, a characteristic of the Battered Woman Syndrome, limits a battered victim's ability to act. Second, society's ineffectiveness in intervening in these situations makes reliance on outside assistance at least dubious and probably precarious. State v. Norman exemplifies these principles.

In State v. Norman, the defense presented expert testimony that Mrs. Norman exhibited the characteristics of the Battered Woman Syndrome, including learned helplessness. Learned helplessness results in a loss by the battering victim of the ability to take steps to protect herself from further abuse. This condition leads to passivity and the inability to realistically assess danger. Even if an opportunity to escape the situation presents itself, the victim of the battering may fail to take advantage of it. This condition has important implications for the doctrine of self-defense. Necessity entails a lack of feasible alternatives. If, because of the condition of learned helplessness, a battering victim is unable to take measures to protect herself short of using deadly force, the alternative measures are not feasible. Furthermore, because learned helplessness occurs as a result of continued

184. See Walker, supra note 3, at 330.
185. Rosen, supra note 14, at 395 ("The professional literature recently has developed evidence to support the contention that a woman who is already being battered by an abusive man, and who tries to leave or get help, is placing her life at risk").
186. 378 S.E.2d 8 (N.C. 1989).
187. Id. at 11. The first expert, a forensic psychologist, described the syndrome as follows: "This condition . . . is characterized by such abuse and degradation that the battered wife comes to believe she is unable to help herself and cannot expect help from anyone else. She believes she cannot escape the complete control of her husband and that he is invulnerable to law enforcement and other sources of help. Id. When asked if he believed it appeared reasonably necessary to Mrs. Norman that she shoot her husband he answered affirmatively. Id. The second expert testified that Mrs. Norman "was a typical abused spouse and that 'she saw herself as powerless to deal with the situation, that there was no alternative, no way she could escape it'." Id. He also agreed that it appeared reasonably necessary to Mrs. Norman that she take her husband's life. Id. at 12.
189. Id.
190. Id.
191. Aside from learned helplessness, practical considerations also make alternative steps difficult. See Steele & Sigman, supra note 2, at 172-74 (enumerating the practical difficulties battering victims face in seeking protection from the police and through restraining and protective orders).
abuse by the batterer,\textsuperscript{192} the batterer is responsible for creating the condition. In other words, the batterer is responsible for creating the situation where his victim has only one realistic option by making it impossible for the victim to take other actions to avoid the harm -- to respond with deadly force. The parallel to traditional self-defense situations is clear; when a threatened harm is imminent, the attacker has limited his intended victim’s choice of action to one option because that is the only choice available due to temporal considerations.\textsuperscript{193}

A second consideration in determining whether it was necessary for Mrs. Norman to use defensive force is the fact that she attempted to take other actions prior to killing her batterer. Mrs. Norman had left Mr. Norman previously on several occasions; however, “he had always found her, brought her home and beaten her.”\textsuperscript{194} Two days prior to the killing, the police were twice summoned to the Norman house.\textsuperscript{195} The first time they did nothing because Mrs. Norman was afraid to sign a complaint against her husband.\textsuperscript{196} The second incident occurred less than an hour later after Mrs. Norman took a bottle of pills.\textsuperscript{197} A police officer chased Mr. Norman back into the house when he tried to interfere with the paramedics tending to his wife; however, apparently no other action was taken against him.\textsuperscript{198} On the day of the killing, Mrs. Norman sought aid at both a mental health center and social services.\textsuperscript{199} Mr. Norman followed her to social services, interrupted her appointment and forced her to return home.\textsuperscript{200} The futility of her efforts to leave Mr. Norman and to obtain outside assistance made her belief that the use of force was necessary both objectively and subjectively reasonable.\textsuperscript{201} Additionally, Mrs.

\textsuperscript{192} See Walker, supra note 3, at 330-32.
\textsuperscript{193} Cf. Ripstein, supra note 28, at 697 (“... unless the attack was seconds away, the accused was presumed to have had other avenues of escape”).
\textsuperscript{194} State v. Norman, 378 S.E.2d 8, 11 (N.C. 1989).
\textsuperscript{195} Id. at 10.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} State v. Norman, 378 S.E.2d 8, 11 (N.C. 1989).
\textsuperscript{200} Id.
\textsuperscript{201} Society’s failure to intervene effectively when given the opportunity is relevant in assessing a battering victim’s options when defensive force is used:

The law has justified violence in the form of self defense for centuries. Our society has since developed more modern and less violent means of protection, such as professional law enforcement, injunctions, and peace bonds. Today public policy favors the use of these modern alternatives over violence in the name of self defense [sic]. The availability of these options has contributed to the reluctance of many courts to recognize self defense [sic] except in the most obvious battered woman cases. Consequently, the degree to which the legal system
Norman's lack of success in these attempts to change her situation probably reinforced her perception that she was powerless to protect herself, which relates directly to learned helplessness.202

protects a battered woman is central to any application of traditional self-defense doctrines to her conduct.

Steele & Sigman, supra note2, at 171-72. “How ironic for the legal system to prosecute a battered woman when the failure of the system to protect her left her with no real option but to take matters into her own hands.” Id. at 174 (citing Lenore E. Walker et al., Beyond the Juror's Ken: Battered Women, 7 VT. L. REV. 1, 171 n.12 (1982)).

Addressing the issue of why Mrs. Norman simply could not flee, Professor Rosen, after first noting that on previous occasions Mr. Norman had tracked, caught and beaten his wife when she attempted to escape and that such attempts often lead to great danger for battered women, provides the following analysis:

Even if flight would have been risky for Mrs. Norman, there was at least a chance that she could have crept out of town, masked her identity, and fled to Alaska to establish a new life. One could argue, therefore, that the killing of her husband was not absolutely necessary. The difficulty with such an argument is that it is based on an erroneous premise that the law always requires absolute necessity before granting the privilege of self-defense. . . . The possibility always exists that a person attacking another with a gun will change his mind, or miss, or have a heart attack before pulling the trigger. If a reasonable person in the situation, however, would believe that deadly force was needed, the law permits the use of fatal defensive force. Similarly, the mere possibility of retreat is not determinative so long as a reasonable person would believe that the retreat would not provide safety. Take the analysis one step further, however, and assume that Mrs. Norman could have escaped safely from her house and fled to Alaska, where she could change her identity and live happily, and safely, ever after. If society required her to do this, the end result most likely would be one less dead body, a result not always possible when the aggressor is coming after the victim at the moment she kills in self-defense. The simple answer to this proposition is that society does not now, nor has it ever, required completely innocent people to behave in this fashion. No matter how clear it was to Gary Cooper that somebody would end up dead if he did not leave before the train carrying the enemy arrived at “High Noon,” our culture allows him to stay in town and affords him the right to kill in self-defense when the bad guys come after him. Even when retreat is required, which is not all that often, one must only physically move to a place of temporary safety. Renunciation of personal and family identity is not demanded.

Rosen, supra note 14, at 392-93, 395-97.

202. See Walker, supra note 3, at 330 (“Although Seligman was looking for a theory to explain the process of exogenous depression when placing animals and people in the laboratory and exposing them to random and variable aversive stimulation, he probably produced a laboratory version of PTSD [post traumatic stress disorder]. Sometimes the participants' behavioral responses made a difference to what happened while other times they did not. This created the condition of non-contingency between response and outcome which then taught the participants not to trust in their own natural responses when under threat of danger.”).
Just as the occurrence of learned helplessness is caused by the batterer’s abuse, which in turn limits his victim’s options in responding to the situation, many of the practical concerns addressed in the preceding paragraph are not available because of the actions of the batterer. It was Mr. Norman’s pursuit of his wife when she tried to get out of the situation that made flight a precarious option. Mr. Norman actively interfered with his wife’s efforts to seek help from outside agencies. He further interfered with paramedics rendering assistance to Mrs. Norman after she took a bottle of pills. Mr. Norman, in fact, inflicted additional abuse upon his wife when she made these attempts. It was Mr. Norman’s actions that eliminated many of the other options which may have been available. Thus, much like a traditional attacker who leaves his intended victim no option other than deadly force because there is no time for anything else, Mr. Norman created the situation where his wife’s only option was to kill him. In other words, it was his fault.

D. FAULT AND NECESSITY

Some may fear that allowing juries to consider self-defense claims in terms of necessity rather than imminence will give people a license to kill whenever self-preservation is at issue. If imminence is removed from the equation, would not Dudley and Stephens come out differently? To believe that it would is to ignore the principle of fault. Fault, as much as necessity and proportionality, is one of the fundamental underpinnings of self-defense doctrine. The condition that a defendant relying on a claim of self-defense must not have been the aggressor in the conflict recognizes this principle. In assessing a self-defense claim, it is essential that the necessity of the response arise from the actions of the attacker. The result in Dudley would not be changed by removing the imminence requirement from self-defense

204. Id.
205. Id. at 10.
206. Id. at 11.
207. This is the situation that the imminence requirement is designed to handle.
208. Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (This trial involved the killing and eating of a compatriot by two sailors who had been afloat in a lifeboat for a considerable period of time. The court held that self-preservation was not the same thing as self-defense and that the killing was unjustified).
210. DRESSLER, supra note 21, at 199; see supra pp. X regarding aggressors.
211. This principle was also implicit in the imminence requirement, for it is the attacker who creates the imminent threat of harm. Because necessity does not implicitly entail fault in the way that imminence does, it must be explicitly included in self-defense doctrine if imminence is removed as a precondition.
doctrine because the victim was not responsible for creating the situation that arguably made eating him necessary.

_Ha v. Alaska_ exemplifies the relationship between fault and necessity. Ha was a Vietnamese immigrant who killed Buu, another immigrant, after Buu had severely beaten and threatened to kill him the night before. The next morning, Ha waited for Buu for an hour and a half and shot him in the back seven times. The trial court rejected a requested self-defense instruction because at the time Ha acted, he was faced by no imminent threat of harm. One of the theories Ha advanced was that he had no other option but to take matters into his own hands because of a cultural distrust of the police. Eliminating the imminence requirement from self-defense would not change the result in this case. Buu was not responsible for Ha’s belief that going to the police for protection would be futile. The question of who is responsible for limiting the defendant’s options, if they are in fact limited, distinguishes this case from that of Mrs. Norman. Mr. Norman, unlike Buu, made it impossible for his victim to seek other avenues of protection.

**CONCLUSION**

Whether a killing was necessary is a question of fact. Eliminating the imminence requirement from self-defense merely allows juries to realistically consider, given the totality of the facts of any given situation, whether the use of defensive force was necessary. Professor Rosen noted that “[u]sing a necessity rule instead of an imminence rule imports no new norms into the law of self-defense; it merely changes the locus of decision making.”

Cases like _Norman_ and _Stewart_ provide strong evidence that a defensive use of deadly force can be necessary despite the lack of an imminent threat of harm. Imminence is only one way to measure necessity. Perhaps all this comment has really demonstrated is the need for early and effective intervention in these situations. Such intervention may eliminate the need for lethal defensive action. Necessity, in these situations, arises in part from the

213. _Id._ at 186.
214. _Id._ at 187.
215. _Id._ at 196.
216. _Id._ at 195.
217. Unless Ha pled some facts to support the notion that Buu was in some way responsible for removing police protection as an option, denial of a self-defense instruction would be appropriate.
219. _Id._
220. See _supra_ Part III.A.
practical lack of alternatives. Until society is able to provide such alternatives and protect a battered woman, we should not hold accountable one who has been prompted to action, in part, by our own inaction. However even if we find a way to intervene effectively in such situations, self-defense doctrine will remain flawed unless we allow necessity, rather than imminence, to be the primary consideration in assessing a use of defensive force.

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