DEMYSTIFYING THE ABUSE EXCUSE: IS THERE ONE?

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Media accounts of some recent high-profile cases claim the criminal law has eagerly embraced a new "abuse excuse" defense; one that allows the defendant to negate his criminal responsibility by shifting blame from himself to the victim who "abused" him. Some prominent academics like Alan Dershowitz and Stephen Morse have legitimated this conventional wisdom by writing op-ed pieces and articles suggesting that "there is an epidemic"[1] of new syndrome excuse defenses swamping our courtrooms. Professor Dershowitz condemns this "defense" by pointing out how easily it can be fabricated by desperate defendants and sleazy defense counsel.[2] Even when claims of victimization are factually well founded, critics insist that most of these

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1. Stephen J. Morse, *The New Syndrome Excuse Syndrome* 14 CRIM. JUST. ETHICS, Winter/Spring, 1995, at 3, 4.

2. *See* Alan M. Dershowitz, *The Abuse Excuse*, S.F. EXAMINER, Jan. 16, 1994, at A15. In one of the first syndicated op-ed pieces in which he coined the phrase "abuse excuse," Professor Dershowitz wrote:

> Two clear messages have been sent. The first to victims of abuse: The legal system may excuse you if you take the law into your own hands instead of either leaving or reporting the abuse. This unfortunate message has been underlined by the outpourings of public support for abuse victims who kill or maim. The second message is directed to criminal defense lawyers: When neither the law nor the facts are on your client's side, argue abuse. It may get you an acquittal, a reduced charge or a hung jury. The popularity of the "abuse excuse" poses real dangers to our safety and to the integrity of our legal system. It is far too easy for a desperate criminal to concoct a false history of abuse, for a disturbed criminal to imagine such a history or for a sleazy lawyer to manufacture such a defense.

Id. Professor Dershowitz's subsequent book, *see* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY (1994), about the abuse excuse received widespread media attention in part because it reinforced the public's perception that claims of victimization were being used by people in all walks of life to deny responsibility for their actions. *See, e.g.*, Tom Egerman, *Legal Expert Doesn't Buy Defensive 'Abuse Excuse,'* STAR-TRIB. (Minneapolis-St. Paul), Dec. 4, 1994, at 14F; Carolyn See, *An Angry Dershowitz Rails Against Our Nation of Wimps*, ROCKY MOUNTAIN NEWS, Dec. 25, 1994, at 78A; Richard E. Vatz & Lee S. Weinberg, *Making Excuses: Legal Media Hound's Latest Effort is a Poor Excuse for a Book on the Issue of Dodging Criminal Responsibility*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 25, 1995, at 10D.

abused defendants are moral agents who should be held accountable for their criminal acts.[3]

If such an "abuse excuse" existed in theory or in practice, its factual and normative premises would indeed be indefensible. Being an *adult* victim of abuse, by itself, does not unduly impair one's moral capacities. Nor does victimhood abrogate one's moral duty not to use unnecessary violence against his victimizer. But the critics are attacking a strawman because the criminal law has not endorsed abuse excuse defenses that absolve victims from blame for their criminal acts.

Let us begin with the obvious. There is no such thing as an "abuse excuse" defense in the substantive criminal law. The only excuse defense that permits a defendant to use evidence of past or present victimization to negate his legal responsibility is the insanity defense. Very few defendants raise this defense[4] and even fewer are acquitted. When defendants claim insanity, juries usually find them sane[5] regardless of whether the defense relies on some traditional mental illness or on one of the new syndromes.

Far from making it easy to deny moral responsibility, the criminal law usually treats documented claims of early victimization that can erode an individual's moral capacities—for example, physical or sexual abuse by a parent or custodian, birth trauma generating neurological damage, or mental retardation—as irrelevant to issues of moral accountability. The sentencing authority may consider this type of evidence but is free to use it as an aggravating factor suggesting the defendant's dangerousness, thus justifying a longer sentence or even death.[6]

While the insanity defense does not provide a very successful vehicle for abuse excuse theories, there are some *partial* defenses reducing murder to manslaughter that can rely on abuse-related claims to explain the defendant's motivation for the killing. For example, if the defendant killed because he unreasonably believed he was about to be killed or he killed in the heat of passion, he may raise imperfect self-defense or provocation.

3. *See* Morse, *supra* note 1.

4. *See* J.S. Janofsky, M.B. Vandewalle, & J.R. Rappeport, *Defendant Pleading Insanity: An Analysis of Outcome*, 17 BULL. AM. ACAD. PSYCHIATRY L. 203 (1989).

5. *See id.*

6. *See* Peter Arenella, *Convicting The Morally Blameless: Reassessing The Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513 n.4 (1994).

However, calling these *partial* defenses "abuse excuses" is misleading because they do not negate the defendant's criminal and moral responsibility for his actions. They simply permit the jury to return a verdict for a less serious homicide crime when the jury believes the defendant is less culpable than someone who killed without these culpability-reducing motivations. Fabrication and victim-bashing strategies may mislead jurors in such cases. These two risks, however, are the price we pay for a criminal justice system that believes the severity of homicide sanctions should depend, in part, on the killer's motivations.

Not only does criminal law theory reject abuse excuses, the system's practices hold most criminal defendants fully accountable for their criminal acts despite evidence of significant impairment of their moral capacities resulting from childhood victimization. Yet, the public believes our system unduly privileges abuse excuse defenses that dilute common sense notions of moral accountability.

What explains the dissonance between our actual legal practices and the public's perception of them? The simple answer is the public's dependence on the media, and especially television, for most of its information about how our criminal justice system functions. The network news does not focus on ordinary criminal prosecutions but on "high profile" cases which, by definition, are aberrational cases containing unique elements that capture our attention.

Only one of these aberrational cases—the prosecution of Lorena Bobbitt for assaulting her husband—illustrated the abuse excuse in action. Despite the absence of any prior history of serious mental disorder, the jury found Bobbitt insane after listening to powerful testimony of how she had been abused by her husband.[7] No one should be happy with a verdict that transformed her willful, unjustifiable act of violent retaliation against her abuser into the irresistible impulse of a crazed woman. We should not excuse private vengeance. Nor does being a victim prevent one from becoming a victimizer. Her husband deserved state-sanctioned punishment for his prior assaults, not mutilation. Bobbitt should have been held accountable for her crime with her victimization being used to justify a lenient sentencing

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7. *See The Unkindest Cut of All*, U.S. NEWS & WORLD REP., Jan. 31, 1994, at 14 [hereinafter *Unkindest Cut*] (discussing the facts of the Bobbitt case).

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This one clear example of an abuse excuse rationale motivating a successful insanity defense triggered a media feeding frenzy. Instead of reminding the public that the jury's acquittal of Bobbitt was the exception to the rule that insanity defenses are rarely successful,[8] the media highlighted those pundits who waxed eloquent about the erosion of moral norms. Commentators attacked the cultural theme expressed in talk shows and seemingly reflected in the Bobbitt verdict that everyone is a victim and no one is responsible for how they respond to their victimizer.[9] Professor Alan Dershowitz coined the term "abuse excuse" defense to describe the Bobbitt case and the media looked for new cases to illustrate this disturbing "trend."

Thanks to Professor Dershowitz and a willing media, the Menendez brothers became the new poster boys for the defense. Most of the American public believed they got away with murder when their first prosecution ended in a mistrial.[10] After all, the Menendez brothers intentionally and brutally slaughtered their parents and then lied about it. Few Americans credited their subsequent claims of abuse and most assumed these teenage boys did not need to kill their parents to solve their "problem." One could almost hear the sighs of relief across American when both brothers were convicted of first degree murder at their retrial.[11]

Despite the media's treatment of Menendez as Bobbitt redux, the two cases do not illustrate the same abuse excuse theme. Unlike Bobbitt's use of the insanity defense to package an abuse excuse theory, the Menendez defense conceded the brothers were criminally responsible for their parents' killing. The issue was whether they were guilty of murder or voluntary manslaughter. If the prosecution story that they killed for greed is correct, they are cold blooded murderers. If one accepts the defense's

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8. Consider Jeffrey Dahmer, a killer who ate his victims' flesh and froze some of their body parts. Despite a documented history of severe mental illness and a consensus from experts about the impact of that illness on his actions, the jury found him sane. *See Found Sane*, TIME, Feb. 24, 1992, at 68.

9. *See* Andrea Sachs, *Now for the Movie*, TIME, Jan. 31, 1994, at 99; *Unkindest Cut*, *supra* note 7, at 14.

10. *See* People v. Menendez, No. SA002728 (L.A. County Mun. Ct. Jan. 28, 1994).

11. *See Menendez brothers found guilty of murder; Self-defense rejected in parents' slayings*, BALTIMORE SUN, Mar. 21, 1996, at 3A (reporting that the judge in the case refused to allow the use of the imperfect self-defense theory).

story, their prolonged abuse led them to misinterpret their parents' actions that fateful evening. They shot their parents based on the *unreasonable belief* that their parents were about to kill them. One does not have to believe their story to understand that their claim of imperfect self-defense[12] is not an abuse excuse defense because it concedes their criminal responsibility for the crime of voluntary manslaughter.[13] In short, imperfect self-defense is a partial excuse that reduces culpability but does not destroy it.[14]

If the media paid attention to ordinary criminal cases, they would find very few examples of successful abuse-related defenses that negated the defendant's criminal responsibility. For every Lorena Bobbitt there are a hundred Jeffrey Dahmers. Even if we consider abuse-related partial defenses such as imperfect self-defense and provocation, there are very few murder prosecutions involving battered children and battered women defendants that pose the same risk of fabrication as the Menendez case. Finally, if the media focused on the backgrounds of those killers who populate Death Row, they would discover serious and undisputed evidence of early abuse and victimization that did

12. *See* CAL. PENAL CODE §§ 188, 192 (West 1995).

13. *See* People v. Christian S., 7 Cal. 4th 768 (1994) (holding that a finding of imperfect self-defense requires that a murder defendant be convicted of voluntary manslaughter).

14. The two juries in the first Menendez trial hung because they could not agree about whether the brothers had committed murder or voluntary manslaughter. Some of the jurors held out for murder, believing the brothers had fabricated their claims of abuse and their perception of imminent threat from their parents. Other jurors held out for murder because they did not understand the nature of the defense. They did not care whether the brothers were abused, because, in their view, abuse should not justify murder. These jurors did not appreciate that imperfect self-defense did not justify the killings but reduced the brothers' culpability in committing them. Several jurors held out for voluntary manslaughter because they had a reasonable doubt about whether the brothers unreasonably believed their parents were about to kill them that night. The media and Professor Dershowitz characterized those jurors holding out for voluntary manslaughter as irrational and untrustworthy. *See, e.g.*, James H. Andrews, *I May Be a Murderer, But It's Not My Fault*, CHRISTIAN SCI. MONITOR, Sept. 19, 1994, at 13; Myron Beckenstein, *The Verdict Is In: The Jury is Flawed*, SUN, Oct. 9, 1994, at 6F; David Markey, *Juries Are Guilty of Injustice*, TIMES UNION, Feb. 27, 1994, at E1; Mark Marvel, *The Law in a Whole New Light*, INTERVIEW, Sept. 1994, at 118 (interviewing Professor Dershowitz). *But see* William A. Schroeder, *A No-Fault System of Justice?*, ST. LOUIS POST-DISPATCH, Feb. 23, 1994, at 7B (supporting the jury's decision in the Menendez case). On a Nightline special, Professor Dershowitz referred to some of the Menendez jurors as "fools" who might have watched too much daytime television. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 330 n.21 (1995). This public trashing was completely unfair to the jurors, who were doing their job in good faith, and to the defense lawyers who presented powerful evidence of serious pathology in the Menendez family.

not diminish the killers' culpability in the eyes of the criminal law.[15]

I dealt with these developmentally disabled defendants every day as a young public defender. In my youthful arrogance and ignorance, Ijust labeled them dumb. It was a routine joke in the office that the police's clearance rate for serious felonies would be much lower if the average defendant had even a modicum of basic intelligence. They committed their crimes foolishly and impulsively and told transparent lies about their innocence. I saw them as slow and dimwitted. I did not understand anything about their developmental deficits. I did not realize how different they were from me.

But life has a way of teaching hard lessons. I have a ten-year-old son who is brain damaged. I now know firsthand how difficult life is for someone who does not have the basic cognitive skills and self-control capacities that most of us take for granted. My son is mildly retarded and suffers from Tourette's syndrome, a neurological disorder whose symptoms include tics and impulse control problems. Under the law's minimalist account of what capacities a person needs to qualify as a moral agent, my son will be one when he reaches the appropriate age. He is able to make rational choices about whether to comply with rules and he knows the difference between right and wrong. Although he has extraordinary difficulty controlling some of his impulses, he can do so on most occasions for some period of time.

Tragically, there are far too many children like my son who do not have intact families with the resources to take care of them. Some of these children are abused by their parent or guardian, neglected by underfunded social service agencies, ignored in the classroom because of their learning disabilities, and used by their more savvy peers in a manner that aggravates their preexisting problems. When these "at risk" children get in trouble with the law, few people in the juvenile justice system take their

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15. Studies that have examined the psychological profiles of death row inmates have found striking similarities: family histories of abuse, prenatal problems, premature birth, low birth weight, and a very high prevalence of low-average intelligence to slight mental retardation. *See* M. Feldman, K. Mallouh, & D.O. Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 BULL. AM. ACAD. PSYCHIATRY L. 345 (1986); D.O. Lewis, J.H. Pincus, M. Feldman, L. Jackson & B. Bard, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986); J.H. Panton, *Personality Characteristics of Death-Row Prison Inmates*, 32 J. CLINICAL PSYCHOL. 306 (1976).

claims of victimization seriously. The few who do lack the resources to address their problems. When these "at risk" children develop into violent young "adult" offenders, the law treats them as fully accountable actors who *deserve* whatever punishment we give them. We judge them by our standards because we do not understand how fundamentally different they are from the rest of us.[16]

Should an enlightened criminal law excuse the developmentally-disabled offender? Hardly. When sane adults commit violent crimes, we must hold them legally accountable, despite their deficits, as an act of community self-defense. However, we should not indulge in the moral hypocrisy of insisting that when we punish and even execute this group of offenders, we necessarily are giving them their just deserts. When we punish the developmentally disabled and mentally retarded offender, we are simply protecting ourselves.

So do not lose too much sleep over the prospect that notions of moral accountability are being demeaned through the rampant use of abuse excuse defenses. The truth is just the opposite: the law privileges a minimalist view of what it takes to be a morally accountable agent to ensure that all but the most severely disabled offenders are held accountable for their crimes.

16. Those who defend the law's minimalist view of the capacities one needs to qualify as a moral agent frequently remind us that the criminal law imposes very minimal standards of behavior that most of us can obey with ease. As Stephen Morse has written, "it is not hard *not* to kill, rape, steal, and burn, and the duty of care to avoid criminal liability for risky conduct is met easily." Morse, *supra* note 1, at 11. This statement certainly is true for many of the people who run afoul of the criminal law. But, there is a growing class of youthful criminal offenders whose impulsivity from a very early age suggests the standards imposed by the criminal law are not so easily met.