Campbell Law Review

Volume 11
Issue 2 *Spring 1989*

Article 5

January 1989

Criminal Law - Battered Woman Syndrome: The Killing of a Passive Victim - A Perfect Defense or a Perfect Crime? - State v. Norman

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CRIMINAL LAW—BATTERED WOMAN SYNDROME: THE KILLING OF A PASSIVE VICTIM—A PERFECT DEFENSE OR A PERFECT CRIME?—*State v. Norman*

INTRODUCTION

Husband killing has become a fad;
wife abuse has become acceptable.[1]

While neither of these statements is true, each represents the extreme side of a controversy affecting the legal profession and the laws of this nation. In the past, the battered woman who struck back at her abuser generally faced convictions for murder and manslaughter. The modern trend, however, seemingly excuses the woman who kills her then passive mate; the same mate who abused her in the past, interpreting such conduct as self-defense. The development of this trend is linked to the introduction of the Battered Woman Syndrome.[2] The introduction of the syndrome into evidence allows the jury to understand the defendant's past abuse by her victim and to ponder evidence of her mental state prior to the killing.

In *State v. Norman*,[3] Judy Norman shot her husband to death while he slept.[4] The North Carolina Court of Appeals overturned the verdict of voluntary manslaughter finding error in the trial court's failure to instruct the jury on self-defense and ordered a new trial.[5] The court reasoned that the victim's prior threats and abuse of the defendant provided adequate provocation for the sub-

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1. *See generally, A Killing Excuse*, TIME, Nov. 28, 1977 at 108; *see also The Right to Kill*, NEWSWEEK, Sept 1, 1975 at 69; *Wives Who Batter Back; Murder or Self Defense*, VIVA, July, 1978 at 58.

2. The scholarly commentary has overwhelmingly endorsed the use of battered woman syndrome evidence. *See generally* Buda & Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 368-378 (1984-85); Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 137-144 (1985); Comment, *Self-Defense: Battered Woman Syndrome on Trial*, 20 CAL. W.L. REV. 485 (1984); Note, *The Battered Wife's Dilemma: To Kill or Be Killed*, 32 HASTINGS L.J. 895 (1981) [hereinafter cited as Note, *Wife's Dilemma*].

3. 89 N.C. App. 384, 366 S.E.2d 586 (1988).

4. *Id.* at 394, 366 S.E.2d at 589.

5. *Id.* at 394, 366 S.E.2d at 592.

sequent killing.[6] The decision provides a unique interpretation of "provocation" and "imminent danger" which ultimately could affect the law of self-defense.

This Note will examine the strengths and weaknesses of the decision in *State v. Norman*, and will discuss whether this ruling provides solutions or further problems for the legal system in this area of controversy. In scrutinizing what has been labeled the "battered spouse syndrome," the legal profession must answer a question. Is the use of the syndrome creating a perfect defense or is it opening the door to the perfect crime?

THE CASE

Judy Norman was charged with murder in the shooting death of her husband, John Thomas "J.T." Norman.[7] Judy and J.T.'s marriage of twenty-five years was marred by a long history of verbal and physical abuse leveled by J.T. (hereinafter decedent or Norman) against Judy, the defendant.[8] Norman, an alcoholic, required the defendant to prostitute herself everyday.[9] He treated her like an animal requiring her to eat dog food out of a bowl and sleep on a concrete floor.[10] In addition, Norman beat the defendant "most every day" with whatever was available from his fists to a baseball bat.[11] He put out cigarettes on the defendant's skin and threw food, drink, and glass in her face.[12] Two days before Norman's death, he was arrested for driving under the influence.[13] Upon release from jail the following day, Norman vented his anger by beating the defendant continuously throughout the day.[14] An officer called to the residence that evening, testified that the defendant, battered and bruised, told him that her husband had been

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6. *Id.*

7. *Id.* at 385, 366 S.E.2d at 597.

8. *Id.* Norman began to drink and beat defendant five years after they were married. The couple had five children, four of whom were still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.

9. *Id.* at 385-86, 366 S.E.2d at 587. Norman required her to make a minimum of $100 dollars a day or he would beat her.

10. *Id.* at 386, 366 S.E.2d at 587.

11. *Id.*

12. *Id.* Defendant exhibited scars on her face from these incidents.

13. *Id.* at 386, 366 S.E.2d at 588.

14. *Id.*

beating her all day and that she could not take it any longer.[15] However, she refused to take out a warrant fearing Norman would kill her.[16] Later that evening the defendant was hospitalized for taking an overdose of "nerve pills."[17] On the day of Norman's death, the beatings intensified, and Norman repeatedly threatened to cut the defendant's throat, cut her heart out, and cut her breasts off.[18] That afternoon Norman took a nap.[19] While Norman was asleep, the defendant went to her mother's house where she found a gun, returned home, and shot Norman to death as he slept.[20]

At trial, the judge instructed the jury on first degree murder, second degree murder, and voluntary manslaughter.[21] The jury found Judy Norman guilty of voluntary manslaughter and she received a six-year sentence.[22] The defendant appealed alleging several errors including the principal issue: whether the trial court erred in failing to instruct the jury on self defense?[23]

On appeal, the State argued that the defendant was not entitled to an instruction on self-defense.[24] The State contended that as a matter of law it was unreasonable for the defendant to believe killing the decedent was a necessity, considering the fact that the decedent was asleep at the time of the shooting.[25]

The North Carolina Court of Appeals held that the defendant was entitled to an instruction of perfect self-defense where there

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15. *Id.* at 387, 366 S.E.2d at 588.

16. *Id.*

17. *Id.* Norman interfered with the emergency personnel who were trying to treat defendant. He was drunk and making such statements as, "If you want to die, you deserve to die. I'll give you more pills," and "let the bitch die. . . She ain't nothing but a dog. She don't deserve to live."

18. *Id.* at 387-88, 366 S.E.2d at 588. Norman beat the defendant all day long. During a ride to Spartanburg (defendant driving), Norman slapped the defendant for driving too closely and poured a beer on her head. Norman kicked the defendant in the side of the head while she was driving and told her he would "cut her breast off and shove it up her rear end."

19. *Id.* at 388, 366 S.E.2d at 589.

20. *Id.*

21. *Id.* at 384, 366 S.E.2d at 586.

22. *Id.* at 385, 366 S.E.2d at 586-87. Voluntary Manslaughter is a Class F felony with a six-year presumptive sentence. *See* N.C. GEN. STAT. § 14-18 (1986).

23. *Id.* at 385, 366 S.E.2d at 587.

24. *Id.* at 390, 366 S.E.2d at 590. *See* State v. Mize, 316 N.C. 48, 340 S.E.2d 439 (1986); State v. Wallace, 309 N.C. 141, 305 S.E.2d 548 (1983); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982).

25. 89 N.C. App. at 390, 366 S.E.2d at 590.

was evidence tending to show that the defendant was suffering from the abused spouse syndrome.[26] The court further held that based on the constant beatings, verbal and physical abuse, and threats on the day of the killing, a jury could find that the defendant believed it was necessary to kill the decedent to save herself from death or serious bodily harm.[27] The court also reasoned that "although the decedent was asleep at the time the defendant shot him, defendant's unlawful act was closely related in time to an assault and threat of death by decedent against the defendant."[28] The court concluded by stating the jury is to regard evidence of battered spouse syndrome merely as some evidence to be considered in its determination as to whether a reasonable doubt exists as to the unlawfulness of the defendant's act.[29]

BACKGROUND

Wife abuse in America has become a significant social problem. Some researchers have estimated that twenty-eight million married women suffer abuse at the hands of their husbands.[30] Unfortunately, such domestic violence often culminates with the woman killing her mate.[31] The source of violence cannot be blamed on the legal system. However, the growth of domestic violence seems to be linked to the legal system's inability to deal with the problem of wife abuse.[32] Police have been criticized for taking the role as primarily a mediator or peacemaker in domestic disputes.[33] Consequently, arrests in those instances rarely occur.[34] Also, prosecutors and judges are criticized for exhibiting a non-interventionist and non-responsive attitude toward domestic disputes.[35] These attitudes, along with the unwillingness of family law courts to issue

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26. *Id.* at 384, 366 S.E.2d at 590.

27. *Id.*

28. *Id.* at 394, 366 S.E.2d at 592.

29. *Id.* at 394, 366 S.E.2d at 592.

30. LANGLEY & LEVY, WIFE BEATING: THE SILENT CRISIS 12 (New York, E. P. Dutton, 1977).

31. *See* Roy, *Some Thoughts Regarding the Criminal Justice System and Wife Beating*, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE, 139 (M. Roy ed. 1977).

32. F. BAILEY & K. FISHMAN, CRIMES OF VIOLENCE: HOMICIDE AND ASSAULT, § 628.1 at 164 (Supp. 1988) [hereinafter BAILEY & FISHMAN].

33. *Id.*

34. *Id.*

35. *Id. See generally Advice for Prosecutors*, 70 ABA J. 27, (Dec. 1984).

protective orders, have played a role in the growth of domestic violence.[36] In light of the legal system's ineffectiveness, women have found it necessary to physically defend themselves.[37] Often this resort to self-help leads to the prosecution of these women for murder and manslaughter.[38] The growing number of homicide and manslaughter cases involving rape victims and battered women as defendants is well documented.[39] Studies, such as the one conducted at Chicago's Cook County Jail, have shown that large numbers of women are convicted and sentenced for having murdered husbands or boyfriends who were physically and sexually abusive.[40] A study of 132 women in Chicago's Cook County Jail serving time for murder or manslaughter indicated that forty percent of the women had killed lovers who had subjected them to physical abuse.[41]

In the last ten years, the prosecution of battered women for the killing of their assailants has generated a great deal of controversy in both society and the legal profession.[42] One difficulty with these cases is that they "often involve sympathetic defendants who cannot fairly be blamed for their conduct, but who have no defense if the law is strictly applied."[43] In the late 1970's defense lawyers began to explore new avenues in defending battered women charged with criminal homicide.[44] The right of self-defense for women first received national attention in the rape cases of Joan Little and Inez Garcia, both of whom killed the men who raped or attempted to rape them.[45] Little, a prisoner in a North Carolina jail, stabbed an unarmed guard who allegedly threatened to rape

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36. *Id.* (citing Woods, *Litigation on Behalf of Battered Women,* WOMEN'S RIGHTS LAW REPORTER, 11 (Fall 1978).

37. Rosen, *The Excuse of Self Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill,* 36 AM. U. L. REV. 11, 13, (1986) [hereinafter *Rosen*].

38. *Id. See* Woods, *supra* note 36, at 13, n. 39; Lidsey, *When Battered Women Strike Back: Murder or Self-Defense,* VIVA (July 1978).

39. BAILEY & FISHMAN, *supra* note 32. *See generally* Lidsey, *When Battered Women Strike Back: Murder or Self-Defense?* VIVA 58-59 (July 1978).

40. *Id.* (citing McCormick, *Battered Women—The Last Resort,* (Unpublished study available at Cook County Department of Corrections, Ill. 1977).

41. *Id.*

42. *Id.*

43. *See* Rosen, *supra* note 37, at 13.

44. *Id.* at 19.

45. Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Woman,* 7 VT. L. REV. 1, 4 (1982).

her. She was acquitted on the theory of self-defense despite the arguably unequal force.[46] Inez Garcia was physically and sexually assaulted by two men who threatened to return and rape her again.[47] In response, Ms. Garcia took a shotgun and searched for the assailants.[48] Upon finding one of the men, she shot and killed him.[49] Garcia was acquitted, as the jury was allowed to consider the men's threat to repeat the attack in determining whether her belief in the necessity to use deadly force to avoid imminent bodily harm was a reasonable belief.[50]

One difficult question in battered spouse cases is why the abused woman stays with the man who abuses her. Feminists and psychological experts report that a woman stays primarily out of shame or fear that her husband might find her if she leaves, economic hardship, and the woman's belief in her husband's reform.[51] Despite these reasons, the popular misconception that these women are "sick" or "masochistic" still prevails.[52]

Use of the "battered spouse syndrome" as a defense has increased greatly in the last five years.[53] Most courts now allow the use of expert testimony, seemingly giving legal acceptance to the syndrome.[54] Much of the success surrounding the use of the battered woman syndrome can be linked to the skillful treatment of the jury in these cases.[55] Understanding the broader based societal issues has also contributed to this success.[56] However, along with the defense's success has come criticism and public concern that "husband killing" has gotten out of hand.[57] Some have called husband killing a "fad" claiming judicial sympathy, in effect, has sanc-

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46. *Id.* Joan Little used an icepick against the unarmed guard.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. LANGLEY & LEVY, *supra* note 30, at 114.

52. *Id.* at 123.

53. *See generally, Annotation Admissability of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome*, 18 A.L.R.4th 1153.

54. *Id.*

55. BAILEY & FISHMAN, *supra* note 32, at 166.

56. *Id.*

57. *See generally, A Killing Excuse*, TIME, Nov. 28, 1977, at 108; *see also* The Right to Kill, NEWSWEEK, Sept. 1, 1975 at 69; *Wives Who Batter Back*, NEWSWEEK, Jan. 30, 1978 at 54; *When Battered Women Strike Back: Murder or Self Defense?*, VIVA, July 1978 at 54.

tioned vengeful wives to kill and "get away with it."[58] Faced with these dilemmas, the courts continue to look for solutions.

ANALYSIS

The first and controlling issue in *Norman* was whether the defendant was entitled to an instruction on perfect self-defense. Before directly addressing the issue, the court explained the operation of the law of self-defense.[59] In North Carolina, the law entitles a defendant to an instruction on perfect self-defense, as an excuse for a killing, when at the time of the killing the following four elements existed:

(1) It appeared to the defendant and she believed it to be necessary to kill the deceased in order to save herself from death or great bodily harm; and
(2) the defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
(3) defendant was not the aggressor in bringing on the affray, i.e., she did not aggressively and willfully enter into the fight without legal excuse or provocation; and
(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to her to be necessary under the circumstances to protect herself from death or great bodily harm.[60]

The question arising from the facts of *Norman* was whether the victim's passiveness at the moment the unlawful act occurred, precludes the defendant from asserting perfect self-defense.[61] The first element of perfect self-defense requires that it appear to the defendant and that the defendant actually believe it necessary to kill the deceased, in order to save herself from death or great bodily harm.[62] This element requires a subjective evaluation.[63] A subjective evaluation examines what the defendant actually perceived

58. *Id.*
59. *Norman*, 89 N.C. App. at 384, 391, 366 S.E.2d at 590-92.
60. *Id.* at 390, 366 S.E.2d at 590 (citing State v. Gappins, 320 N.C. 44, 357 S.E.2d 654 (1987); *See* State v. Mize 315 N.C. 48, 51, 340 S.E.2d 439, 442 (1986); State v. Bush 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982) (quoting State v. Norris 303 N.C. 526, 530, 279 S.E.2d 570, 572-573 (1981)).
61. *Norman*, 89 N.C. App. at 391, 366 S.E.2d at 590.
62. *Id.* at 390, 366 S.E.2d at 590.
63. *Id.* at 391-92, 366 S.E.2d at 590.

at the time of the shooting.[64] The North Carolina Court of Appeals determined that the evidence would permit a jury to find that the defendant believed it necessary to kill the victim to avoid being killed.[65] This determination was based on the increased beatings and the threats by decedent as well as the testimony of the defendant and two expert witnesses.[66] All of this evidence reinforced the reasonableness of the defendant's belief in the necessity to kill the decedent to save herself.[67]

The second element of perfect self-defense requires that defendant's belief be reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.[68] This element is measured by an objective standard.[69] The court of appeals cited the record as containing sufficient evidence to warrant a finding by the jury, who represent people of ordinary firmness, to infer that the defendant's belief was reasonable under the circumstances.[70] The court relied on evidence presented by two expert witnesses in the field of forensic psychology, both of whom concluded that the defendant suffered from the "abused spouse syndrome."[71] The experts believed the condition developed as a result of severe cycles of violence by the decedent against the defendant.[72] Such constant and repeated abuse caused the mental state "learned helplessness" to develop.[73] The defendant's feeling of helplessness and her in-

64. *Id.* at 391, 366 S.E.2d at 590.
65. *Id.* at 392, 366 S.E.2d at 591.
66. *Id.* at 392, 366 S.E.2d at 590-91.
67. *Id.* at 392, 366 S.E.2d at 591.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 388-90, 366 S.E.2d at 591. Dr. William Tyson concluded that the defendant "fits and exceeds the profile of an abused or battered spouse." Dr. Tyson explained that in the defendant's case the situation had progressed beyond mere "wife battering or family violence" and had become "torture, degradation and reduction to an animal level of existence, where all behavior was marked purely by survival. . . ." Dr. Rollins was the defendant's attending physician at Dorothea Dix Hospital where she was sent for a psychiatric evaluation after her arrest. Based on an examination of the defendant, laboratory studies, psychological tests, interview and background investigation, Dr. Rollins testified that the defendant suffered from "abused spouse syndrome".
72. *Id.* at 392, 366 S.E.2d at 591. *See generally* L. WALKER, THE BATTERED WOMAN SYNDROME, 27-28 (1984).
73. *See generally* Faigman, *The Battered Woman Syndrome and Self-Defense; A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986) [hereinafter cited

ability to remove herself from the situation were cited by the court as major factors in determining the reasonableness of her belief in the necessity to kill her husband.[74]

The third element of perfect self-defense is satisfied as long as the defendant did not aggressively and willfully enter into the fight without legal excuse or provocation.[75] The court of appeals noted that in the absence of a single confrontation or affray, it is necessary to measure the defendant's action "in light of the totality of the circumstances."[76] One circumstance considered was the inability of the defendant to protect herself during an attack.[77] During an attack, a battered spouse "is immobilized by fear if not actually physically restrained."[78] The length of time between the attack and the time the defendant overcomes her fear raises the issue of imminent danger. Nevertheless the court felt that based on the evidence, a jury could find that the "decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent and that the defendant took advantage of her first opportunity to defend herself."[79]

The fourth element of perfect self-defense requires that the defendant use no more force than believed to be reasonably necessary to protect herself.[80] The court of appeals in a one sentence analysis found the final element to be satisfied; "[T]he expert testimony considered with the other evidence would permit reasonable minds to infer that defendant did not use more force than reasonably appeared necessary to her under the circumstances to protect herself from death or great bodily harm."[81]

The court's finding in *State v. Norman* that the four elements of perfect self-defense were met at the time of the killing raises a number of questions. One broad question is whether the court's use of the battered spouse syndrome is simply the application of

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as Faigman]; *See generally*, Rosen, *supra* note 30.

74. 89 N.C. App. at 393, 366 S.E.2d at 591. *See generally*, Note, *Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense Do Not Rquire a Specific Instruction on Battered Woman Syndrome*, 60 N.D.L. REV. 141, 143 n.19 (citing 34 STAN. L. REV. 615, 619 (1982) [hereinafter Note].

75. *Id.*

76. *Id.*

77. *Id.* (citing State v. Kelley, 97 N.J. 178, 220, 478 A.2d 364, 325 n. 23 (1984).

78. *Id.*

79. *Id.* at 394, 366 S.E.2d at 592.

80. *Id.*

81. *Id.*

this theory to the elements of perfect self-defense or is the court in effect creating a new defense? Some have suggested that the use of the syndrome as a defense excuses the killing simply because of the evil character of the victim.[82] Others see the defense as a "juxtaposition of insanity and self-defense."[83] The key concerns are that the elements are being stretched so as to include the battered spouse syndrome, or that they are being applied differently in the case of an alleged battered spouse than the same elements would be applied in any other perfect self-defense case.

The difficulty in analyzing the application of element one—whether the defendant believed it was necessary to kill the victim—and element two—whether the defendant's belief was reasonable, is the fact that their applications are very similar. The first element uses a subjective standard to determine what the defendant actually believed.[84] This standard is used by a minority of the jurisdictions.[85] The objective standard, as applied to the second element, requires that the defendant's belief, considering whether the circumstances as they existed at the time, was sufficient to create such a belief in the mind of a person of ordinary firmness.[86]

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82. *See* Acker & Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelley*, 21 CRIM. L. BULL. 125, 146-151 (suggesting evidence may lead juries to believe the killing was just).

83. *See* Vaughan & Moore, *The Battered Spouse Defenses in Kentucky*, 10 KY. L. J. 399, 419 (1983).

84. 89 N.C. App. at 390, 366 S.E.2d at 592.

85. *See* Note, *supra* note 72, at 146. A split of authority exists where a defendant's actions should be measured against the objective or subjective standard of reasonableness. One commentator sets forth the standards as follows:

> The minority view probably the common law rule is the subjective standard as set forth in 40 AM. JUR.2d *Homicide* § 154 (1968). It holds that a person claiming self-defense must have honestly believed she was in imminent danger under all of the circumstances as he honestly perceived them. The Model Penal Code has adopted the subjective standard. "The use of force . . . toward another person is justified when the actor believes that such force is . . . necessary for the purpose of protecting himself. . . . " Model Penal Code § 3.04(1) (1968).
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> The majority view is that the apprehension of danger and belief of necessity must be a reasonable belief. 40 AM. JUR.2d *Homicide* § 1 (1968). The prevalent view is that an honest but unreasonable belief concerning the necessity of self-defense merely negates malice aforethought and reduces the offense to voluntary manslaughter.

Note, *Battered Woman Sundrome: Admissibility of Expert Testimony for the Defense*, 47 MO. L. REV. 835, 843 N. 50 (1982).

86. *Id.*

Most courts use either the objective or the subjective test while North Carolina uses both tests.[87] In applying the objective standard, a jury is required "to consider only the acts and circumstances surrounding the accused at or immediately before the time of the killing from the standpoint of a reasonable and prudent person."[88] The subjective standard when applied to the second element, on the other hand, required the jury to decide whether the circumstances surrounding the accused were sufficient to induce an honest and reasonable belief in her mind that she must use force to defend herself.[89]

The court of appeals in *Norman* stated clearly that "the second element of [perfect] self-defense . . . is measured by the objective standard. . . . "[90] Nevertheless, the court analyzed the second element with a standard very similar to the subjective standard. The court began its analysis by citing evidence of the repeated cycles of violence by the victim toward the defendant and discussed the defendant's state of "learned helplessness."[91] The evidence went directly to the honesty and the reasonableness of the defendant's belief, tending to show the subjective standard was applied. The objective standard, however, is concerned with what a person with a mind of ordinary firmness would believe to be reasonable under the circumstances. The court of appeals applied the objective standard only nominally by allowing the jury to consider many of the defendant's unique circumstances thereby evaluating the resonableness of the action as the defendant saw it. The court either applied the subjective standard or stretched the objective standard in such a manner as to remove the test's objectivity. By placing the jury in the shoes of the defendant, the jury would be prevented from answering the question objectively. At best, a jury would be faced with the impossible task of determining what a reasonable person suffering from the abused spouse syndrome would believe. The extension of the objective test in this manner mandates the assumption that a person of ordinary firmness would fall prey to the syndrome. Such an assumption is questionable at best and is unfounded in the absence of scientific evidence or discussion on the point.

87. *Norman*, 89 N.C. App. at 391-92, 366 S.E.2d at 590-91.
88. Note, *supra* note 74, at 146.
89. *Id.*
90. 89 N.C. App. at 392, 366 S.E.2d at 591.
91. *Id.*

In addition to applying a subjective standard to the second element of perfect self-defense, the court of appeals examined the theory of "learned helplessness" as evidence to support the reasonableness of the defendant's conduct.[92] "Learned helplessness" causes the battered woman to believe she is helpless to remove herself from this brutal situation.[93] The court stated that this vulnerability must be considered in determining the reasonableness of the defendant's actions.[94] "Learned helplessness" does explain the reasonableness of the defendant's feeling of vulnerability; however, it fails to explain the reasonableness of the defendant's action of killing her husband while he slept. Theoretically, it is inconsistent for a woman, who is helpless and unable to improve her situation, to assert such a "positive control over her situation as to kill her batterer."[95]

The effect of the court of appeals ruling in *State v. Norman* is difficult to predict. The unique analysis of the second element of perfect self-defense raises several questions. How will the ruling affect future applications of the elements of perfect self-defense? In answering this question, one should not forget that this ruling and analysis only entitle the defendant to an instruction on perfect self-defense; it does not excuse her actions. One effect of the ruling will be a broadening of the evidence permitted regarding the defendant's actual beliefs. The ruling also raises questions as to whether the court correctly applied the objective standard to the second element of perfect self-defense. Further, this ruling begs the question: should the court in fact apply the subjective standard? Or has the court created a new standard by which to interpret the element. The answers to these questions will affect the future application of the elements of perfect self-defense. Despite possible negative effects, the *Norman* ruling provides battered women with the opportunity to explain their actions. If the court has erred, they have erred properly on behalf of the defendant, a proposition upon which our legal system is based. Another issue raised by the court of appeals' ruling deals with the third element of self-defense relating to provocation. How could the defendant have been provoked by the sleeping Mr. Norman? In analyzing

92. *Id.*

93. *Id.*

94. *Id. See generally, supra* note 74.

95. *See* Faigman, *supra* note 73, at 641. *See generally* R. GELLES & C. CORNELL, *Intimate Violence in Families*, 63-81 (1985). "Most battered women are far from passive." *Id.* at 77.

this element the court relied on the "cycle theory" of the battered woman syndrome.[96] One premise behind this theory is that at the moment of attack, the battered woman is least likely to counter because she is immobilized by fear.[97] The court stated that, once the fear has subsided, the battered spouse need not wait for a deadly attack to occur.[98] This type of "preventive" self-defense has been adopted by other state courts.[99] Nevertheless, the defendant is required to show some apparent or immediate danger.[100] This presents a problem because "frequently a battered woman kills her mate after an attack has ended or sometimes when seemingly no threat is present.[101] Furthermore, a battered woman would appear to always have the alternative of leaving the violent relationship instead of killing.[102] Yet, a majority of jurisdictions, including North Carolina, impose no duty to retreat if the aggressor employs

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96. 89 N.C. App at 393, 366 S.E.2d at 591. *See* Faigman, *supra* note 73, at 627 (citing L. Walker (1984), *supra* note 72). A discussion of the stages of the Walker Cycle Theory:

> The Walker cycle theory forms the conceptual bridge that spans the time gap between the batterer's threat of death or serious bodily harm and the defendant's act. Walker describes three distinct phases of the typical battering relationship. A "tension building phase" erupts into an "acute battering incident," which is in turn followed by "loving contrition." The first phase is marked by verbal bickering and increasing tension between the man and woman. In the second phase the batterer explodes into an uncontrollable and violent rage. In the final phase the batterer typically expresses regret and profusely apologizes, usually promising never to beat the woman again. Despite the man's promises during this third phase, the cycle eventually begins anew.
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> According to the cycle theory, the battered woman is reduced to a state of fear and anxiety during the first two phases of the cycle, and her perception of danger extends beyond the time of the battering expisodes themselves. A "cumulative terror" consumes the woman and holds her in constant fear of harm. The fear of harm continues even during the peaceful interlude between episodes of abuse. It is during this peaceful interlude that the woman may seize the opportunity to strike back at the batterer.

Faigman, *supra* note 71, at 627.

97. *Id.* (citing State v. Kelley, 97 N.J. 178, 220, 478 A.2d 364, 385 n. 23 (1984).

98. *Id.*

99. *See* State v. Gallegos, 719 P.2d 1268 (N.M. App 1986); and State v. Allery, 682 P.2d 312 (Wash. 1984); State v. Leidholm, 334 N.W.2d 811 (N.O. 1983).

100. *See* State v. Roybal, 33 N.M. 187, 262 P. 929 (1927).

101. *See* Faigman, *supra* note 72, at 621.

102. *Id.* at 622.

deadly force or when the victim is in her own home.[103] These varying factors have created a dilemma. The battered spouse syndrome could be a solution. By using the syndrome, a defendant is able to bring out the history of the past beatings to help the jury understand the reasonableness of her actions.[104] The syndrome also allows the jury to understand the impending danger which the battered woman faces.[105]

The facts in *State v. Norman* show that the defendant believed she could not escape from the decedent's abuse.[106] These facts are similar to those facts before the North Dakota Supreme Court in *State v. Leidholm*,[107] which also involved a battered spouse who killed her husband as he slept.[108] The North Dakota Supreme Court stated that where the facts and circumstances are sufficient to create a reasonable and honest belief in the mind of the accused that she cannot retreat from the assailant with safety, her use of deadly force is justified or excused.[109] Other courts have excused the use of deadly force in response to threatening communications and gestures, where the accused could perceive impending danger based on prior attacks.[110] In summary, courts have

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103. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 53 at 391. The law's attitude toward the duty to retreat reflects the tensions underlying the self-defense doctrine generally. On one hand, an individual should be encouraged to retreat in order to avoid injury to herself or the aggressor. At the same time, one who is attacked should not be required to adopt a cowardly or humiliating posture. The majority of American jurisdictions impose no duty to retreat if the aggressor employs deadly force and the defender reasonably believes that she is in danger of death or serious bodily injury. A substantial minority of states, however, requires the defending party to retreat if she can do so in complete safety. *Id.* at 395-96.

An individual has no duty to retreat if attacked by an intruder in her home. Courts are divided, though, on whether there is an obligation to retreat when the assailant is a co-occupant of the dwelling. Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 26 A.L.R.3d. 1296 (1969). A majority of jurisdictions do not require retreat when the assault occurs within the home and the assailant is a co-occupant. The rationale for this position apparently is that the defender has no safer place to which she can escape.

104. *Norman*, 89 N.C. App at 392, 393, 366 S.E.2d at 590.

105. *Id.*

106. *Id.* at 388.

107. 334 N.W.2d 811 (N.D. 1983).

108. *Id.* at 813.

109. *Id.* at 821;.

110. *See* State v. Gallegos, 719 P.2d at 1271 (citing State v. Walker, 40 Wash. App 658, 700 P.2d 1168 (1985).

placed a greater emphasis on the probability that an attack will occur and the impending nature of an attack, and place less emphasis on the immediacy of an attack or whether an attack was actually occurring.[111] In finding "the decedent's sleep was but a momentary hiatus in a continuous reign of terror," the court of appeals in *State v. Norman* ruled in accordance with other jurisdictions in finding sufficient provocation.[112]

The decision of the court of appeals in *State v. Norman* should be affirmed. The court neither stretches the law nor does it create a new defense for battered women. The court simply and masterfully applied the facts of the case to the law. The difficulty was not in applying the law but in understanding how the facts should be applied to the law. The effects of this ruling are uncertain. The obvious is a beneficial effect on the plight of battered women who strike back.[113]

CONCLUSION

Upon applying the theories of the battered spouse syndrome to the elements of perfect self-defense, the North Carolina Court of Appeals granted Judy Norman a new trial. The error was the failure by the trial court to instruct the jury on perfect self-defense. As the court warned, the law should never casually permit the unlawful killing of another human being. Yet, it is the court's responsibility to insure with equal vigor that innocent victims of abuse are entitled to defend themselves. The realities of an abusive relationship force the court to apply the elements of self-defense subjectively. This subjectivity raises questions regarding the application of the elements of self-defense and whether a special defense has been created for battered women.

The ruling in *State v. Norman* is a step in the right direction in helping victims of abuse; however, the abuse itself is the root of the problem. Society will be better served if the legislature, law enforcement agencies, social service agencies, and the courts work

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111. *Id.* at 1271. *See* State v. Liedholm, 33 N.W.2d 811 (N.D. 1983); *See generally*, Note, *Wife's Diemma, supra* note 2.

112. 89 N.C. App at 394, 366 S.E.2d at 592.

113. State v. Norman was under consideration by the North Carolina Supreme court of the time of publication of volume 11 of the CAMPBELL LAW REVIEW.

together to deal with the problem and protection of battered women.

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