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WAS THE FIRST WOMAN HANGED IN NORTH CAROLINA A "BATTERED SPOUSE?"

JEFFREY P. GRAY

It is a gruesome tale, now more folklore than fact. It is the oft told story of the pioneer wife who slipped her baby girl from the arms of her sleeping husband, chopped him to pieces with an axe, and then hid throughout the hillside the parts of his body she could not burn. She hung for her crime, but only after a daring escape attempt and numerous requests for clemency.

Could she have been a “battered spouse?” In some states in this nation, present day law might have excused her crime on that ground, but not in North Carolina, and especially not in the early 1800's.

Her name was Frankie Silver. To many North Carolinians, the name sounds familiar; they just cannot tell you why. Her crime earned her a place in William Powell’s Dictionary of North Carolina Biography.¹ Muriel Sheppard wrote about the oral tradition of the murder in her book about the Toe River Valley, Cabins in the Laurel.² Frankie Silver has had among her post-mortem defenders the great U.S. Senator, jurist, and self-proclaimed “county lawyer” Sam J. Ervin, Jr., as well as Burke County elementary school students who have sought a pardon for Frankie from the Governor.

The story of Frankie Silver and her crime is a difficult one to tell with accuracy. History has clouded many of the facts, and oral renditions—repeated for generations —have fogged the truth. In the winter of 1831, Charles and Frankie Silver lived in a sparsely populated section of Burke County (now Mitchell County) at a

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bend in the Toe River. They had a one-year-old daughter, Nancy. During the day of December 22nd, Charles had chopped and stacked hardwood for the fireplace in their one-room cabin to last them over the Christmas holiday. He lay sleeping by the fire with the baby in his arms. At some point while he was sleeping, Frankie removed the baby to safety, then decapitated Charles with an ax. She chopped his body up and burned much of it in the fireplace, depleting the entire three to four-day store of firewood. The parts of her husband she could not burn, she hid in a hollow log on the hillside or buried in shallow holes under rocks and logs. She scrubbed the wooden floor clean and, using the same axe, chipped the blood spatters off the hewn wooden mantel.

She then went to visit Charles's parents very early on the morning of December 23rd and announced she had done her washing and scouring. She told his parents a concocted story that Charles had walked across the frozen river the day before to get his Christmas liquor and had not returned. She begged his family to search for him. Her story, however, quickly became implausible. She was later charged for her crime.

This is the most commonly repeated story. The debate about what occurred in that one-room cabin on a cold winter night 165 years ago continues, and becomes especially heated, when the motives for the crime are proffered. Charles's family members—then, and over 150 years later—contend that Frankie killed Charles with malicious intent; many assumed her motive was jealousy over Charles's unfaithfulness. Others, including Nicholas A. Woodfin, who has been alleged to be Frankie's defense counsel and who later became a very prominent attorney in Asheville, argued that Frankie did not willfully kill Charles. They believe he came home drunk and began beating her with a stick and that Frankie struck back and killed him in self-defense. Woodfin claimed that this is the story Frankie told him. He stated that Frankie's death "was a miscarriage of justice" and that she was "unjustly hanged."³ It was to this version of the facts that "Senator Sam" was an adherent.⁴ It is from this version of the facts that springs a defense for a modern day Frankie Silver.

Frankie lived in an isolated area, with little or no support group outside her and her husband's immediate families. She

may have been abused—maybe repeatedly throughout her marriage—and the abuse became too much. Picture her on the day of the killing. The cycle of violence started anew, and her husband beat her with a stick during a drunken rage. He fell asleep. Incapacitated and defenseless, she struck. Afterwards, she was in denial and feigned no knowledge of what occurred. Frankie Silver's possible reaction has been repeated many times since that cold night in 1831. Advocates for a new concept of self-defense in modern times have given her actions and reaction a name: the "battered spouse syndrome."

The "battered spouse syndrome" has yet to be recognized by either the medical community or the courts as an accepted psychological malady. The Diagnostic and Statistical Manual of Mental Disorders (DSM IV) used to diagnose psychological disorders does not contain an entry for such a syndrome. However, recognition of its symptoms is gradually becoming accepted. As a theory to explain a behavior pattern, it originated in the extensive research and writings of Dr. Lenore E. Walker, a psychologist who developed this syndrome as a vehicle to assist women in explaining their experiences in the context of a criminal trial where the woman has used force against her spouse.5 A "syndrome" is generally defined as a group of signs and symptoms that collectively indicate or characterize a disease, disorder, or abnormality.6 Such being the case, "battered spouse syndrome" is aptly named because of its reliance on a variety of broad-based "signs" or "symptoms."

In her writings, Dr. Walker has outlined a theory based on her research with battered spouses regarding the structure of a battering relationship from the perspective of the battered spouse. This theory has most frequently been explained as the "cycle of violence." According to Dr. Walker's theory, the abuse cycle consists of three recognizable phases: 1) the tension building phase, 2) an acute battering incident, and 3) a contrition phase. During

the tension building phase, minor battering incidents occur and escalate over time. This is generally the longest phase of the cycle. Next occurs an acute battering incident—the second phase—which is distinguished by the batterer’s loss of control and the unpredictability and severity of the beatings. This is the shortest phase, ranging from two to 24 hours. During the third and final phase, the batterer typically expresses tremendous remorse, promises to stop the violence, and acts in an apologetic, loving, and kind way. In some cases, the third phase may disappear over time or merely become a lull in the hostilities.

This “cycle of violence” is explained in Dr. Walker’s writings using additional psychological theories such as “intermittent reinforcement,” i.e., when certain behavior occurs at irregular and unpredictable intervals, that behavior becomes difficult to modify or extinguish, and “learned helplessness,” i.e., when an animal that is subjected continuously to situations over which it has no control ultimately loses the ability to respond even when control is returned. Other factors, in addition to evidence of the existence of a “cycle,” are added on a case-by-case basis as signs or symptoms to support the existence of “battered spouse syndrome.” Commentators, as well as expert defense witnesses in criminal prosecutions, have also identified several factors that support the existence of the syndrome. It is from these additional factors that an argument could be made that Frankie Silver suffered from battered spouse syndrome long before psychology became an accepted science.

Specifically, these factors are a feeling—real or perceived—of isolation, fear of leaving the batterer, prevailing social standards, financial dependence, and a sense of loyalty. Isolation can be geographic (as in Frankie Silver’s case), or merely isolation from friends and family. Frequently, this isolation is forced by the battering spouse. The fear of leaving can be multi-faceted, including a fear that the husband will kill her, their children or anyone who helps her escape, or a fear that she will have no one to support her if she does leave or will not be able to maintain financial independence. Social standards can include socio-economic standards and beliefs regarding the role of wives and women and can be based in culture or religion. However, the social standards of Frankie Sil-

ver's time are not the strongest indicators of battered spouse syndrome.

How Frankie Silver committed her crime provides persuasive evidence of battered spouse syndrome. Under the facts as they are most commonly accepted, she struck while her "batterer" was asleep—a recurrent theme in battered spouse cases where the retaliatory act has resulted in a criminal prosecution. This fact alone negated any argument for self-defense in North Carolina in 1832 as it would have negated any such argument in 1996. Where the victim was sleeping and he battered spouse syndrome is preferred to justify a defense of self-defense, there have been many questions about the syndrome's value as a scientific theory and as a justification for a killing.

Cases where a wife has killed a husband are by no means unusual. Self-defense (with evidence of the "cycle" and physical violence), as well as a general plea of temporary insanity, have been, and are, frequently successful as defenses. But the defense of "abuse" as a justification did not fully reach the public eye until Farrah Fawcett appeared in the made-for-television movie, The Burning Bed. Based on an actual case, The Burning Bed told the story of Francine Hughes, who killed her sleeping husband after years of abuse; she was exonerated. Hughes' case is considered the landmark case for recognizing the plight of battered women. Ironically, though, Hughes premised her defense on the ground of temporary insanity and did not present a defense based purely on abuse by her victim.

In many instances, the law that governs self-defense will allow an excuse where the wife is actually being battered and strikes back, dealing a lethal blow. The situation is different,
however, when, as in Hughes' case—and arguably Frankie Silver's—the batterer is asleep. The law, based on traditional theories of self-defense, does not allow an excuse when the victim is asleep.

The cornerstone of self-defense is the concept of imminence. The use of force in response to a threat of violence is considered timely only when the defendant reasonably perceived that death or great bodily harm by the attacker is imminent. To proponents of the battered spouse syndrome as a defense to murder, the concept of imminence is non-specific; that is, violence resulting from an ever-present threat or an attack which could occur at any time. North Carolina, as well as a majority of other jurisdictions, defines “imminence” more restrictively. In terms of self-defense, “imminence” is generally defined as “immediately necessary on the present occasion.” Thus, under this definition, a victim who kills a sleeping abuser does not meet the criterion of imminence. Such was Frankie Silver's case in 1832 in North Carolina, just as it would be today.

Coincidentally, North Carolina has the distinction of having the most frequently cited case where the defense of abused spouse was argued when the victim was asleep, State v. Norman. In Norman, the North Carolina Supreme Court addressed the issue of the battered spouse syndrome as a defense to murder in a case of first impression. The facts underlying Norman would repulse any reasonable person's sensibilities and cause moral indignation actually or apparently was necessary under the circumstances. Id. at 70-71, 357 S.E.2d at 659. An instruction on imperfect self-defense is appropriate when the evidence tends to support the existence of only the first two elements. State v. Bush, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982). Perfect self-defense is a justification for homicide. If a homicide is “justified,” the defendant is exonerated and is entitled to an acquittal. At common law, the law “excused” crimes if the unique characteristics of the defendant rendered him less blameworthy. Imperfect self-defense, a common-law “excuse,” may afford a defendant a mitigated sentence, but does not guarantee acquittal.


12. MODEL PENAL CODE 3.04(1).


14. Id.
that such atrocities could be inflicted upon a human being in this country without the law interceding to protect the victim.

To paraphrase the Court's facts—without minimalizing the physical and mental abuse Judy Norman endured—her plight began five years into her 20 years of marriage. Her husband's physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. Other specific incidents of abuse included her husband putting his cigarettes out on her, throwing hot coffee on her, and breaking glass against her face and crushing food on her face; in fact, Judy Norman attributed several scars about her face to her husband's assaults.

Other indignities inflicted upon Judy Norman by her husband included the fact that her husband did not work and forced her to make money by prostitution; that he made humor of this fact to family and friends; that he would beat her if she resisted going out to prostitute herself or if he was not satisfied with the amount of money she made; that he routinely called the defendant "dog," "bitch" and "whore," and on a few occasions made her eat pet food out of the pets' bowls and bark like a dog. Further, her husband often made her sleep on the floor. At times, he deprived her of food and refused to allow her to get food for the family. During those years of abuse, Judy Norman's husband threatened numerous times to kill her and to maim her in various ways.

Judy Norman said her husband's abuse occurred only when he was intoxicated but that he would not give up drinking. She said that she and her husband "got along very well when he was sober" and that he was "a good guy" when he was not drunk. She had accompanied her husband to the local mental health center for sporadic counseling sessions for his problem, but he continued to drink.

These years of abuse culminated with an incident where Judy Norman's husband was charged with DWI while returning home.

15. Id. at 255, 378 S.E.2d at 10.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 256, 378 S.E.2d at 10.
22. Id.
23. Id.
with her from prostituting. After being released from jail, he resumed drinking and abusing her. Judy Norman summoned the sheriff's office but then refused to take out a warrant on her husband. She then attempted suicide. Later the following day, she shot her husband while he was sleeping.

Judy Norman was charged with first-degree murder, and the jury found her guilty of voluntary manslaughter. She was sentenced to six years imprisonment. The Court of Appeals granted a new trial, citing as error the trial court's refusal to submit a possible verdict of acquittal by reason of perfect self-defense. In so doing, the Court of Appeals recognized evidence of battered spouse syndrome as sufficient to support a defense of self-defense, even where the victim was asleep and death or great bodily harm to the defendant was not imminent. The Supreme Court reversed the decision of the Court of Appeals.

Our Supreme Court recognized that the right of self-defense "springs from a primal impulse and is an inherent right of natural law." The Court then set forth the law in North Carolina as it relates to the perfect right of self-defense:

In North Carolina, a defendant is entitled to have the jury consider acquittal by reason of perfect self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm. That belief must be reasonable, however, in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness. Further, the defendant must not have been the initial aggressor provoking the fatal confrontation. A killing in the proper exercise of the right of perfect self-defense is always completely justified in law and constitutes no legal wrong.

24. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 257, 378 S.E.2d at 11.
29. Id. at 254, 378 S.E.2d at 9.
30. Id.
31. Id. at 258-59, 378 S.E.2d at 12.
32. Id. at 259, 378 S.E.2d at 12.
33. Id. (citing State v. Holland, 193 N.C. 713, 138 S.E.8 (1927)).
34. Id. at 260, 378 S.E.2d at 12.
The Court held that the defendant in *Norman* was not entitled to a jury instruction on perfect self-defense. Likewise, and for additional reasons, the Court also found that the defendant was not entitled to an instruction on *imperfect* self-defense.

The trial court was not required to instruct on *either* form of self-defense unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from *imminent* death or great bodily harm.

Under North Carolina law, no such evidence was introduced in *Norman*, and it would have been error for the trial court to instruct the jury on either perfect or imperfect self-defense.

The same could be said in Frankie Silver's case, depending on which version of the facts you believe. The transcript of her trial—if one were made—no longer exists, and the oral and written accounts are rife with inconsistencies. The facts from her case on appeal offer nothing to shed light on her defense, if any. No statement of the facts exists in the opinion from the Supreme Court of North Carolina other than that "[t]he defendant was indicted for murder."

Many of the various factual possibilities surrounding this killing are almost wholly inconsistent with any notion of self-defense, such as Frankie striking the first blow in a jealous rage or that Charles was asleep when struck. Other theories also negate such a defense. Among the theories that exist is that Frankie was aided in the killing by members of her family either in the actual crime or in attempting to cover it up. This theory is supported by the fact that two of her family members—her mother and a brother—were also indicted, but no true bill was returned as to them. Thus, there is no hard evidence to support this conjecture.

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35. *Id.*
36. *Id.* (citations omitted).
37. *Id.* at 260, 378 S.E.2d at 12 (citing *State v. Mize*, 316 N.C. 48, 340 S.E.2d 439 (1986)).
39. *Id.* at 271.
The only evidence to support a defense of self-defense, based on the battered spouse syndrome or otherwise, is contained in a few contemporary accounts and some recorded oral history. Various letters and petitions to the governors of that period asking for commutation make reference either to the abuses of Charles Silver inflicted upon his wife or to self-defense as a defense. For instance, an undated petition (believed to have been sent between the trial and the date of the fall term of Superior Court) addressed to Governor Stokes, and signed by 94 of the most prominent men of Burke County, states "[the only inducement on the part of the defendant for commission of the alleged offense was that of brutal conduct of the husband toward the wife - as appeared in evidence." Most interesting is a letter from Thomas W. Wilson, an attorney and most likely Frankie Silver's trial counsel, to Governor Swain, who succeeded Governor Stokes in December of 1832, which alludes to a confession made by Frankie following the affirmation of her sentence by the North Carolina Supreme Court. The confession was before Wilson, John Boone, the newly elected Sheriff (and believed to be a nephew of Daniel Boone), and a third person. In the letter, Wilson states that following a rigid examination & cross examination we were all of the opinion that it was clearly a case of manslaughter if not justifiable homicide[. T]his was always my opinion from the circumstances proved and if the facts could have been proved as they really were that it would have amounted to no more than manslaughter. Wilson then insinuates that Frankie did not confess when initially indicted out of fear that it would be used against her mother and brother. After restating the facts and the improbability of the State's version of the events, Wilson writes, "[s]he must have killed him by some unlucky blow not premeditated." He blames Frankie's conviction on the re-examination of previously sequestered witnesses after the jury initially retired (i.e., the sole, and technical, issue reviewed by the Supreme Court).

Other evidence is purely recorded oral history, such as the report prepared by then attorney Sam J. Ervin, Jr., of Morganton, which appeared in the Morganton News-Herald on April 3, 1924, or Kemp Plummer Battle's interview with Nicholas Woodfin found in his book Memories of an Old-Time Tar Heel. Ervin wrote:

43. Id.
The story of Frankie Silver is tragic in several respects. The late Col. B. S. Gaither, who was the youthful clerk of the Superior Court at the time of her trial and execution and who witnessed a remarkable memory, was wont to assert that she would not have been convicted if the truth had been disclosed at the trial. According to Col. Gaither, Silver mistreated his wife and she killed him in protection of herself. And he always maintained the opinion that if the defense had admitted the killing the jury would probably have found her act justified and would have acquitted her.

The defense, however, was a denial that the hand of Frankie Silver struck the fatal blow and there being evidence of her guilt, the jury following the instinct of the sleuth which lurks in every human mind, promptly convicted her of wilful murder. 44

Further, in a chapter entitled “A Trip to the Mountains in 1848,” Battle included the following observations by Nicholas A. Woodfin:

Not long before [Woodfin’s] death I asked him about the case. He replied earnestly in substance, “She was unjustly hung. Her story was reasonable and told with every evidence of sincerity. Her husband came home drunk and began to beat her with a stick; she struck back and killed him. She did not intend to kill him, but only to keep him from beating her. She tried to hide the body by cutting it up and burning it. She did not know the difference between murder and manslaughter or self-defense. The law at that time did not allow her to testify in court and she was convicted. If she could have told her story to the jury, the result would have been different. I rode through the mountains three weeks to get signatures to her plea for pardon. I got a goodly number but Gov. Swain refused to interfere. It was a miscarriage of justice, sir.” 45

As mentioned above, Frankie’s court case was further compounded by an interesting piece of juristic history. At the time of her trial, a defendant could not testify on his or her own behalf; this provision of law was not repealed until 1881. 46 Thus,

44. See Ervin, supra note 5.
45. Id. at 90-91. Battle states that Woodfin was Frankie’s trial attorney. Other evidence indicates that this description of Woodfin’s role is almost certainly erroneous. Most likely, Thomas Wilson represented Frankie during and after her trial. Woodfin was, however, active in the post-trial efforts to gain executive clemency for Frankie.
46. See Battle, supra note 45, at Chap. 44 (1873); Laws And Resolutions Of 1881, Chap. 110, § 1.
because, at least ostensibly, there were no other witnesses to Charles Silver’s death other than the one-year-old baby, any defense for Frankie would have been virtually impossible to present in an 1830’s court of law in this State.

Further evidence of self-defense, although without attribution, is found in a letter to the editor of the *Lenoir-Topic* from a Henry Spainhour, published in the May 7, 1886, *Morganton Star*. This letter sets forth the self-defense story as confessed to by Frankie, including the assertion that Charles was awake at the time of the first blow with the axe. The fact that the victim was awake would be crucial to any defense—both in 1831 and in 1996—in North Carolina. Further, because it is not possible to prove the “imminence” of death or great bodily harm in North Carolina where the victim is sleeping, this fact would be extremely crucial to the defense of self-defense.

The North Carolina Supreme Court expounded on the legal and philosophical roots of self-defense in *Norman* and discussed the necessity of the imminence requirement.

The term “imminent,” as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as “immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law.” [citation omitted] Our cases have sometimes used the phrase “about to suffer” interchangeably with “imminent” to describe the immediacy of threat that is required to justify killing in self-defense.47

In *Norman*, the Court found that the evidence “did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm.”48 The evidence in *Norman*—as well as in the Frankie Silver case, if you accept the most frequently proffered version of the facts, that Charles Silver was asleep—did not show an “imminent” harm or that anything was about to happen when the defendant fatally attacked her husband. In the case of Frankie Silver, again, according to the most frequently proffered facts, Frankie Silver’s husband had been sleeping by the fire with the baby in his arms when Frankie slipped the baby from his grasp and attempted to decapitate him with an axe. The first blow was not mortal, and

47. *Norman*, 324 N.C. at 261, 378 S.E.2d at 13 (citing Holland, 193 N.C. at 718, 138 S.E.2d at 10).
48. *Id.*
her husband jumped to his feet. The final confrontation resulted in blood being spattered on the fireplace mantel. Similarly, in *Norman*, the victim had been asleep for some time when the defendant walked to her mother's home, retrieved a pistol, returned to her home, and shot her husband three times; she even cleared the pistol after it jammed. Subsequently, in neither instance was the defendant faced with an "instantaneous choice between killing . . . or being killed or seriously injured." Not only was no assault or other action underway by the respective victims at the time of the fatal assaults by the respective defendants, but neither had an assault or other action occurred immediately prior to the victims falling asleep. It is on this point that the battered spouse syndrome advocates twist the traditional view of the defense of self-defense. *Norman* summarized the problem with this departure.

Prior to analyzing the various scholarly publications recognizing the existence of "battered spouse syndrome," the Court in *Norman* set forth the precedential case, *State v. Mize*, in support of its conclusion that a defendant is not entitled to a jury instruction on either perfect or imperfect self-defense when the defendant goes to the victim and initiates the final, fatal confrontation, regardless of the reasonableness of his belief. In *Mize*, the victim had reportedly been looking for the defendant to avenge the rape of his girlfriend by the defendant; the defendant hid from the victim for most of the day. After coming out of hiding, the defendant went to the victim's home, awakened him, and then shot and killed him. The defendant claimed that he feared the victim was going to kill him and that his killing of the victim was in self-defense. In rejecting the defendant's contention in *Mize*, the Court stated:

Here, although the victim had pursued defendant during the day approximately eight hours before the killing, defendant Mize was in no imminent danger while [the victim] was at home asleep. When Mize went to [the victim's] trailer with his shotgun, it was a

49. Id.
50. Id.
51. Id. at 262, 378 S.E.2d at 13.
52. Id. at 265-66, 378 S.E.2d at 15-16.
55. *Mize*, 316 N.C. at 49, 340 S.E.2d at 440.
56. Id.
57. Id. at 50, 340 S.E.2d at 440.
new confrontation. Therefore, even if Mize believed it was necessary to kill [the victim] to avoid his own imminent death, that belief was unreasonable.\(^5\)\(^8\)

The Court in *Mize* then established that a defendant’s subjective belief that death or serious bodily injury might be “inevitable” at some indefinite point in the future does not equate to “imminent.” Thus, in Frankie Silver’s case—as in *Norman*—the defendant’s belief that the victim might kill her, at some point in the future (such as if she left him), would have been an insufficient basis for an instruction on self-defense.

Therefore, whether in 1832 or in modern times, the rationale of *Norman* would control Frankie Silver’s fate. Under this rationale, if the victim is asleep, a defendant cannot avail herself of the defense of self-defense in North Carolina, even if the battered spouse syndrome can be proved.

Seven years after *Norman*, the North Carolina Supreme Court was again faced with the question of the battered spouse syndrome in *State v. Grant*.\(^5\)\(^9\) In this most recent case, the defendant had secreted a large, serrated knife under the couch prior to the murder.\(^6\)\(^0\) After her husband had been asleep on the couch for a number of hours, she arose in the morning, retrieved the knife, and stabbed him in the heart.\(^6\)\(^1\) When the stab wound proved not to be fatal, she shot him three times with a very powerful pistol.\(^6\)\(^2\) She then feigned a breaking and entering, and drove to her parents to establish an alibi.\(^6\)\(^3\) She later confessed her crime. Uncontroverted expert testimony that the defendant suffered from battered spouse syndrome was presented at trial.\(^6\)\(^4\)

In this case, as well as in other similar cases from jurisdictions which are in accord with North Carolina in their view of self-defense, the argument was raised that the law should be changed.\(^6\)\(^5\) Arguing that, viewed through the eyes of a battered spouse, the act of killing is justifiable, defense attorneys and advocacy groups contend that self-defense should be available as a defense in cases such as *Norman* and *Grant*. In contrast, how-

\(^{58}\) *Id.* at 53, 340 S.E.2d at 442 (citations omitted).


\(^{60}\) *Id.* at 290, 469 S.E.2d at 1.

\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.*

\(^{64}\) *Id.*

\(^{65}\) *Id.* at 291, 470 S.E.2d at 1.
ever, those legal reasons set forth by the North Carolina Supreme Court in *Norman* are sound. In summary, the Court stated:

As we have stated, stretching the law of self-defense to fit the facts of this case would require changing the "imminent death or great bodily harm" requirement to something substantially more indefinite than previously required and would weaken our assurances that justification for the taking of human life remains firmly rooted in real or apparent necessity. That result in principle could not be limited to a few cases decided on evidence as poignant as this. The relaxed requirements for perfect self-defense proposed by our Court of Appeals would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem. 66

The Court declined to expand North Carolina's law of self-defense and affirmed that decision in *Grant*. In all likelihood, North Carolina courts will decline to do so again if presented with the same issue in the future. The limits of immediacy and necessity which have, in all prior cases, provided an appropriately narrow, but firm, basis upon which a homicide may be justified continue to serve our State well. Although great sympathy for the Frankie Silvers of this country may exist, 67 no compelling justification for altering this long standing law can be shown. The solution lies somewhere other than in the criminal law jurisprudence.

Even the so-called experts do not agree in their arguments for a change in the law of self-defense. In *Norman*, the Court made mention of two scholarly works, with varying theories, regarding spousal abuse as a justification for homicide. 68 Since the Court's opinion in *Norman*, such works have multiplied. The *Norman* decision has been central to many of these writings. As yet, no single work or collection of works has proven to be compelling enough to override the Court's legitimate public and legal policy concerns avowed in *Norman*. Even Justice Martin's strong, well-written dissent in *Norman* contains fallacies in its ultimate con-

66. *Norman*, 324 N.C. at 265, 378 S.E.2d at 15 (citation omitted).
67. Even in Frankie's time which was restrictive of women's rights women rallied in her defense. Once the abuse version of the story became widely circulated, 34 of Burke County's most influential women signed a petition to the Governor asking for mercy. Swain Papers, Gov. Papers 67, 261-262.
clusions, in addition to the difference of legal opinion from the majority.

Research and writing on the battered spouse syndrome abounds, as well as scholarly works addressing the various theories of self-defense. Worthy of mention first is the mother of battered spouse research, Lenore E. Walker. She authored the original article in 1977 which gave rise to the now generally accepted "cycles of domestic violence" theory, two books, and numerous law review articles, all of which refer to the battered woman/wife/spouse syndrome as a mental health disorder. Other mental health experts, as well, have construed the battering relationship as deviant and recognize it to be a psychological malady.

The approaches of the research and writings are from varying legal jurisprudential angles. Much of the writings address the syndrome from a particular standpoint. Others approach the question from a broad-based argument regarding the criminal law, generally, and advocate alteration of the traditional definitions of self-defense. These scholars generally have analyzed this question from a stereotyping and equal protection angle, as well as from a pure feminist standpoint of writing. While the overwhelming body of research has recognized the existence of such a syndrome and advocated, for various reasons, an adapta-

69. See supra note 6.
tion of the criminal law, a few writings have refuted the theory and opposed any change in the criminal law to accommodate battered women.\textsuperscript{75}

Many of these writings discuss, or at least mention, \textit{Norman}, and \textit{Norman} has been the subject of an exhaustive law review note.\textsuperscript{76} Still other writings address the broader questions, both legal and psychological, of disproportionality in sentencing wives that murder husbands, "learned helplessness," and dysfunctional families, generally. To all of these writings should be added those cited by the Supreme Court in \textit{Norman}.\textsuperscript{77}

However, one \textit{cannot} get bogged down in the intellectual swirl of legal and psychological debate over the battered spouse syndrome. Some simple facts remain. First, as previously stated, this so-called "syndrome", as documented as it may be, \textit{is not} recognized as a mental illness and does not appear in the widely recognized, frequently relied upon, and oft quoted persuasive authority the \textit{Diagnostic and Statistical Manual of Mental Disorders} (DSM IV). Second, the Court's opinion in \textit{Norman} is legally sound and no compelling reason has been, nor can be, shown to reverse or modify that opinion. The decision rests on sound public and legal policy considerations.

The reasonableness of the belief and "imminence" are the essential elements of perfect self-defense. The evaluation of the reasonableness of a defendant's actions usually hinges upon the imminence of the threat to the defendant. The requirement that the attack be imminent is a sensible one and ensures that killing the attacker is used only as a last resort. "Imminence" is what defines the scope of events or circumstances the jury is permitted to consider in evaluating the reasonableness of a defendant's actions. Concomitantly, any change in such a definition may limit or broaden the scope.


\textsuperscript{77} \textit{Norman}, 324 N.C. at 264-266, 378 S.E.2d at 15-16.
The ramifications of changing this definition was the root of the Court’s opinion in *Norman*. To tamper with that root threatens not only the trunk and branches, but the life of the entire tree. Why such a bold statement? Because to change the definition of “imminence” to adapt the law to fit any notion of a “syndrome,” the North Carolina Supreme Court—or any other state court considering this question—must, in turn, alter the “reasonable person standard” found throughout the civil and criminal law. This point is pivotal in not only Justice Martin’s dissent in *Norman*, but also in all the scholarly works which his dissent reflects.

In order to alter the law to accommodate a “battered spouse,” an appellate court or legislature must allow the jury to measure the defendant’s conduct against that of a “reasonable battered spouse.” Based on testimony tending to establish the presence of battered spouse syndrome, Justice Martin concluded that the battered spouse’s fear that “one day her husband [would] kill her in the course of a beating” created an honest belief that “danger [was] constantly ‘immediate.’”78 According to Justice Martin, this state of mind, unique to the syndrome, served to distinguish the reasonableness of the spouse’s perception of imminence from that of the defendant in all other cases, such as those cited above.79

To do as Justice Martin and certain other respected scholars have suggested would transform an objective standard into a purely subjective standard. Justifying a battered spouse’s actions on the basis of psychological characteristics not present in the ordinary reasonable person goes against the grain of many basic theories of our American jurisprudence.

Under the current law (i.e., *Norman*, *Gappins*, *Mize*, etc.), anyone acting in a manner similar to the facts in illustrative cases cited by the Court is entitled to an acquittal based on justification. This is the basis of the justification theory that is the core of perfect self-defense. To reverse or modify this concept as suggested by various defense attorneys, advocacy groups, and legal scholars would, in the words of Professor Rosen, allow a jury to acquit based on “an identifiable psychological syndrome that caused [the battered spouse] to assess the dangerousness of the situation in a different manner than an average, ordinary person.”80


79. *Id*.

North Carolina employs a very narrow definition of imminence which requires an evaluation of the victim's actions at the moment of the killing. This rule is supported by the belief that requiring an immediate threat prevents unnecessary self-help. As a matter of public policy, a narrow interpretation of "imminence" reflects society's belief that every human life is valuable—regardless of how disgusting or contemptible the person's behavior. While the State should be, and is, certainly sympathetic to any battered spouse, it cannot allow such a spouse to sentence to death a person who has merely threatened to kill at some earlier time. More than a history of severe beatings, psychological domination, and threats of death must occur before self-defense becomes available; death or great bodily harm at the hands of the person must be imminent. Regardless of the need for punishment (and most batterers "need killing," as they say in the mountains of western North Carolina), batterers are no less entitled to the equal protection of their lives. The general determination offered by North Carolina's narrowly construed imminence requirement provides that protection.

*Norman* is a correct application of the existing law in North Carolina and it is as sound today as it was eight years ago. Despite the heart-felt sympathy that must go out to a battered spouse, despite the longing to help when a battered spouse's story comes to light, and despite the scholarly writings espousing the existence of a syndrome and advocating change in the traditional rule of law, modification of the law of self-defense is not an appropriate means to remedy the dilemma facing a person who may suffer symptoms of "battered spouse syndrome." Although the State should sympathize with such a situation, it cannot accommodate the few at the expense of general principles of deterrence and equal protection of human life.

As for Frankie Silver, in modern times it would still be an uphill battle for her to show that her husband was awake and she feared for her life when she struck the fatal blow. As it was in 1830's frontier North Carolina, she had much more to hinder her struggle: the public perception of her false story of Charles's disappearance, her attempts to hide her crime, and her unwillingness to admit or confess her guilt; the lack of a competent witness to the acts; the legal bar to her testifying in her own defense; and an all-male jury. Each of these worked to her disadvantage. While her conduct following the death of Charles can be explained away by the broad, sweeping and myriad symptoms of the bat-
tered spouse syndrome, other facts—such as the relative size of Charles as compared to her size—would be to her disadvantage in proving he was awake at the time of the killing.

As a historical note, one other factor would also have been to her disadvantage and possibly would have dispelled any notion of self-defense being used. While at least one version of the story has Charles Silver loading his gun to shoot Frankie when she struck, the more universal version has him threatening to beat her with a stick of unknown size. At the time of this alleged assault, a husband had a right to give his wife "correction" and "moderate chastisement," including striking her with his fists, as long as no permanent injury was inflicted; the husband was the sole judge of the reason and necessity for chastisement. Therefore, depending on the severity of the beating, self-defense may not even have been a possible defense until the assault escalated beyond mere chastisement.

CONCLUSION

So, was Frankie Silver, the first woman hanged for murder in North Carolina, a battered spouse? Most likely, at least by today's standards. However, under the law and mores of her time, her situation was probably not unusual.

Like most frontier marriages, the Silvers' marriage was built on one part love and most parts necessity. Living was essentially day-to-day, the male was often dominant, and hard drinking was common. Physical abuse and "battering" of a wife was accepted. Families were isolated, and females, especially, lacked a support group. While a strong case can be made that Frankie Silver was a battered spouse, it is all for naught; for then, as now, any defense based on such a malady was not available to her.

At best, the evidence of being an abused and battered spouse could have acted to mitigate Frankie Silver's act. Judy Norman, for example was charged with first-degree murder but only found guilty of voluntary manslaughter after the presentation of the horrendous evidence of her abuse. While the defense of self-defense was not available to her, the evidence of the battered spouse syndrome certainly must have acted in her favor. The same could have been true for Frankie Silver. Her post-trial coun-

sel, Thomas W. Wilson, professed in a letter to Governor Swain that she was guilty of “no more than manslaughter.”

The story of Frankie Silver lends to the immediacy of her timeless plight. In many ways, she possibly was no different than Judy Norman. Judy Norman’s sentence was commuted by the Governor to time-served on July 7, 1989, three months after the North Carolina Supreme Court re-instated her conviction. Frankie Silver was not so fortunate. Despite numerous petitions (including one signed by seven members of her jury) and letters, as well as untold numbers of personal contacts, two Governors refused to extend clemency. To this day, school children of Burke County petition the Governor as a class project attempting to obtain a pardon. The facts of Frankie Silver’s unfortunate saga—forever clouded in myth, legend, and inconsistency—will forever tie her to the verdict of GUILTY OF MURDER.

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82. See supra note 40.