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Misunderstanding Judy Norman: Theory as Cause and Consequence

MARTHA R. MAHONEY

Judy Norman shot her abusive husband during a late afternoon nap while he rested before violently trafficking her that night. The sharp contrast between the extreme violence and danger Judy faced and the denial of a self-defense instruction triggered extensive academic debates about justification and the use of deadly force. Norman became one of the most famous cases involving battered women, appearing in many casebooks and hundreds of law review articles. Despite all this work, the facts of the case contradict much of what scholars have said about Norman. Misconceptions about expert evidence, "Battered Woman Syndrome," and battered women drive academic errors that affect evaluation of her need to act immediately, including the timing of sleep and death and the idea that her perceptions of risk were distorted. Almost all legal scholars failed to grapple with the looming threat of violent, forcible sexual slavery and therefore did not explore the larger question of whether that threat may justify deadly force in self-defense.

Battered woman syndrome and learned helplessness are terms of art. In law, the term "battered woman syndrome" became a generic umbrella for expert evidence whether or not the expert applied Lenore Walker's original theory. For decades, social scientists have applied other frameworks to understanding the impact of battering, especially "survivor theory" and "coercive control." From the mid-1990s, the term "intimate partner violence and its effects" replaced battered woman syndrome and learned helplessness, but syndrome terminology persisted in legal contexts, giving Walker's theory disproportionate influence. Simplified concepts of the syndrome led some criminal law theorists to believe that critics of the Norman holding must be relying on expert testimony about passivity and helplessness to argue for change in the concepts of imminence and reasonableness. In fact, the forensic expert at Judy Norman's trial had applied the "coercive control" framework that became more influential over time.

This Article analyzes facts and confronts doctrinal questions in light of current social science. Replacing battered woman syndrome with "intimate partner violence" and replacing learned helplessness with ". . . the effects of intimate

partner violence," we should reevaluate the literature on Norman and self-defense to identify the best arguments and address new questions.

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Misunderstanding Judy Norman: Theory as Cause and Consequence

MARTHA R. MAHONEY *

INTRODUCTION

A. *The Norman Case in Court and in Legal Scholarship*

Late in the afternoon of June 12, 1985, near Spindale, North Carolina, John Thomas Norman (J.T.) was taking a nap before transporting his wife Judy to a “truck stop” rest area where, every night, he forced her to sell sex.¹ For two days, J.T. had beaten Judy continuously and threatened to maim her and to kill Judy and her mother. His threats frightened Judy’s mother, Laverne Laws, so much that Laverne borrowed a gun and put it in her purse. Judy’s efforts to find help had failed. Afraid that a crying baby would wake J.T. from his nap, Judy took the baby to Laverne’s house thirty yards away. J.T. had not allowed Judy to eat for three days and she had a splitting headache. She asked her mother for something for the headache; Laverne said that there were pain pills in her purse in the next room. Judy opened the purse, saw the gun, took it, walked across the road, and shot J.T. while he slept.²

* Professor and Dean’s Distinguished Scholar, University of Miami School of Law. Portions of this Article were presented at faculty workshops at Fordham University School of Law and the University of Miami School of Law, and I am grateful to participants for their comments. Donna Coker and Ken Casebeer provided many rounds of insights and priceless suggestions. I am deeply grateful to Mary Ann Dutton, Mary Ann Franks, Madeleine Plasencia, and Stephanie Wildman for extended comments and discussion, to Richard McAdams for suggesting that the Judy Norman case merited an article of its own, to Holly Maguigan and Jessica Siegel for thoughtful comments and questions as the project got underway, and to Robert Wolf for his thoughts, his time, and the transcript. Elizabeth McIntosh, Nicole McLemore, Patrick McGee, Summer Galitz, and Mackenzie Garrity provided superb assistance with research. Thanks also to Robin Schard and the reference librarians at University of Miami School of Law. These generous helpers are not responsible for any mistakes that remain; all errors are my own.

¹ Transcript of Record at 17, *State v. Norman*, No. 85-CRS-3890 (N.C. Super. Ct., Rutherford County 1987) [hereinafter Transcript] (presenting testimony of Deputy Sheriff R.H. Epley that located the Norman residence a mile or two outside of Spindale city limits); *id.* at 48 (presenting testimony of Mark Navarra about trafficking Judy at the “truck stop”); *id.* at 128 (presenting testimony of Judy Norman referring to a “truck stop” and clarifying that it was a “rest area” on I-85 near Kings Mountain, North Carolina.). Judicial opinions used both terms. See *State v. Norman (Norman II)*, 378 S.E.2d 8, 10–11 (N.C. 1989) (majority opinion) (using the term “rest area”); *id.* at 19 (Martin, J., dissenting) (using the term “rest[]stop”); *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988) (using the terms “truck stop” and “rest stop”).

² For a description of the history of the marriage, see *infra* Part I.A.

At Judy's murder trial in 1987, a detailed record of violence, degradation and threats emerged from thorough, intelligent work by her attorneys, Robert Wolf and Robert Harris; the court-appointed forensic psychologist, Dr. William Tyson; and the trial judge, John Gardner.³ Although Judge Gardner denied Judy's request for a jury instruction on self-defense, he had appointed Dr. Tyson, admitted all evidence relevant to evaluating both provocation and self-defense, and given the issue serious consideration until the end of the trial.⁴ The jury convicted Judy of manslaughter.⁵ In 1988, an appellate court ordered a new trial, holding that a jury could find J.T.'s sleep to be only "a momentary hiatus in a continuous reign of terror" that might show imminent threat of death or great bodily harm.⁶ In 1989, the North Carolina Supreme Court reversed, holding that Judy had "ample time" to find other ways to protect herself; they saw no evidence that could give rise to either actual or reasonable belief that she faced imminent threat or needed to use deadly force.⁷ Justice Harry Martin dissented, emphasizing not only Judy's fear but her inability to escape, the failure of her efforts to get help, and the fears and perceptions of threat among the people closest to her.⁸

The sharp contrast between the violence and danger facing Judy Norman and the denial of a self-defense instruction brought legal scholars into extensive debates about justification and the use of deadly force. *Norman* came to stand for a class of sympathetic defendants who killed in response to horrifying abuse, under circumstances in which most scholars could not see an imminent threat to justify self-defense.⁹ Hundreds of law review articles cite the case, many casebooks include it as a principal case or note, and scholarly debates on self-defense often focus on *Norman*.¹⁰

³ See *infra* note 262–04 and accompanying text (highlighting that Judge Gardner chose both of the experts the defense called at trial and that, as a court-appointed expert, Dr. Tyson was available to testify for either party); see also *infra* note 282 and accompanying text (explaining that Dr. Rollins had performed Judy's competency evaluation after the shooting).

⁴ See, e.g., *infra* note 270 (overruling objection to allowing expert opinion on whether Judy reasonably believed it was necessary to kill her husband); see also Transcript, *supra* note 1, at 196–203 (considering other battered women's self-defense cases during conference on jury instructions).

⁵ Transcript, *supra* note 1, at 22; *Norman II*, 378 S.E.2d at 9.

⁶ *Norman I*, 366 S.E.2d at 592 (holding that a jury "could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, [and] that defendant merely took advantage of her first opportunity to protect herself").

⁷ *Norman II*, 378 S.E.2d at 13 (stating a conclusion that time was "ample" without referring to the facts or explaining its reasoning).

⁸ *Id.* at 17–18 (Martin, J., dissenting).

⁹ See, e.g., Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 346 (2007) (describing *Norman II* as "the most widely-cited example of a battered woman prevented from claiming self-defense solely by an application of the imminence rule" and citing discussion by other scholars).

¹⁰ Some articles focus on the *Norman* case in detail. See Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 65–66 (2008) (arguing that Judy Norman's action was reasonable); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 89–93 (1991) (reviewing

Norman is one of the best-known cases in criminal law, but the scholarly debates include serious errors explored in this Article. Many of these mistakes rest on legal misunderstandings about the social science on battering. Scholars often treat *Norman* as a case defined by “battered woman syndrome” as they understand that term.¹¹ Many misunderstand “learned helplessness” as a literal term and assume that the *legal* argument for self-defense rested on Lenore Walker’s application of “learned helplessness” to battered women.¹² This allowed myths about passivity and lack of help-seeking to confuse scholars about the content of expert testimony. “Battered woman syndrome” is a term of art with different meaning in psychology than in law. In law, many states made it a generic term for expert evidence, whether or not that expert applied Walker’s theories. To clarify these issues, encompass the breadth of knowledge in the field, and avoid misunderstandings, psychologists have for decades described the subject of expert knowledge as “battering and its effects” or “intimate partner violence and its effects.”¹³

In the *Norman* trial, Dr. Tyson’s testimony applied a “coercive control” framework that, along with “survivor theory,” became more influential and better-supported than Walker’s “syndrome.” Subsequent work in social

Norman in detail and noting deadly threats, the threat of forced prostitution as “third-party rape,” and attacks on Judy’s ability to leave). A Westlaw search of law reviews and journals on February 15, 2018 found 201 articles that cited *Norman I*, *Norman II*, or both decisions. For examples of scholarly discussion, see, e.g., Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, in CRIMINAL LAW CONVERSATIONS 407 (Paul H. Robinson, Stephen Garvey & Kimberly Kessler Ferzan, eds., 2009) (featuring a debate between several authors regarding imminence in self-defense with substantial focus on *Norman*); Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 264–68 (Stephen Shute & A.P. Simester eds., 2002) [hereinafter *Battered Women Who Kill Their Sleeping Tormenters*] (discussing *Norman*). For coverage of *Norman* in casebooks, see SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 903 (10th ed. 2017) (principal case); CYNTHIA GRANT BOWMAN ET AL., FEMINIST JURISPRUDENCE: CASES & MATERIALS 236 (5th ed. 2018); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 576 (8th ed. 2017) (note).

¹¹ See, e.g., Joshua Dressler & Holly Maguigan, *Battered Women, Self-Defense, and the Law*, 79 FORDHAM L. REV. RES GESTAE 1, 11 (2011) (noting that this section of the exchange is based on the Judy *Norman* case); 15 (identifying Dressler’s concern as “the infusion of the Battered Woman Syndrome evidence as the way to prove imminence . . .”); Jane Campbell Moriarty, “While Dangers Gather”: *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 24 (2005) (stating that *Norman* did not allow expert testimony because that testimony would have made “[h]omicidal self-help . . . a lawful solution” (citing *Norman II*, 378 S.E.2d at 15)).

¹² For a discussion of concepts of “Battered Woman Syndrome” and “learned helplessness,” see *infra* Part III; see also *infra* note 254 and accompanying text (quoting Joshua Dressler, “learned to be helpless”); *infra* note 398 and accompanying text (“It is almost impossible to imagine that a human being, rather than a thing, could really be that passive when abused.” (quoting Anne Coughlin)); *infra* note 440 and accompanying text (“addicted to abuse” (quoting George Fletcher)).

¹³ See *infra* note 221 and accompanying text.

science would clarify some of the issues in *Norman* and illuminate the evaluation of danger.¹⁴

Cultural and social awareness also changed after *Norman*. In the 1980s, research and policy proposals on sexual slavery and forced prostitution were just emerging.¹⁵ After the late 1990s, states and the federal government gave greater recognition to the dangers of trafficking, provided special visas for victims, and took additional legal measures.¹⁶ It is not surprising that in the 1980s, judges, lawyers, and commentators saw forced prostitution as part of a pattern of abuse rather than a harm that in itself might justify defensive force. Nonetheless, scholars should have been able to understand Judy Norman's statements about the looming threat of violent prostitution, quoted in the published opinions.¹⁷

The legal academy has spent a lot of time and ink on *Norman*, but much of our work ignored important statements by Judy Norman and Dr. Tyson. When legal scholars mine social science for nuggets to support what we already believe, we miss complexity and evolving knowledge. Misunderstandings about "battered woman syndrome" theory affected scholarly analysis of the *Norman* case—in the subtitle of this article, "theory as cause." Significant misconceptions include the ideas that presenting expert evidence constitutes a separate and distinct "battered woman syndrome" defense, that "learned helplessness" is a literal term and not a psychological term of art, and that expert testimony focuses on abnormal perception. Professors also failed to grasp the urgency of the threat of trafficking Judy identified at trial.¹⁸ And those mistakes had consequences: debates that missed threats and relied on a vulgarized idea of "learned helplessness" generated flawed legal theory proposals.

¹⁴ See *infra* notes 222–74 and accompanying text (highlighting some of the subsequent social science work relevant to the *Norman* case).

¹⁵ See, e.g., KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* xi (1979) (explaining that when she began writing her book, "the subject had been so effectively buried that there was hardly a trace of evidence that women were being forced into prostitution and trafficked from one country to another"; xi–xiii (explaining the impact of the expansion of pornography and acknowledging the recency of work against sexual slavery at the time of writing); 5–9 (explaining work with the concept of "female sexual slavery," and issues of research methodology).

¹⁶ See, e.g., Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1474 (2000) (delineating the various increased protections afforded by the U.S. government to victims of sex trafficking as part of this act); see also *infra* note 494 and accompanying text (highlighting other legislative changes relating to victims of sex trafficking).

¹⁷ *State v. Norman (Norman II)*, 378 S.E.2d 8, 14 (N.C. 1989) (majority opinion); see also *infra* notes 189, 199–202 and accompanying text (discussing the threat of violent prostitution that Judy Norman faced).

¹⁸ These failures echo the judicial failure to see imminent threat when a man was on top of a woman with his hands around her throat. See V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1246–48 (2001) (discussing trial ruling in *Commonwealth v. Watson*, 431 A.2d 949 (1981)); *id.* at 1286 ("[E]ven when the cases are confrontational—when the gun is pointed at her—they still are not seen as confrontational.").

This Article reconstructs Judy Norman's experience from published opinions and the trial transcript, supplemented by public records. Scholarly mistakes about *Norman* were avoidable because most of the important facts appear in the published opinions,¹⁹ but the transcript provides additional examples of coercive control, danger, and other details important to applying subsequent social science research. To help the reader distinguish the material we should all have understood *without* additional aid from the transcript, citations supporting facts will include references to the pages at which these facts appeared in the opinions as well as in the transcript.

We will examine impending threat: the fear that J.T. was going to kill Judy—expressed by eyewitnesses as well as the defendant—and Judy's fear of the forcible trafficking and torture that would commence when J.T. woke from his nap. We will ask how the possibility or impossibility of escape should be relevant to the time frame of threat. We will consider whether the brief and uncertain remainder of an afternoon nap should make deadly force unavailable to defend against either death or brutal trafficking. After clarifying the content of expert testimony, we will evaluate scholarly arguments about justification and self-defense in *Norman*, including the proposal for an alternative defense based on duress and excuse. To illustrate the ways in which preconceptions have overrun facts, we begin with a circumstance that all three opinions described differently: *At what time of day did Judy Norman shoot J.T.?*

A. *What Time Was It and Why Does It Matter? A "Midnight Shooting" During an Afternoon "Nap"*

The majority opinion in the Supreme Court of North Carolina said Judy had "ample time and opportunity to resort to other means of preventing further abuse by her husband."²⁰ "Ample time" is relevant to the question of

¹⁹ Among the points that appear throughout this Article that should have been apparent in the published opinions: J.T. Norman was napping before trafficking Judy, not asleep for the night; testimony from Dr. Tyson, the psychologist, emphasized coercive control rather than Lenore Walker's theory of learned helplessness; Tyson's testimony supported the reasonableness of Judy's perception—his review of the record showed no options she had overlooked; Judy's behavior was not passive—she engaged in urgent help-seeking; the most immediate threat Judy identified from the witness stand was forcible sex trafficking that night—death came second; and the family was so convinced of his dangerousness that they failed to intervene when they watched him burn her with a cigarette and when he trafficked her. See *infra* notes 30–31 and accompanying text (discussing whether J.T. was napping); *infra* Part II.B (describing Dr. Tyson's testimony about coercive control and help-seeking); *infra* note 199 and accompanying text (discussing Judy Norman's immediate fear of prostitution); Transcript, *supra* note 1, at 48, 56, 66, 131 (showing various family members' knowledge of cigarette burning and trafficking). In addition, basic legal research would have revealed that, when the police told Judy they could not arrest J.T. unless she "took out a warrant," they were wrong—state law had changed years earlier to allow warrantless arrest for domestic violence. See *infra* note 114 and accompanying text.

²⁰ *Norman II*, 378 S.E.2d at 13 (N.C. 1989) (majority opinion).

whether a threat was *imminent*.²¹ In addition, courts sometimes use the term “imminent” to assess the likely progress of an ambiguous threat,²² so Judy’s “opportunity to resort to other means” is directly relevant to whether deadly force was necessary but might also be relevant to imminence.²³

Each judicial opinion described the timeframe somewhat differently. The appellate court described a “late afternoon . . . nap” with police dispatched at 7:30 PM.²⁴ In the North Carolina Supreme Court, the dissent stated that J.T. lay down “[e]arly in the evening” and the majority said simply, “evening.” But both the majority and dissent stated that the police arrived at “night.”²⁵

In fact, J.T. Norman napped and died by daylight, although the transcript does not state when he lay down or how long he slept. June 12th was close to the longest day of the year, and sunset was more than an hour away when police received the call about his death and when they arrived.²⁶ “Late afternoon” and “early evening” are fair descriptions; some definitions of “evening” apply as well. But the police did not arrive at “night”—a term defined in relation to either sunset or darkness.²⁷ The appellate court was

²¹ States use varying language to describe the temporal urgency required for justified self-defense: imminent, immediate, or necessary to act immediately. See 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1) (1984) (noting variations of language for imminence); see also WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 10.4 (2d ed. 2016 update) (discussing variations in terminology for imminence).

²² See Nourse, *supra* note 18, at 1252–53 (2001) (“The vast majority of imminence-relevant cases in my survey look like the ‘standard’ self-defense case—a case, for example, in which the defendant alleged that he saw a weapon, the victim was advancing, or there was a fight.” (footnotes omitted)); *id.* at 1253 n.89 (citing a case in which one prisoner advanced toward another with his hand in his pocket).

²³ *Norman II*, 378 S.E.2d at 13 (majority opinion). As explored in Section I.B below, when courts consider the availability of options in the evaluation of imminence, they concede that context matters to assessing temporal urgency.

²⁴ *State v. Norman (Norman I)*, 366 S.E.2d 586, 587–88 (N.C. Ct. App. 1988).

²⁵ *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting); *id.* at 11 (majority opinion).

²⁶ See *Complete Sun and Moon Data for One Day*, U.S. NAVAL OBSERVATORY, [http://aa.usno.navy.mil/rst/onedaytable?ID=AA&year=1985&month=6&day=12&state=NC&place=S pindale](http://aa.usno.navy.mil/rst/onedaytable?ID=AA&year=1985&month=6&day=12&state=NC&place=S%20pindale) (last visited Oct. 9, 2018) (showing complete sun and moon data for Wednesday, June 12, 1985). The U.S. Naval Observatory calculator, *Sun and Moon Data for One Day*, found that in Spindale, North Carolina, on June 12, 1985, sunset came at 8:43 PM and twilight ended at 9:13 PM. *Id.* Captain Price of the Rutherford County Sheriff’s Office was first on the scene, after receiving a call about J.T.’s death at 7:20 PM. Transcript, *supra* note 1, at 79. Deputy Epley received a call at 7:37 PM. and arrived at the house at 7:49 PM. *Id.* at 17. The appellate opinion summarizes these times accurately as approximately 7:30 PM. *Norman I*, 366 S.E.2d at 587.

²⁷ “Night” has more than one definition, but almost all are anchored in relation to sunset or to an identifiable level of darkness. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ABRIDGED 485 (William Sprague ed., 9th ed. 1915) (“As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset[.]”); Black’s Law Dictionary has four separate definitions and the first three confirm the relationship to darkness or sunset: “1. The time from sunset to sunrise. 2. Darkness; the time when a person’s face is not discernible 3. Thirty minutes after sunset and thirty minutes before sunrise” The fourth definition in Black’s Law Dictionary – “evening” – could lead to confusion between evening and night, and some of the references to police activity on June 11th and 12th. For additional clarification, the North Carolina

correct and both opinions in the state supreme court were wrong on that point.²⁸

“Night” appears frequently in work by legal scholars. One author quotes the appellate court on the “late afternoon . . . nap,” and only seven pages later refers to a “midnight shooting.”²⁹ Another refers to the afternoon “nap,” then says that Judy Norman “had several hours to ‘cool off’ before she killed her sleeping husband” and discusses whether “she could have just fled into the night.”³⁰ Authors who read in a long period of sleep cannot cite facts for that time frame, and “midnight shooting” is a fantasy or projection with no support in any account. These writers imagine a luxury of time that Judy did not possess.

These subtle differences about time frame reveal questions important to the temporal urgency of danger that are lost in arguments based on “night”: *How long* could J.T. be expected to remain asleep? Did the judges understand that he was napping before trafficking activity that night? That the nap might last only minutes longer? Did the majority read in a longer period when they coupled “night” and “sleep,” or when they treated the *Norman* case as “somewhat similar” to a defendant who hid from a vengeful enemy for eight hours before taking a shotgun to his home and killing him while he slept?³¹ Should Judy’s proven inability to resist J.T.’s attacks matter in evaluating the urgency of the impending threat? What quantum of time would be ample for her to make yet another attempt to find help? How should we consider uncertainty—does a reasonable person measure the time remaining in a nap from the longest or the shortest possibility? And should that estimate consider patterns recognized among abusers?³² I will argue that

burglary statute, judges adopted a light-based standard: it is night when not enough light remains to see a person’s face without artificial lighting. *State v. McKeithan*, 537 S.E.2d 526, 533 (N.C. Ct. App. 2000). On the day of the shooting, police would have been on the scene for some time; casual references in the transcript sometimes include either term, “evening” or “night.” See Transcript, *supra* note 1, 43–45, 85 (using the terms “evening” and “night”).

²⁸ Compare *Norman I*, 366 S.E.2d at 588 (indicating that police arrived in the evening), with *Norman II*, 378 S.E.2d at 9 (stating that police arrived at night) (majority opinion), and *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting) (noting that police arrived in the evening around 8:00 PM).

²⁹ Compare Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 461 (2006) [hereinafter Dressler, *Battered Women and Sleeping Abusers*] (“afternoon . . . nap”) (quoting *Norman I*, 366 S.E.2d at 587–89), with *id.* at 468 n.27 (“midnight shooting”). See also Joshua Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law: Some Critical Reflections*, 93 MARQ. L. REV. 1475, 1489 (2010) [hereinafter Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law*] (“[D]eadly force was not immediately necessary in the middle of the night while J.T. slept.” (second emphasis added)).

³⁰ See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 393 (1993) (“nap”); *id.* at 374–75 n.5 (“[O]f course, Ms. Norman had several hours to ‘cool off’” (emphasis added)); *id.* at 393–94 (treating escape as impractical or unavailable and discussing potential risk if she “just fled into the night”).

³¹ *Norman II*, 378 S.E.2d at 13–14 (majority opinion) (citing *State v. Mize*, 340 S.E.2d 439 (N.C. 1986)).

³² In a thoughtful essay, Professor Joan Krause evokes the experience of parents:

the mis-descriptions of time frame by judges and scholars reveal stereotypes about impaired perception in battered women and, simultaneously, reveal a problem in professorial attachment to our own interpretations: How else could “afternoon” turn into “midnight” without anyone noticing the change?

Part I retells Judy Norman’s story chronologically. Part II reviews the range of theories of intimate partner violence from the 1980s to the present, unpacks the expert testimony at trial, and traces the way in which the *Norman* appellate opinions recast expert testimony on “coercive control” into a “syndrome” framework. Part III criticizes scholarly misreadings that sprang from oversimplified and mistaken concepts about the “syndrome” and battered women.

Part IV explores ways to clarify these misunderstandings. Courts and scholars divide on whether sleep rules out imminent threat from the abuser. Part IV.A covers contradictions in theories about the legal ramifications of sleep, while Part IV.B explores questions about timing and threat that arise if resistance to violent, forcible sex trafficking may justify the use of deadly force in self-defense. Part IV.C addresses the relevance of witness perceptions of threat to the jury’s evaluation of reasonableness, and Part IV.D asks what interventions, if any, could have saved Judy Norman without killing her husband. Focusing on imminence and justification, Part IV.E addresses Joshua Dressler’s argument that justification must be unavailable and an excuse defense based on duress would be a more principled and effective way to address Judy Norman’s situation.

I. JUDY NORMAN’S STORY

A. *History of the Marriage*

Judy Ann Laws married John Thomas Norman when she was fifteen-years old and pregnant; he was five years older.³³ Judy had two children by

Unless actually comatose, a sleeping abuser is merely seconds away from being an *awakened* abuser—and research demonstrates that abusers (particularly when intoxicated) tend to sleep lightly, demand that their partners be present when they awaken, and resume the abuse immediately. . . . By way of loose analogy, as parents of infants well know, a sleeping baby is merely seconds away from being a screaming baby. Indeed, it would not be inaccurate to describe my daughter’s afternoon nap as an “imminent meltdown”—one that my husband and I may be uniquely qualified to predict.

Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 563 n.35 (2007).

³³ Transcript, *supra* note 1, at 127. The majority opinion in the North Carolina Supreme Court recognized implicitly how young Judy was when they married. See *Norman II*, 378 S.E.2d at 10 (“At the time of the killing, the thirty-nine-year-old defendant and her husband had been married almost twenty-five years and had several children.”). Most testimony at trial focused on the period around J.T.’s death, but prior abuse was of vital importance to understanding that period. Testimony from Judy herself, Dr. Tyson, and Mark Navarra fills in some of the history and context of the marriage. *Id.* at 47 (Mark

the year she turned eighteen.³⁴ During the first five years of marriage, J.T. did not abuse her.³⁵ Sometimes she worked as a waitress, but after J.T. started drinking and became abusive, she could no longer hold a job. J.T. said she did not make enough money as a waitress; he would come to her workplace and make her leave.³⁶ He began forcing her into prostitution.³⁷

While they still lived in North Carolina, Judy had her third child.³⁸ J.T. had family in Chicago, and they moved there in late 1968 or early 1969.³⁹ The family lived on welfare and the money from Judy's prostitution.⁴⁰ Sometimes, J.T. threw her out of the house without a coat or shoes and forbade her to come back without enough money; sometimes, she had to sleep in the car.⁴¹ When he spent the money on alcohol, Judy shoplifted food for the children.⁴²

In Chicago, they had two more children.⁴³ Judy gave birth to their fourth child prematurely in 1969 after J.T. beat her and kicked her down a flight of

Navarra); *id.* at 126 (Judy); *id.* at 152 (Dr. Tyson). Public records drawing from the Social Security Death Index show their dates of birth: J.T. Norman in 1940 and Judy Ann Laws in 1945. John Norman, SOCIAL SECURITY DEATH INDEX 1935–2014, <https://www.ancestry.com> (under “Search” and “Birth, Marriage & Death” search in the first name field for “John,” last name field “Norman,” birth year field “1940,” and “North Carolina” in the location field); Judy A. Norman, SOCIAL SECURITY DEATH INDEX 1935–2014, <https://www.ancestry.com> (under “Search” and “Birth, Marriage & Death” search in the first name field for “Judy A.,” last name field “Norman,” birth year field “1945,” and “North Carolina” in the location field).

³⁴ See *Jerry Dean Norman*, NORTH CAROLINA BIRTH INDEXES, <https://www.ancestry.com> (citing Jerry Dean Norman as born in 1961); *Robert Thomas Norman*, NORTH CAROLINA BIRTH INDEXES, <https://www.ancestry.com> (citing Robert Thomas Norman as born in 1962 to John and Judy).

³⁵ See Transcript, *supra* note 1, at 134 (stating that abuse began after five years, when he began drinking); see also *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988) (stating that “Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married.”).

³⁶ See *id.* at 136 (stating that when she worked as a waitress he would force her to quit, describing how he came to one of her jobs and forced her to walk out twice in one day, and concluding that “[h]e wouldn’t let [her] work like that” because she did not make enough money).

³⁷ See *id.* at 128 (describing how he would beat her if she did not prostitute); *Norman II*, 378 S.E.2d at 10 (stating that her husband “forced her to make money by prostitution . . .”).

³⁸ See *Phyllis Christine Norman*, NORTH CAROLINA BIRTH INDEXES, <https://www.ancestry.com> (citing Phyllis as born to John and Judy in 1968).

³⁹ See Transcript, *supra* note 1, at 137 (quoting that Judy’s son was “shot in Chicago” and her husband had relatives in Chicago).

⁴⁰ See *id.* at 145 (referencing testimony of Judy Norman that family lived on welfare and she worked as a prostitute).

⁴¹ See *id.* at 55–56 (recording testimony of Mark Navarr, who lived with J.T. and Judy in Chicago and North Carolina for about a year and a half and observed these conditions).

⁴² *Id.* at 136.

⁴³ The move to Chicago took place between November 1968, when Phyllis was born in North Carolina, and August 1969, when John Wayne Norman was born prematurely in Chicago. See *supra* note 38 (establishing that Phyllis Christine Norman was born in North Carolina in 1968); see also Transcript *supra* note 1, at 149 (stating that Judy’s “son was born in ’69 in Chicago.”). Loretta, the youngest child, was born in December 1978. See North Carolina Voter Registration, LEXISNEXIS, <https://www.lexisnexis.com/en-us/gateway.page> (follow “Public Records” to “Voter Registration” hyperlink; search First Name field for “Loretta” and Last Name field for “Hines” and select the State as

stairs.⁴⁴ The appellate opinion described this attack during pregnancy and noted correctly that four of Judy's five children were still living at the time she shot J.T.⁴⁵ That led some scholars to infer that the premature baby had died,⁴⁶ but the transcript reveals an even more extreme form of control over Judy. John Wayne Norman weighed only one and a half pounds at birth. During the six months he remained in the hospital, J.T. forbade Judy to visit him.⁴⁷ When John Wayne finally left the hospital, J.T. gave the baby to his sister to raise. Judy did not see the boy until he was twelve years old when he found her and asked to live with her. She said yes.⁴⁸

Whatever Judy feared in that moment at the top of those stairs, she could not have imagined that if she and the baby both survived, they would have no contact for twelve years (even if they had argued about giving the baby to his sister, she would not have anticipated an attack that risked the baby's life). The abuser enhances power and control when the target cannot prepare physically or emotionally against pain, fear, and loss.⁴⁹ The most dangerous batterers use knowledge they gain through intimacy to inflict pain and fear with unique effectiveness for a particular victim.⁵⁰ And Judy was vulnerable. She had no right to legal counsel in her effort to find safety with her children or regain custody of her son, and her criminal record for prostitution and

"North Carolina"); *Judy Norman*, Harrelson Funeral and Cremation Services, <http://hosting-9639.tributes.com/obituary/show/Judy-Norman-95106577> (last visited Oct. 9, 2018) (stating in Judy's obituary that Loretta Hines was her daughter). The family did not return to North Carolina until late 1983. See Transcript, *supra* note 1, at 190 (verifying through Lemuel Splawn's testimony that J.T. had been away for almost twenty years).

⁴⁴ Transcript, *supra* note 1, at 151; *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

⁴⁵ *Norman I*, 366 S.E.2d at 587. Cf. *State v. Norman (Norman II)*, 378 S.E.2d 8, 10 (N.C. 1989) (stating that Judy had "several children").

⁴⁶ See Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757, 787 n.64 (1996) ("When Mrs. Norman was pregnant with her fifth child, her husband beat her and kicked her down a flight of steps, causing the premature birth, and death, of the baby the next day."); Tania Tetlow, *Criminalizing "Private" Torture*, 58 WM. & MARY L. REV. 183, 199 (2016) ("He knocked her down the stairs while she was pregnant, which resulted in the death of their child.").

⁴⁷ See Transcript, *supra* note 1, at 151 (testimony of Judy Norman) (stating his birth weight, that "he stayed in the hospital for six months," and that her "husband wouldn't even let [her] go see him").

⁴⁸ See *id.* (stating that "my husband's sister kept him until he was twelve (12) years old" and indicating that John Wayne Norman was still living with Judy at the time of the trial).

⁴⁹ Cf. HARLAN K. ULLMAN & JAMES P. WADE, DEFENSE GROUP INC., SHOCK AND AWE: ACHIEVING RAPID DOMINANCE xxiv (1996) (explaining the goal of the experts who developed the military campaign strategy of "Shock and Awe" was "to affect the will, perception, and understanding of the adversary to fit or respond to our strategic policy ends through imposing a regime of Shock and Awe").

⁵⁰ EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 241 (2007) (describing the "technology" of coercive control—the methods that make threats credible, punishments compelling, and escapes difficult).

shoplifting would have increased her fear of turning to courts for help.⁵¹ Given the high risk of failure and the credibility of J.T.'s threats to kill, she probably did not consider legal action.

Abuse was linked to J.T.'s drinking. He hit Judy "most every day . . . whenever he got drunk."⁵² Judy said that they "got along very well when he was sober"⁵³ and that he was "a good guy" when he was not drunk.⁵⁴ But the drinking—and abuse—continued. He beat her with his fists, with a baseball bat, and with household items turned into weapons, including bottles, glasses, an ashtray, a shoe, and a flyswatter.⁵⁵ When he beat her, she cried but did not fight back.⁵⁶ Beyond physical violence and unpredictable terror, he forced her to sleep on the floor, sometimes to eat pet food from the dog dish, and sometimes to bark like a dog.⁵⁷

Judy tried fleeing in search of help. In 1973, before Chicago had any hotlines or shelters,⁵⁸ she was admitted for treatment at Chicago-Reid Mental Health Center.⁵⁹ There, she described battering incidents and was diagnosed with injuries consistent with abuse. Two days later, she left after J.T. arrived at the hospital and made frightening threats.⁶⁰

At trial, Judy's lawyer asked why she had not left her husband. She answered that she had left him many times: "I've . . . stayed all night in hotels to get away from him; he'd find me. I've walked to my son's house with no coat on . . . in snow to get away from him."⁶¹ Whenever she left,

⁵¹ See Transcript, *supra* note 1, at 136 (testimony of Judy Norman) (describing arrests in Chicago for shoplifting and prostitution).

⁵² *Id.* at 57 (testimony of Mark Navarra); State v. Norman (*Norman II*), 378 S.E.2d 8, 10 (N.C. 1989) (majority opinion); State v. Norman (*Norman I*), 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

⁵³ Transcript, *supra* note 1, at 181 (testimony of Dr. Rollins); *Norman II*, 378 S.E.2d at 10 (majority opinion).

⁵⁴ Transcript, *supra* note 1, at 144 (testimony of Judy Norman); *Norman II*, 328 S.E.2d at 10.

⁵⁵ *Norman II*, 328 S.E.2d at 10 (stating that physical abuse included striking her with various objects); *Norman I*, 366 S.E.2d at 587 ("He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle"); see Transcript, *supra* note 1, at 54 ("fly swatter"), 65 ("ball bats"), 66 ("shoe"), 129 ("ashtray"; "fist"), 130 ("broke bottles and glasses on her and hit her with shoes").

⁵⁶ *Norman II*, 378 S.E.2d at 21 (Martin, J., dissenting). Subsequent research would reveal that resistance strategies work for some women but are much less effective than many other strategies. Lisa Goodman et al., *Women's Resources and Use of Strategies as Risk and Protective Factors for Reabuse Over Time*, 11 VIOLENCE AGAINST WOMEN 311, 327–32 (2005). In addition, resistance increases the risk of increased violence. *Id.* at 329–30.

⁵⁷ *Norman II*, 378 S.E.2d at 10; *Norman I*, 366 S.E.2d at 587; Transcript, *supra* note 1, at 65.

⁵⁸ See History, CONNECTIONS FOR ABUSED WOMEN & THEIR CHILDREN, www.cawc.org/mission-history/ (last visited Oct. 9, 2018) (describing the development of domestic violence services provided by Connections for Abused Women and their Children (CAWC), including the first organizational meeting leading to a task force (1976), first hotline (1977), and first shelter (1979)).

⁵⁹ Transcript, *supra* note 1, at 162 (testimony of Dr. Tyson).

⁶⁰ *Id.*

⁶¹ *Id.* at 135.

"[h]e'd come and find me and he'd beat me up."⁶² J.T. controlled the money—Judy had no way to get another place to live. She had nowhere to go, and he had threatened to kill her if she left.⁶³

The record hints at extraordinary violence in J.T. Norman's family but does not provide details. Judy testified in court about what happened to one of her sons who died in Chicago:

A. [He] was shot

Q. Was that while he was beating his wife?

A. It was prior . . . to him beating on her, yes.⁶⁴

Then Judy's attorney asked, "What happened to [J.T.'s] brother's wife in Chicago?"⁶⁵ Any harm that befell Judy's sister-in-law would have made J.T.'s threats more credible,⁶⁶ but the judge sustained that objection and another when Judy's lawyer asked whether John Wayne, raised by her husband's sister, was violent toward the other children.⁶⁷

Judy may have hoped that life would improve when they returned to North Carolina in November 1983.⁶⁸ Her oldest son stayed in Chicago. The household included three of their children (Phyllis was seventeen at the time of her father's death, John Wayne was fourteen, and Loretta was six) as well as Phyllis's baby, Little Mark, and her boyfriend Mark Navarra.⁶⁹ The new residence was in the heart of Judy's family, in a community of small cinder block houses one or two miles outside Spindale.⁷⁰ Her mother, sister, and grandmother lived in adjoining houses or just across a small country road.⁷¹

In general, strong social support reduces the recurrence of violence, so hope for change would have been rational. For women who experience the most severe violence, however, social support networks make no difference to the frequency or intensity of violence; severe violence is equally likely to recur no matter how much social support she has.⁷² In his last days, J.T.

⁶² *Id.* (testimony of Judy Norman). Judy further testified that she "couldn't leave him. He threatened to kill me if I'd leave. I've left him, and he'd come and find me, and then beat me." *Id.* (emphasis added).

⁶³ *Id.*

⁶⁴ *Id.* at 137; see also Death Certificate, Robert Norman (Chicago 1982).

⁶⁵ Transcript, *supra* note 1, at 137.

⁶⁶ Batterers sometimes make threats by referring to other incidents of death and violence. STARK, *supra* note 50, at 2451.

⁶⁷ Transcript, *supra* note 1, at 137–38; *id.* at 151.

⁶⁸ *Id.* at 145. The family returned from Chicago in November and spent two Christmases in North Carolina. *Id.*

⁶⁹ *Id.* at 183 (stating that her son remained in Chicago); *id.* at 67, 70, 72, 151 (describing members of household).

⁷⁰ *Id.* at 17 (testimony of Deputy R.H. Epley).

⁷¹ *Id.* at 83–84 (testimony of Laverne Laws).

⁷² Goodman et al., *Women's Resources and Use of Strategies*, *supra* note 56, at 330–31. In general, "social support [was] critical to victims." *Id.* at 330. "[E]ven taking into account the severity of prior violence and other key predictors, participants' social support networks protected them against future

spoke angrily of Judy's family,⁷³ which suggests that they tried to support her, but their presence did not protect her. Mark Navarra said of this physical abuse: "[H]e did it a lot when other people was around; he was showing off or something."⁷⁴

Judy might also have hoped for improvement when J.T. participated in mental health counseling on a "sporadic" basis.⁷⁵ Even after separation, battered women are more likely to attempt to work out relationships when their partners participate in counseling.⁷⁶ J.T.'s counselor, Charlie Paige, testified at trial that he had seen Judy in the course of his work with J.T. and observed black eyes and bruises on her face and shoulder.⁷⁷

Her life in North Carolina was consistent with life in Chicago—violence, forced prostitution, death threats, and humiliation. Judy's daughter, Phyllis, testified, "She would beg him not to make her to go out He would just slap her and tell her to get on out there and do what a woman's supposed to do."⁷⁸ Daily, J.T. took her to the truck stop more than forty-five minutes away.⁷⁹ He demanded that she bring back at least one hundred dollars each day and beat her if she did not get enough money.⁸⁰ Sometimes Phyllis and Mark went with her to avoid the violent attacks J.T. made when he took Judy.⁸¹

The majority said that J.T. made "humor" of her prostitution in front of family and friends,⁸² but that sanitized summary misses the lessons about

violence." *Id.* However, for one-fourth of study participants who "had experienced the most severe violence, social support did not serve as a protective factor. Reabuse was equally likely at every level of social support. For these women, it may be that the violence was so severe that the support of family and friends was not sufficient to stop or prevent it." *Id.* at 330–31.

⁷³ Transcript, *supra* note 1, at 82.

⁷⁴ *Id.* at 57, 87, 194; State v. Norman (*Norman I*), 366 S.E.2d 586, 587 (N.C. Ct. App. 1988); State v. Norman (*Norman II*), 378 S.E.2d 8, 10 (N.C. 1989) (majority opinion).

⁷⁵ *Norman II*, 378 S.E.2d at 10; Transcript, *supra* note 1, at 92 (testimony of Charlie Paige). Early on the day of his death, Judy urged J.T. to accept help for alcoholism. *Id.* at 139; *Norman II*, 378 S.E.2d at 10 (majority opinion). The record does not show what moved J.T. to enter counseling, but there is no evidence in the record of events that would trigger mandatory participation, so it may have been voluntary.

⁷⁶ See, e.g., EDWARD W. GONDOLF & ELLEN R. FISHER: BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 4, 87–88 (1988) (identifying batterer participation in counseling as one of the strongest predictors that a woman would leave shelter and return to the batterer).

⁷⁷ Transcript, *supra* note 1, at 97.

⁷⁸ *Id.* at 63 (testimony of Phyllis Norman).

⁷⁹ *Id.* at 63–64, 128 (describing "truckstop" as a rest area near Kings Mountain). According to Google Maps, it takes about forty-five minutes to drive from Spindale to Kings Mountain; I-85 is a short distance past Kings Mountain—the rest stop would be farther. *Directions from Spindale, NC to Kings Mountain, NC*, GOOGLE MAPS, <https://www.maps.google.com> (enter "Spindale, NC" into the search field, then follow the "Directions" hyperlink, and search the destination field for "Kings Mountain, NC").

⁸⁰ Transcript, *supra* note 1, at 64; State v. Norman (*Norman I*), 366 S.E.2d 586, 588 (N.C. Ct. App. 1988); *Norman II*, 378 S.E.2d at 10 (majority opinion).

⁸¹ Transcript, *supra* note 1, at 128.

⁸² *Norman II*, 378 S.E.2d at 10 (majority opinion).

power that J.T. built into Judy's humiliation. When he had friends over to drink, J.T. would command their six-year-old daughter, Loretta, to tell his friends what her mother did for a living.⁸³ Loretta had to answer, "Momma sucks dicks," and if she failed to say it, he would "whup her."⁸⁴ The visitors would laugh, and Judy would hang her head.⁸⁵ Phyllis said this happened all the time.⁸⁶ With every performance by Loretta, J.T. proved again that Judy's children could be used to hurt her, and that if they tried to protect her, they would suffer.

Judy could drive, but driving did not mean freedom. When she left, J.T. would find her and force her to return.⁸⁷ When they traveled, J.T. would make her take the wheel—a method often used by kidnappers—and beat her while she struggled to control the vehicle.⁸⁸ Mark Navarra testified that two weeks before his death, as the family left to drive to Chicago for a visit, J.T. told Judy he would "beat her from the house to the State line."⁸⁹ J.T. poured hot coffee on Judy and beat her while she drove, and "that went on for a while . . . I couldn't go to sleep because . . . when he got to hitting her; he'd reach over and hit her, and she's swerv[ing] in and out of the road . . . it was going on quite a bit."⁹⁰

There were additional indications that her children were in danger. J.T. tried to make his daughter Phyllis go into prostitution.⁹¹ Dr. Tyson testified that there was evidence J.T. had begun to make threats against the children.⁹²

Although the regime was much the same, it could not be described as stable. This was deliberate and studied *instability*—a pattern in which J.T.'s *predictable* ability to carry out threats and inflict pain combined with *unpredictable* attacks that used both violence and nonphysical methods to maintain control. The continuing patterns included reliance on Judy's income, forcing her to sell sex against her will, turning her compliance into another weapon against her, and sometimes even horror (the denial of

⁸³ Transcript, *supra* note 1, at 72–74.

⁸⁴ *Id.* at 73–78 (testimony of Phyllis Norman); *id.* at 193 (testimony of Lemuel Splawn). Phyllis told the judge that her father would "whup" her sister if she did not say it; when the jury returned, the judge admitted the testimony about what Loretta said but sustained the objection to what J.T. would do if she did not say it. *Id.* at 78.

⁸⁵ *Id.* at 76. When asked, "What did your momma do at that time?" Phyllis Norman answered, "She just drops her head; she can't do nothing 'cause if she'd say something, my dad would get up and beat her." *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 135.

⁸⁸ *Id.* at 133–34.

⁸⁹ *Id.* at 58.

⁹⁰ *Id.* at 59; see also *infra* notes 155–97 and accompanying text (describing additional incidents of beating Judy while she was driving).

⁹¹ See Transcript, *supra* note 1, at 67 (indicating that Phyllis answered "yes" to a question about this attempt by her father). The prosecutor's objection was sustained and the transcript has no further details. *Id.*

⁹² *Id.* at 170.

contact with one son, the death of another in an act of domestic violence, and the prospect of having her daughter pushed into prostitution).⁹³ Another thread also ran through both Chicago and North Carolina: Judy's efforts to find help met with frustration.

On the night of June 10 and morning of June 11, Phyllis and Mark went with Judy to the truck stop.⁹⁴ J.T. arrived later, already drunk.⁹⁵ He said Judy did not have enough money and began hitting her in the face with his fist.⁹⁶ He poured hot coffee on her.⁹⁷ When she tried to escape, he slammed the car door against her.⁹⁸ This was brutal coercion, but the family did not describe it as different from other days at the truck stop.

In the early morning hours of June 11, they were on the way home, driving two cars because J.T. had come separately.⁹⁹ The police stopped J.T. and arrested him for drunk driving, and he spent the rest of the night in jail.¹⁰⁰ He called Judy, and her mother, Laverne, bailed him out; he was released in the morning.¹⁰¹

B. *Assessing Threat: Crisis and Death*

This Section follows the last day and a half of J.T.'s life. His threats became more grotesquely abusive and lethal. Judy was very frightened. After she tried to kill herself, the pace quickened further and she sought help urgently. Her mother, daughter, and social workers tried to help, but the violence and threats got worse. The dissent in the North Carolina Supreme Court would point to the actions and perceptions of eyewitnesses in assessing danger, the credibility of J.T.'s threats, and the reasonableness of Judy Norman's fear. To understand the family's fear of J.T., readers must face a hard question: If someone held your own mother in front of your eyes and put out a cigarette forcibly on her collar bone, what threat would be sufficient to make you stand still and take no action?

⁹³ *Id.* at 67, 137, 151.

⁹⁴ *Id.* at 48; *State v. Norman (Norman II)*, 378 S.E.2d 8, 10 (N.C. 1989); *id.* at 19 (Martin, J., dissenting); *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

⁹⁵ *Norman II*, 378 S.E.2d at 10; *Norman I*, 366 S.E.2d at 588.

⁹⁶ Transcript, *supra* note 1, at 128–29 (testimony of Judy Norman, describing J.T. punching her in the face); *id.* at 49 (testimony of Mark Navarra, stating that J.T. punched Judy). See also *Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting) (noting that Phyllis testified that J.T. had beaten her mother after arriving); *Norman I*, 366 S.E.2d at 588 (indicating that J.T. was “hitting defendant in the face with his fist”).

⁹⁷ *Id.* at 48–49 (testimony of Mark Navarra); *Norman I*, 366 S.E.2d at 588 (noting that J.T. threw hot coffee on Judy at the truck stop).

⁹⁸ Transcript, *supra* note 1, at 129.

⁹⁹ See *id.* (indicating that J.T. drove a car borrowed from Judy's sister).

¹⁰⁰ *Norman II*, 378 S.E.2d at 10; *id.* at 19 (Martin, J., dissenting); *Norman I*, 366 S.E.2d at 588; Transcript, *supra* note 1, at 49, 57 (testimony of Mark Navarra); *id.* at 129 (testimony of Judy Norman).

¹⁰¹ *Norman II*, 378 S.E.2d at 10; *id.* at 19 (Martin, J., dissenting); Transcript, *supra* note 1, at 129.

1. June 11th

J.T. reacted violently to the experience of arrest and jail. He returned home on June 11th in a state of unprecedented rage.¹⁰² He began hitting Judy immediately and kept it up all day, slapping her and throwing "anything that was in his reach" at her, including glasses, ashtrays, and beer bottles.¹⁰³ He asked her to make him a sandwich but then threw it on the floor and demanded that she make another.¹⁰⁴ He threw the second sandwich on the floor as well and told Judy that he did not want her to touch it. She used a paper towel to handle the bread and luncheon meat for the third sandwich. He smeared it in her face.¹⁰⁵

Judy's mother Laverne said that by late afternoon, Judy was unusually frightened: "She was real nervous, and she didn't act like herself; she acted scared all the time."¹⁰⁶ This description implies that Judy did not usually manifest such extreme fear, another indication that even though violence was a daily event, the intensity of violence and indications of danger were increasing. The police received a call about a domestic quarrel, and Officer Price said that he arrived after dark.¹⁰⁷ Judy's face was bruised and she was crying.¹⁰⁸ She said J.T. had been beating her all day and that she "could not take it any longer."¹⁰⁹ Officer Price advised her to go to the county jail to "take out a warrant on him."¹¹⁰ She said if she did that, he would kill her.¹¹¹

¹⁰² Transcript, *supra* note 1, at 49–50 (testimony of Mark Navarra) (discussing how J.T. returned from jail and "started with Judy"; *id.* at 57–58 (stating that J.T. "looked real mad," angrier than Navarra had ever seen him); *id.* at 131 (testimony of Judy Norman) (discussing J.T.'s behavior after returning from jail); *See also Norman II*, 378 S.E.2d at 10 (stating that "[t]he defendant's evidence also tended to show that her husband seemed angrier than ever after he was released from jail and that his abuse of the defendant was more frequent); *Norman I*, 366 S.E.2d at 588 (stating that when J.T. "was released from jail the next morning, on 11 June 1985, he was extremely angry and beat defendant").

¹⁰³ Transcript, *supra* note 1, at 129 (testimony of Judy Norman); *see also Norman I*, 366 S.E.2d at 588 (describing J.T.'s anger and violence upon release from jail).

¹⁰⁴ Transcript, *supra* note 1, at 50 (testimony of Mark Navarra).

¹⁰⁵ *Id.* at 131 (testimony of Judy Norman); *see also Norman II*, 378 S.E.2d at 10 (discussing the sandwich incident); *id.* at 19 (Martin, J., dissenting) (discussing the sandwich incident); *Norman I*, 366 S.E.2d at 588 (discussing the sandwich incident).

¹⁰⁶ Transcript, *supra* note 1, at 81 (testimony of Laverne Laws); *see also Norman I*, 366 S.E.2d at 588 ("Defendant's mother said defendant acted nervous and scared").

¹⁰⁷ Transcript, *supra* note 1, at 35 (testimony of Donald Price) (describing time of this June 11th incident as after 8:00 or 8:30 PM and noting that it was already dark; *but cf. Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting) (stating time as 8:00 PM but not mentioning the testimony about darkness).

¹⁰⁸ Transcript, *supra* note 1, at 36 (testimony of Donald Price).

¹⁰⁹ *Norman II*, 378 S.E.2d at 10; *id.* at 19 (Martin, J., dissenting); *Norman I*, 366 S.E.2d at 588; Transcript, *supra* note 1, at 36 (testimony of Donald Price).

¹¹⁰ Transcript, *supra* note 1, at 39 (testimony of Donald Price).

¹¹¹ *Norman II*, 378 S.E.2d at 10 (stating that the sheriff's deputies advised Judy Norman to file a complaint, but "she was afraid her husband would kill her if she had him arrested"); *id.* at 19 (Martin, J., dissenting) (discussing that the police officer told Judy Norman "he could do nothing for her unless she took out a warrant on her husband," but if she did, she said he "would kill her"); *Norman I*, 366 S.E.2d

Officer Price told her he could not do anything for her until she got “a warrant in my hand where I could place him under arrest.”¹¹²

Some years before the events in *Norman* in 1985, the *Norman* case, which occurred in 1985, a warrant would have been necessary. As in most states, police could make warrantless arrests for misdemeanors only if they witnessed the violent act or saw threats involving property or physical injury.¹¹³ In 1979, however, North Carolina had passed an act permitting warrantless arrests in domestic violence cases.¹¹⁴ Officer Price’s statement reflected a gap between law and practice that the Violence Against Women Act of 1994 (VAWA) addressed by funding law enforcement training programs.¹¹⁵

When Officer Price left without arresting J.T., Judy went into the bathroom with a cup of coffee and took seventeen or eighteen “nerve pills.”¹¹⁶ Judy had never brought coffee to the bathroom before, and Phyllis wondered why she had done it. Phyllis went into the bathroom and found the empty pill bottle.¹¹⁷ Laverne was at the house and heard Phyllis tell her father that Judy had taken some pills. J.T. shouted that they should let her die; he threatened to cut Judy’s heart out and cut off her breast.¹¹⁸ He cursed

at 588 (“The officer advised [Judy Norman] to take out a warrant on her husband, but [she] responded that if she did so, he would kill her.”); Transcript, *supra* note 1, at 39 (testimony of Donald Price).

¹¹² Transcript, *supra* note 1, at 39 (testimony of Donald Price); see *Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting) (“The officer told her that he could do nothing for her unless she took out a warrant on her husband.”). Laverne also believed J.T. would kill Judy if she “took a warrant out.” Transcript, *supra* note 1, at 90 (testimony of Laverne Laws).

¹¹³ See Lisa G. Lerman, *Expansion of Arrest Power: A Key to Effective Intervention*, 7 VT. L. REV. 59, 64–67 (1982) (explaining the technical aspects of warrantless arrests); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 61–63 (1992) (explaining the national movement to push for warrantless arrest).

¹¹⁴ See Act of Jan. 10, 1979, ch. 561, 1979 N.C. Sess. Laws 592–93 (providing remedies for domestic violence); N.C. GEN. STAT. ANN. § 50B-5 (Supp. 1979) (“Local law enforcement officer . . . is authorized to take whatever steps are reasonably necessary to protect the complainant from harm.”). This act authorized warrantless arrests for violations of protective orders. N.C. GEN. STAT. ANN. § 50B-4 (Supp. 1979); Lerman, *supra* note 113, at 67 (citing the North Carolina statute section 50B-4 as requiring police to make arrests when there is probable cause of spousal assault).

¹¹⁵ See, e.g., *Factsheet: The Violence Against Women Act*, WHITE HOUSE, https://obamawhitehouse.archives.gov/sites/default/files/docs/vawa_factsheet.pdf (last visited Oct. 6, 2018) (“VAWA funds train over 500,000 law enforcement officers, prosecutors, judges, and other personnel every year.”); U.S. DEP’T OF JUSTICE, NJC152159, GRANTS TO COMBAT VIOLENT CRIME AGAINST WOMEN: PROPOSED REGULATIONS 2–3 (1994) (discussing the national impact of Violence Against Women Act of 1994).

¹¹⁶ *Norman II*, 378 S.E.2d at 10; *Norman I*, 366 S.E.2d at 588; Transcript, *supra* note 1, at 67–68 (stating that Judy Norman took coffee to the bathroom); *id.* at 132 (referring to “nerve pills”).

¹¹⁷ Transcript, *supra* note 1, at 67–68 (testimony of Phyllis Norman).

¹¹⁸ *Id.* at 81–82 (testimony of Laverne Laws).

and said, "Call your brothers . . . I'm not scared of your whole family . . . I'll kill you, your mother and your grandmother."¹¹⁹

Laverne called for an ambulance. When it arrived, Judy at first refused to go to the hospital. She was beginning to lose consciousness; Laverne thought Judy might die before she agreed to go.¹²⁰ J.T. fought the paramedics and refused to let them help Judy.¹²¹

In the sole example of outright defiance in this story, seventeen-year-old Phyllis said to her father, J.T., "I ain't letting my mother die because of nobody."¹²² She told Judy, "Momma, you're going."¹²³ With Laverne's assistance,¹²⁴ Phyllis walked her mother out past her raging father and put Judy in the ambulance.¹²⁵ J.T. continued to disrupt the paramedics; they complained that it was hard to treat Judy and called for backup.¹²⁶

Officer Price had not driven far when he received the call to return to the Norman residence to help with J.T.¹²⁷ He found a chaotic scene. J.T. shouted that they should "[l]et the bitch die."¹²⁸ Price said they were there to save a life, showed J.T. a club or flashlight, and threatened to arrest him: "I started to grab him and he ran into his house . . ."¹²⁹

The paramedics worked on Judy, who appeared to be unconscious, and took her to the hospital.¹³⁰ J.T. reacted with fury, telling Phyllis to take her "bastard" baby and get out.¹³¹ The Norman children fled and stayed the night at Laverne's mother's house.¹³²

Meanwhile, Laverne obtained a gun. J.T.'s death threats frightened her: "He might have killed the whole family, and [I was] especially scared that

¹¹⁹ *Id.* at 82 (testimony of Laverne Laws); see *Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting) (quoting J.T. as saying "I'll kill you, your mother and your grandmother"); *Norman I*, 366 S.E.2d at 588 ("Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother.").

¹²⁰ Transcript, *supra* note 1, at 82-83.

¹²¹ *Id.* at 36-37 (testimony of Donald Price); see *Norman II*, 378 S.E.2d at 10 ("[J.T.] told [paramedics] to let [Judy Norman] die."); *Norman I*, 366 S.E.2d at 588 ("[J.T.] Norman was interfering with emergency personnel who were trying to treat [Judy Norman].").

¹²² Transcript, *supra* note 1, at 68 (testimony of Phyllis Norman).

¹²³ *Id.* at 83 (testimony of Laverne Laws).

¹²⁴ *Id.* at 55, 83 (testimony of Mark Navarra and Laverne Laws).

¹²⁵ *Id.* at 68, 83 (testimony of Phyllis Norman and Laverne Laws).

¹²⁶ *Id.* at 37, 39-40 (testimony of Donald Price).

¹²⁷ *Id.* at 39.

¹²⁸ *State v. Norman (Norman I)*, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988); *State v. Norman (Norman II)*, 378 S.E.2d 8, 10 (N.C. 1989) (stating that J.T. said they should let Judy die); (Martin, J., dissenting) (quoting the statement that they should let "the bitch die;" Transcript, *supra* note 1, at 37 (testimony of Donald Price)).

¹²⁹ Transcript, *supra* note 1, at 37, 40 (testimony of Donald Price); see also *Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting) ("[T]he officer was compelled to chase [J.T.] into the house."); *Norman I*, 366 S.E.2d at 588 ("The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house.").

¹³⁰ Transcript, *supra* note 1, at 37 (testimony of Donald Price).

¹³¹ *Id.* at 83 (testimony of Laverne Laws).

¹³² *Id.*

he would kill [Judy].”¹³³ Two years earlier, Judy’s sister Janice had been the victim of a violent home invasion.¹³⁴ Janice carried a gun in her purse.¹³⁵ After Laverne called the paramedics, she placed Janice’s gun in her own purse and took it away.¹³⁶

At the hospital, the emergency medical staff pumped Judy’s stomach.¹³⁷ Charlie Paige, a psychologist from the mental health center, was on call that night. He had seen J.T. occasionally for mental health counseling and had seen Judy when she accompanied J.T.¹³⁸ Paige interviewed Judy when she woke up, sometime after 1:00 AM, and found her anxious and depressed.¹³⁹

Laverne had joined Judy at the hospital.¹⁴⁰ Charlie Paige encouraged Judy to accept help and suggested prosecuting her husband for abuse.¹⁴¹ Initially, Judy was angry, but she and Laverne agreed to go to the mental health center in the morning to consider prosecution.¹⁴² During the interview with Paige, Judy said that she should kill her husband for what he had done to her.¹⁴³ Paige urged her to enter the Prevention of Abuse in the Home (PATH) domestic violence shelter, but Judy was worried about her children and wanted to stay with them.¹⁴⁴ Paige gave Laverne a card for the shelter.¹⁴⁵ The hospital released Judy at about 2:30 AM.¹⁴⁶ Paige had advised Laverne

¹³³ *Id.* at 82.

¹³⁴ *See id.* at 116 (testimony of Janice Dyer) (testifying that, on September 4, 1983, Bobby Shepherd broke into her house, stabbed her, attempted to rape her, and killed her niece).

¹³⁵ *Id.* at 82 (testimony of Laverne Laws).

¹³⁶ *Id.* Laverne took the gun to her own mother’s house nearby. *Id.* Later, Judy found the gun in Laverne’s purse at Laverne’s house. *Id.* at 141 (testimony of Judy Norman). *See also* State v. Norman (*Norman II*), 378 S.E.2d 8, 19–20 (N.C. 1989) (Martin, J., dissenting) (describing Laverne’s acquisition and Judy’s discovery of the gun).

¹³⁷ *Norman II*, 378 S.E.2d at 10 (majority opinion); *see also* Transcript, *supra* note 1, at 97 (testimony of Charlie Paige) (testifying that Judy had her stomach pumped).

¹³⁸ Transcript, *supra* note 1, at 92, 97 (testimony of Charlie Paige).

¹³⁹ *Id.* at 92–93 (explaining further that “anxiety” meant feeling “nervous” and “depressed” meant feeling “hopeless [and] helpless.”). The majority opinion in *Norman II* omits the testimony about anxiety and nervousness, reporting only her depression and anger. *Norman II*, 378 S.E.2d at 10.

¹⁴⁰ *See* Transcript, *supra* note 1, at 93 (testimony of Charlie Paige) (testifying that he discussed possibilities with Judy and Laverne).

¹⁴¹ *Id.*; *Norman II*, 378 S.E.2d at 10.

¹⁴² Transcript, *supra* note 1, at 93 (testimony of Charlie Paige); State v. Norman (*Norman I*), 366 S.E.2d 586, 588 (N.C. Ct. App. 1988) (stating that Judy was “angry and depressed”); *Norman II*, 378 S.E.2d at 10 (stating that Judy “agreed to go to the mental health center the next day to discuss” prosecution or commitment, but she “seemed depressed” and “expressed considerable anger toward her husband”).

¹⁴³ Transcript, *supra* note 1, at 95 (testimony of Charlie Paige); *Norman II*, 378 S.E.2d at 10–11.

¹⁴⁴ Transcript, *supra* note 1, at 96–97 (testimony of Charlie Paige).

¹⁴⁵ *Id.* at 87 (testimony of Laverne Laws).

¹⁴⁶ *Id.* at 88.

that Judy should not return home that night, so Judy spent the rest of the night at her grandmother's house.¹⁴⁷

2. June 12th

J.T. reacted to Judy's suicide attempt with more rage.¹⁴⁸ Judy went to the mental health center where the staff advised her to sign papers to have J.T. committed for his alcoholism. Judy went back and told him "J.T., straighten up. Quit drinking. I'm going to have you committed to help you."¹⁴⁹ He answered, "If you do . . . I'll see them coming and before they get here, I'll cut your throat."¹⁵⁰

Stories from that last day illustrate J.T.'s methods of control and the inability of the people around them to stop his violence. Judy went to an appointment at the food stamp office.¹⁵¹ At home, J.T. asked Mark Navarra to go with him to bring her back, and Mark agreed.¹⁵² A clerk interrupted Judy's food stamp interview to say that J.T. was there demanding that she go home.¹⁵³ Judy became very upset and began to cry. The eligibility worker locked the door "for safety sake" to give Judy time to calm down before she left.¹⁵⁴ J.T. forced Judy, still groggy from the pills, to drive home, and he hit her as they went.¹⁵⁵ The car swerved.¹⁵⁶ Mark told J.T. that "if he was going to hit her, let me drive or wait until we get home . . ."¹⁵⁷ It is not clear whether this request to delay a beating would have functioned as a confrontation with J.T., and the record does not show how J.T. responded.

A little while later, they were in the car again, and J.T. was using the same tactics. His friend, Lemuel Splawn, had invited J.T. to drive with him to Spartanburg to pick up Splawn's paycheck.¹⁵⁸ Splawn was not expecting

¹⁴⁷ *Id.* at 88–89; *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting) (stating that Judy spent the rest of the night at her grandmother's house); *Norman I*, 366 S.E.2d at 588 ("On the advice of the therapist, defendant did not return home that night, but spent the night at her grandmother's house.").

¹⁴⁸ See *Norman I*, 366 S.E.2d at 588 ("The next day, 12 June 1985, the day of Norman's death, Norman was angrier and more violent with defendant than usual.").

¹⁴⁹ Transcript, *supra* note 1, at 139 (testimony of Judy Norman); see also *id.* at 94 (Paige observed her presence at the center); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting).

¹⁵⁰ Transcript, *supra* note 1, at 139; *Norman II*, 378 S.E.2d at 11 (majority opinion); *id.* at 20 (Martin, J., dissenting).

¹⁵¹ Transcript, *supra* note 1, at 101–02 (testimony of Revonda Hipps, eligibility specialist); cf. *Norman II*, 378 S.E.2d at 11 (majority opinion) (stating that Judy went to "the social services office that day to seek welfare benefits").

¹⁵² Transcript, *supra* note 1, at 59–60 (testimony of Mark Navarra).

¹⁵³ *Norman II*, 378 S.E.2d at 11; Transcript, *supra* note 1, at 101 (testimony of Revonda Hipps).

¹⁵⁴ Transcript, *supra* note 1, at 101–102.

¹⁵⁵ *Id.* at 133–34 (testimony of Judy Norman).

¹⁵⁶ Transcript, *supra* note 1, at 84 (testimony of Laverne Laws) ("He made her drive the car back home from the food stamp office and she was from one side of the road to the other.").

¹⁵⁷ *Id.* at 60 (testimony of Mark Navarra).

¹⁵⁸ *Id.* at 191 (testimony of Lemuel Splawn); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting); *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

Judy, but she was with J.T. when he arrived¹⁵⁹—which had the effect of preventing her from engaging in more help-seeking. J.T. drove at first, but then he pulled over and told Judy to drive. Still affected by the overdose, Judy struggled to control the car.¹⁶⁰ J.T. said she was following a truck too closely and began slapping her, then poured beer over her head.¹⁶¹ Splawn said, “[t]here’s no use in that. If you’re going to act like that, just take me back home.”¹⁶² J.T. said he was going to go to sleep. “[H]e laid his head on the arm rest, put his feet over towards her and then took his foot and kicked her up the side of the head.”¹⁶³ Splawn also testified that as they arrived to pick up the check, J.T. threatened to “cut her breast off and shove it up her rear end.”¹⁶⁴

Judy had not eaten in three days.¹⁶⁵ There was no food in the house on June 12th.¹⁶⁶ The young people had to go out if they wanted anything to eat.¹⁶⁷ Laverne sent some groceries, but J.T. made Judy put the food back in the bag.¹⁶⁸ He said she was not going to eat.¹⁶⁹ Phyllis brought her a doughnut from Laverne, but J.T. smashed it into Judy’s face.¹⁷⁰

Laverne had been trying to help. In addition to sending food, she went with Judy to the hospital and the food stamp office, and she had called the paramedics on the 11th.¹⁷¹ On the afternoon of the 12th, when six-year-old Loretta told her that J.T. was beating Judy again, Laverne called the police, but they said they could do nothing without a warrant.¹⁷² She stated that she did not try to get a warrant because “they wouldn’t accept a warrant from me and he told her if she ever took a warrant out for him he would kill her.”¹⁷³ The police did not arrive.¹⁷⁴

¹⁵⁹ Transcript, *supra* note 1, at 191.

¹⁶⁰ *Id.* at 133–34 (testimony of Judy Norman).

¹⁶¹ See *id.* at 133–34, 191–92 (testimony of Judy Norman and Lemuel Splawn); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting) (describing J.T.’s assaults on Judy); *Norman I*, 366 S.E.2d at 588 (same).

¹⁶² Transcript, *supra* note 1, at 192 (testimony of Lemuel Splawn).

¹⁶³ *Id.*

¹⁶⁴ *Id.*; *Norman I*, 366 S.E.2d at 588.

¹⁶⁵ Transcript, *supra* note 1, at 66 (testimony of Phyllis Norman); *Norman II*, 378 S.E.2d at 20.

¹⁶⁶ Transcript, *supra* note 1, at 66 (testimony of Phyllis Norman); *id.* at 137 (testimony of Judy Norman).

¹⁶⁷ *Id.* (testimony of Judy Norman); see also *id.* at 51 (testimony of Mark Navarra) (stating that Phyllis had some money from babysitting, so they went to McDonald’s).

¹⁶⁸ *Id.* at 70 (testimony of Phyllis Norman).

¹⁶⁹ *Id.*; *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting).

¹⁷⁰ Transcript, *supra* note 1, at 131–32 (testimony of Judy Norman); *State v. Norman (Norman I)*, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988).

¹⁷¹ Transcript, *supra* note 1, at 82, 85 (testimony of Laverne Laws).

¹⁷² *Id.* at 90.

¹⁷³ *Id.*

¹⁷⁴ *Id.*; *Norman I*, 366 S.E.2d at 588.

The advocates at PATH were trying to help. They called Laverne to arrange for Judy to come meet with them to discuss shelter, talked with both Laverne and Judy's grandmother, and tried unsuccessfully to have Judy brought to the phone.¹⁷⁵ When Laverne's call to police did not bring help, she called PATH.¹⁷⁶ PATH called the police,¹⁷⁷ which apparently resulted in Officer Price being dispatched to the Norman house. While Price was on the way, he received a second call that a man had been shot.¹⁷⁸

Meanwhile, that afternoon, the family had watched *without interfering* while J.T. put out a cigarette on Judy's collarbone.¹⁷⁹ Testimony about this incident came from two witnesses as well as from Judy herself.¹⁸⁰ When asked about Judy's reaction, Mark Navarra said, "It hurt her . . . [S]he was scared."¹⁸¹ When Judy's lawyer asked Phyllis what she had done to try to stop her father from treating her mother like this, she answered, "I was scared to do anything. I begged him not to hit her."¹⁸² The cigarette burn was more than a method of inflicting pain. It showed Judy again that no one—not even the daughter who stood up to J.T. the previous day and saved her life—would act to stop him.

After the cigarette burn, J.T. sat cursing for a while and then told Judy, "[I]et's go lay down."¹⁸³ She started to lie on the smaller bed, but he said, "[n]o, bitch . . . [d]ogs don't sleep on beds, they sleep [on] the floor."¹⁸⁴ A little while later, Phyllis came in—not to ask her mother to watch her baby, but to get J.T.'s permission.¹⁸⁵ In the following quotes from the transcript, phrases important to time span or perceptions of danger are italicized. Judy described what happened after she lay down on the floor:

A. [*I*]t wasn't but a little *bit* till my daughter came in there and she says, "Daddy," says, "Let momma watch the baby while I go to the store." And, he says, "All right." So I got the baby

¹⁷⁵ Transcript, *supra* note 1, at 98–99 (testimony of Ann Lancaster).

¹⁷⁶ Transcript, *supra* note 1, at 87 (testimony of Laverne Laws). In response to a question, Laverne answered that she had called PATH, but the prosecutor's objection was sustained, and she did not describe the call. *Id.*

¹⁷⁷ *Id.* at 99–100 (testimony of Anne Lancaster).

¹⁷⁸ *Id.* at 42 (testimony of Donald Price) (describing two calls; first about a quarrel then about a shooting).

¹⁷⁹ *Id.* at 131 (testimony of Judy Norman); State v. Norman (*Norman II*), 378 S.E.2d 8, 11 (N.C. 1989); *Norman I*, 366 S.E.2d at 588.

¹⁸⁰ *Norman II*, 378 S.E.2d at 19 (Martin, J., dissenting).

¹⁸¹ Transcript, *supra* note 1, at 53 (testimony of Mark Navarra).

¹⁸² *Id.* at 67 (testimony of Phyllis Norman).

¹⁸³ *Id.* at 140–41 (testimony of Judy Norman); *Norman II*, 378 S.E.2d at 20 (Martin J., dissenting).

¹⁸⁴ Transcript, *supra* note 1, at 140–41 (testimony of Judy Norman); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting); *Norman I*, 366 S.E.2d at 588.

¹⁸⁵ Transcript, *supra* note 1, at 141 (testimony of Judy Norman); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting) (stating that "Phyllis came in and asked her father if defendant could take care of her baby"); *Norman I*, 366 S.E.2d at 588 (stating that J.T. Norman "assented" to having Judy watch the baby).

and I had him on the bed. I was sitting in the floor watching him so he wouldn't fall off and J.T. *just finally went to sleep.*

Q. What happened *then*?

A. *The baby started crying* and I snuck up and took him out there to my mother's. I said, "Momma, watch him. I'm scared he'll wake J.T. up, and he'll start fussing again." And, I give her the baby. I said, "Give me something for the headache; my head is busting." [Laverne] says, "I've got some pain pills in my purse." So I went in there to get the pain pills and the gun was in there, and I don't know, I just seen the gun, and I took it out, and I went back out there and shot him.¹⁸⁶

Judy shot three times into the back of J.T.'s head while he lay sleeping.¹⁸⁷

Phyllis testified that after the shots, she ran into the bedroom and saw her mother with a gun:

A. I grabbed the gun, and I hollered, "No," and she turned it loose to me I looked at my dad's head. I seen the blood and I dropped the gun, and I ran out of the room and hollered that he killed her. I kept on hollering, "*He killed her.*"

. . . .

Q. Why did you think he'd killed her?

A. Because I would always think that he would kill her.

. . . .

He would always said that he would kill her. He kept on telling her and everybody else he would kill her.

. . . .

[He said it] the day he got shot. He would say it every day. It was constantly¹⁸⁸

At trial, Judy's lawyer asked her why she had killed him. She wept while she answered:

A. Why? Because I was scared of him and *I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been.* I just couldn't take it no more.

¹⁸⁶ Transcript, *supra* note 1, at 141 (testimony of Judy Norman) (emphasis added); *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting).

¹⁸⁷ *Norman II*, 378 S.E.2d at 9; *Norman I*, 366 S.E.2d at 589.

¹⁸⁸ Transcript, *supra* note 1, at 61–62 (emphasis added) (testimony of Phyllis Norman).

There ain't no way . . . even if means going to prison. It's better than living in that. That's worse hell than anything . . .

Q. On that day, when he threatened to kill you, did you believe him?

A. Yes. I believed him; he would, he would kill me if he got a chance. If he thought he wouldn't a had to went to jail, he would a done it . . .¹⁸⁹

On this fear, let us take Judy Norman at her word. On the night of the shooting, she told a deputy sheriff that she shot J.T. because she had taken "all she was going to take from him"¹⁹⁰—but that statement does not contradict her terror at the prospect of even more violent trafficking that night. Defense witnesses corroborated J.T.'s threats of death and Judy's inability to escape violent trafficking.¹⁹¹ The crisis had brought intense fear and urgent help-seeking, but the help she sought and others tried to give had not protected her. She believed terrible things were going to happen—the threat of death and the certainty of imminent, vicious, violent sexual trafficking—and she could neither defend against them nor escape.

She feared that he was going to kill her. So did her family.¹⁹² J.T.'s repetitive threats did not undermine his credibility: the testimony showed that Judy, Laverne, and Phyllis all feared his lethal threats. Judy was certain that she could not get away, and so was everyone around her.¹⁹³ Judy and Laverne both believed that J.T. would kill her instantaneously if she took out a warrant or signed papers to have him committed.¹⁹⁴

Even while Judy pursued a variety of strategies to find help, she responded to specific deadly threats with strategies that studies would later

¹⁸⁹ *Norman II*, 378 S.E.2d at 11, 14; *Norman I*, 366 S.E.2d at 589; Transcript, *supra* note 1, at 142 (emphasis added).

¹⁹⁰ Transcript, *supra* note 1, at 27 (testimony of Deputy Sheriff R.H. Epley).

¹⁹¹ In a slightly different argument, Whitley Kaufman points to the anger in Judy's statement at the hospital that she should kill J.T. for what he had done to her. Kaufman, *supra* note 9, at 366. Kaufman treats this as evidence that Judy killed J.T. over past wrongs rather than fear about future danger—basically, acting for revenge rather than from fear. But anger over past wrongs does not contradict terror in the present. The debate with regard to *Norman* turns on whether the judge should have allowed the jury to consider self-defense. The jury would have weighed evidence of both anger and terror in determining whether Judy had acted based on actual and reasonable fear.

¹⁹² Transcript, *supra* note 1, at 61–62 (testimony of Phyllis Norman); *id.* at 82 (testimony of Laverne Laws). Part IV.C *infra* explores the relationship between eyewitness perception and reasonableness and discusses the treatment of that issue in the dissent.

¹⁹³ See *Norman II*, 378 S.E.2d at 18 (Martin, J., dissenting) (analyzing imminence in light of captivity).

¹⁹⁴ Transcript, *supra* note 1, at 90, 139; *Norman I*, 366 S.E.2d at 588 (recounting Judy's statements that J.T. threatened to kill her if she tried to have him committed and that he would kill her if she took out a warrant).

call “placating.”¹⁹⁵ She complied—she did not defy him on those points. Compliance with those threats did not mean that she was behaving passively but rather that she found his death threats credible.¹⁹⁶

Judy would not leave her children.¹⁹⁷ Therefore, for safety, J.T. would have to be removed effectively. But he had made a credible threat that she would die before law enforcement could remove him.¹⁹⁸ And as long as she avoided the steps that would bring *immediate* death, she would not be able to predict any particular instant at which a lethal attack would happen.

From the witness stand, Judy described her immediate fear that the forced prostitution looming before her would be unendurable. She said, “it was going to be the same thing”—beatings and forced sex with strangers.¹⁹⁹ But she did not say that her experience would be the same as the beatings and hot coffee two nights earlier. “[W]hen he took me to the truck stop that night it was going to be worse than he had ever been.”²⁰⁰ That fear was consistent with her suicide attempt the previous night. Both her attempt to kill herself and her action in shooting J.T. *followed* incidents that proved she could not get help and *preceded* the time at which he would force her to the truck stop.

Threats of trafficking and death do not contradict each other. J.T. had convinced the family that he would kill her.²⁰¹ The threat of trafficking was so clear, so about-to-happen-that-night, that the opinions do not treat it as a threat but as a fact. It happened every day. If he wanted another \$100, he could kill her later.

For trafficking, the meaningful acts would not have to wait until night. The record does not state the time at which J.T. planned to leave. Because driving to the truck stop would take more than forty-five minutes, they could leave during daylight and arrive after dark.²⁰²

¹⁹⁵ See Lisa Goodman et al., *The Intimate Partner Violence Strategies Index: Development and Application*, 9 VIOLENCE AGAINST WOMEN 163, 169 (2003) [hereinafter Goodman et al., *Strategies Index*] (explaining that placating strategies are “intended to change batterer behavior without challenging, and possibly even supporting, his sense of control”).

¹⁹⁶ Stereotypes can make avoidance of a credible threat of death seem like passivity instead of active self-preservation.

¹⁹⁷ Transcript, *supra* note 1, at 96-97 (testimony of Charlie Paige) (testifying repeatedly that Judy would not go to the PATH shelter because she was concerned about her children and wanted to be with them). Cf. *id.* at 170 (testimony of Dr. Tyson) (stating that after her suicide attempt Judy began to fear that if she were gone J.T. would transfer the abuse he had heaped on her to her children and her family).

¹⁹⁸ *Norman II*, 378 S.E.2d at 20 (Martin, J., dissenting).

¹⁹⁹ *Id.* at 11 (majority opinion).

²⁰⁰ *Id.* (emphasis added).

²⁰¹ See, e.g., Transcript, *supra* note 1, at 61-62 (testimony of Phyllis Norman) (testifying that J.T. said “constantly” that he would kill Judy Norman).

²⁰² See *Directions from Springdale, NC to Kings Mountain, NC*, *supra* note 79 and accompanying text (“[I]t takes about 45 minutes to drive from Springdale to King’s Mountain.”); for a discussion of daylight and nightfall, see *supra* note 26 and accompanying text (explaining that there was still daylight remaining when J.T. Norman was killed).

From the moment J.T. opened his eyes, events would move rapidly toward torture and prostitution. The trafficking event would begin when he started transporting her, or even sooner, when he began beating her to force submission and move her toward the car. Judy could not escape while she drove.

On their previous trip to the truck stop, J.T. had punched her in the face while forcing her to sell oral sex. It is difficult to imagine the peculiar humiliations and forms of pain she would face on a night when he was angrier than ever. “[W]orse than he had ever been” as not mere conjecture from Judy—it had abundant support in the witnesses’ descriptions of spiraling, escalating rage and danger.

3. *A Summary of Judy’s Strategies*

Eighteen years after Judy shot J.T., a major study created an index of thirty-nine strategies women use to deal with abuse and evaluated the effectiveness of those strategies.²⁰³

Within the twenty-four hours before J.T.’s death, Judy used at least nine strategies from the index. She used at least three of nine formal network strategies: talking to a doctor or nurse about abuse, consulting a mental health counselor and trying to get J.T. help for alcohol or substance abuse. Of four strategies classified as “informal network,” Judy tried two: talking to family or friends about protecting herself and staying with family the night she left the hospital.²⁰⁴ Judy also tried one of four “legal” strategies: talking to the police.²⁰⁵ The officer told her incorrectly that he could not arrest J.T. without a warrant; indirectly, the officer acted as if no crime occurred when J.T. fought paramedics and shouted they should let her die after her suicide attempt. As Victoria Nourse points out, the police conveyed a message that legal help was not available.²⁰⁶

During those twenty-four hours, Judy had sought help from several sources: the police (who did not arrest J.T.), the food stamp office (where

²⁰³ Goodman et al., *Strategies Index*, *supra* note 195, at 168.

²⁰⁴ See *State v. Norman (Norman I)*, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988) (stating that Judy talked to family about protecting herself and stayed with family the night she left the hospital); Goodman et al., *Strategies Index*, *supra* note 195, at 184 (listing the four informal network strategies).

²⁰⁵ See *Norman I*, 366 S.E.2d at 588 (noting that Judy told a police officer that “her husband had been beating her all day and she could not take it any longer”); Goodman et al., *Strategies Index*, *supra* note 195, at 184 (listing the four legal strategies).

²⁰⁶ Nourse focuses on the failure of police to arrest J.T. for attempting to prevent the paramedics from rescuing Judy after her suicide attempt and shouting that they should let her die. Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 46 (2008) (“Norman’s best claim . . . is . . . that she suffered from an ongoing course of felony conduct to which the authorities not only did nothing when done in their presence (let her die), but acted in ways suggesting that *there was no violation of law*.”). Nourse argues that “the question is whether Norman can be analogized to one who, quite literally, has been remitted to a state of nature where the government has abandoned her to the government of her murderous husband, with no legal recourse.” *Id.*

J.T. interrupted her visit to get her back), and the mental health center (where she began efforts to have him committed, which halted when she believed his threat to kill her). She also sought help at the hospital—though she was unconscious when transported there, she talked with staff voluntarily when she woke up. Laverne also used some of the strategies from the index, including calling the police (a legal strategy) and obtaining a weapon (safety planning).²⁰⁷

In addition, Judy used two of the five “placating” strategies in the index: she tried to keep things quiet for him and did whatever he wanted to stop the violence. In the abstract, placating and resisting may seem contradictory. In fact, these are two of the strategies most frequently chosen by battered women and, at times, by the same woman in trying to deal with violence.²⁰⁸ A follow-up study found that direct resistance was the strategy most associated with the recurrence of abuse.²⁰⁹ Therefore, if Judy could not get away, she was probably wise not to fight back directly.

Evaluating resistance is a more complicated issue. Judy used either one or two resistance strategies in that twenty-four-hour period. The question is whether to classify suicide as resistance, and authorities differ on that point. Although suicide does not appear in the Strategies Index, some social scientists treat it as a form of resistance.²¹⁰ Captivity and impossibility of escape would seem to be the predicates for treating suicide as resistance, as in the historic example of captured Africans who refused to become slaves by jumping off slave ships,²¹¹ otherwise, suicide has a very different quality. Captivity and the possibility of escape are at the core of much of the debate on the *Norman* case. Judy definitely adopted a “resistance” strategy when she used a weapon against J.T.

She did not try to leave for the shelter. Separation is a resistance strategy that Judy had tried in the past without success, and for which J.T. had threatened death. (At trial, Dr. Tyson would summarize the failed efforts that

²⁰⁷ See Goodman et al., *Strategies Index*, *supra* note 195, at 183–84 (listing legal strategies and safety planning strategies).

²⁰⁸ *Id.* at 178.

²⁰⁹ Goodman et al., *Women's Resources and Use of Strategies*, *supra* note 56, at 328.

²¹⁰ Compare Goodman et al., *Strategies Index*, *supra* note 195, at 178 (omitting suicide from a list of resistance strategies), with Brittany E. Hayes, *Women's Resistance Strategies in Abusive Relationships: An Alternative Framework*, 3 SAGE Open, July–Sept. 2013, at 1, 4 (classifying suicide as a form of resistance) (citing Margaret Abraham, *Fighting Back: Abused South Asian Women's Strategies of Resistance*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 253 (Natalie J. Sokoloff & Christina Pratt eds., 2005)).

²¹¹ Telephone interview with Sherrilynn Bevel, Ph.D. (July 18, 2016). At the time of the interview, Dr. Bevel was a doctoral candidate in the Political Science Department at the University of Chicago. Her degree was conferred in December 2018, and currently she is the Director of Training and Special Projects, The Institute for the Study and Practice of Nonviolence, I am grateful to Sherri Bevel for this insight.

convinced her she could not try again.)²¹² If Judy could not have J.T. removed, she had to bring her family with her, but it is not clear whether she could have taken the household. Phyllis had a baby and a boyfriend, Phyllis and Mark could not stand up to J.T., and there was no hint that either had steady work on which to survive. Some shelters have age limits on male children,²¹³ and the record does not reveal whether the shelter would have accepted John Wayne Norman, the teenager who had come back to Judy only recently, or Mark Navarra, who was not related to Judy by blood or marriage. The threats against family members that Laverne found credible and J.T.'s interest in prostituting Phyllis would have kept Judy from leaving her family behind.

II. UNDERSTANDING THE EXPERTS

A. *Analytical Frameworks and Research on Intimate Partner Violence*

In the late 1970s, researchers developed more than one theory to explain dangerous and sometimes lethal patterns of violence by men against women. In books published in 1979 and 1984, psychologist Lenore Walker linked two of her theories in a pattern she called "Battered Woman Syndrome"²¹⁴: a "cycle of violence" that moved through stages of tension building, violent explosion, and remorseful loving behavior, which Walker had found in two-thirds of the battering relationships she studied; and her application of Martin Seligman's "learned helplessness" theory of depression to battered women who could not control or escape the violence against them.²¹⁵ (Later, Seligman found problems with this application of his theory and pointed out that passivity can be an appropriate instrumental response to danger.)²¹⁶

²¹² See Transcript, *supra* note 1, at 163 (testimony from Dr. Tyson explaining her effort to get help in Chicago in 1973); *infra* text accompanying notes 271–72 (summarizing Dr. Tyson's account of Judy's efforts to find help); *infra* text accompanying notes 331–38 (same).

²¹³ See *Escaping with Older Kids*, DOMESTICSHELTERS.ORG (Jan. 27, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/escaping-with-older-kids> ("Depending on how they're staffed, some shelters may only take male children under a certain age—usually the limit is somewhere between 12 and 18" (internal quotation marks omitted)).

²¹⁴ LENORE E. WALKER, *THE BATTERED WOMAN* 45–70 (1979); see generally LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984) (analyzing and discussing issues related to the battered woman syndrome and linking the "cycle of violence" and "learned helplessness" in her theory).

²¹⁵ WALKER, *THE BATTERED WOMAN*, *supra* note 214, at 45–70 (discussing and applying Seligman's theory).

²¹⁶ CHRISTOPHER PETERSON ET AL., *LEARNED HELPLESSNESS: A THEORY FOR THE AGE OF PERSONAL CONTROL* 239 (1993) (criticizing Walker's application of Seligman's learned helplessness theory to battered women, and noting tension in Walker's work between learned helplessness and the idea that battered women's fears are appropriate responses to real dangers, and pointing out that passivity can be instrumental).

Other approaches emerging in this period that went on to greater influence in social science included “survivor theory” and “coercive control.”²¹⁷

“Battered woman syndrome” became a term of art with distinct meanings in different fields.²¹⁸ In psychology, the term identifies Walker’s psychological theory. In legal contexts, the term “battered woman syndrome” is often generic—an umbrella term for expert evidence on intimate partner violence and its effects, whether the expert will or will not apply Walker’s theories.²¹⁹

Battered women’s self-defense cases do not always use expert testimony, but experts can be critically important.²²⁰ Although some states

²¹⁷ See LEE H. BOWKER, *BEATING WIFE BEATING* (1983) (studying women who solved the problem of violence without leaving the relationship, an approach that is part of survivor theory); R. EMERSON DOBASH & RUSSELL P. DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 15 (1979) (“We propose that the correct interpretation of violence between husbands and wives conceptualizes such violence as the extension of the domination and control of husbands over their wives.”); GONDOLF & FISHER, *supra* note 76, at 11 (naming and describing survivor theory); LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* 78–139 (1985) (including literature review and a chapter on coercive control).

²¹⁸ See Martha R. Mahoney, *Why Didn’t WE Leave? Confronting the Failure of Legal Scholars to Move On from a “Syndrome” Framework for Intimate Partner Violence* (unpublished manuscript) (on file with author) [hereinafter *Why Didn’t WE Leave?*], at 1 (defining “term of art” and explaining that “battered woman syndrome” became a term of art with different meanings in different fields); 11–14 describing analytical frameworks for expert knowledge on intimate partner violence, including Lenore Walker’s “Battered Woman Syndrome”; 15 (describing 1996 report from National Academy of Science that described “battered woman syndrome” in passing as a framework applied to testimony in legal cases); 17–20 (describing the development of “battered woman syndrome” as a “term of art” and explaining how legal research methods perpetuated that term as a description of expert evidence). Elizabeth Schneider explains that in law the phrase “battered woman syndrome” applies even more broadly to include additional phenomena, in contrast to its specific use in psychology (“[Walker originally used the term] as a clinical description of certain psychological effects that the trauma of battering produces in women. Paradoxically, “battered woman syndrome” is now used as a catch-all phrase by the media and in courtrooms to describe a great range of issues: a woman’s prior responses to violence and the context in which those responses occurred; the dynamics of the abusive relationship; a subcategory of post-traumatic stress disorder; or woman abuse as a larger social problem.”) ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 23–24 (2000).

²¹⁹ SCHNEIDER, *supra* note 218, at 23–24.

²²⁰ See, e.g., U.S. DEP’T OF JUSTICE & U.S. DEP’T OF HEALTH & HUMAN SERVS., *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT* vi–xiv (1996), <https://www.ncjrs.gov/pdffiles/batter.pdf> [hereinafter *VALIDITY AND USE OF EVIDENCE*] (summarizing findings from three reports assessing validity of expert evidence, its admissibility, the legal role of this evidence). For some of the earliest, path-breaking descriptions of considerations in using expert evidence in women’s self-defense cases, see generally *WOMEN’S SELF-DEFENSE CASES: THEORY AND PRACTICE* (ELIZABETH BOCHNAK, ed. 1981). See Susie Macpherson et al., *Expert Testimony*, in *WOMEN’S SELF-DEFENSE CASES*, *supra*, at 87–97 (discussing the risks and benefits of “expert testimony on the phenomenon of battering,” *id.* at 88, a variety of potential experts including mental health professionals and law experts who have worked with battered women, *id.* at 90–91, and describing two types of expert evidence—general testimony on domestic violence, its patterns, and its effects, *id.* at 93, and individual evidence with expert testimony, *id.* at 94–97). See also Betty Levinson, *Using Expert Testimony in the Grand Jury to Avoid a Homicide Indictment for a Battered Woman: Practical Considerations for Defense Counsel*, 9 *WOMEN’S RTS. L. REP.* 239, 242–44 (1986).

refer to evidence in general terms such as the effects of “intimate partner violence,” many use the term “Battered Woman Syndrome” to describe the subject of expert testimony.²²¹ Lenore Walker’s “syndrome” theories never defined or limited the theories other experts could apply. Experts provide general information on intimate partner violence and may provide clinical evaluations; law professors should not assume that clinical testimony on “learned helplessness” defines the field.²²² Some scholars who began within a “syndrome” framework came to emphasize help-seeking and social context by the 1990s.²²³ The persistence of “syndrome” terminology made Walker’s early framework seem more durable in law than in other fields.²²⁴

Ultimately, Walker’s theory has had more influence in law than it had in social science, but legal actors understood it differently than did social

²²¹ As of the mid-1990s, about half the states had statutes on admissibility that referred specifically to expert testimony on “battered woman syndrome” or “battered spouse syndrome.” VALIDITY AND USE OF EVIDENCE, *supra* note 220, at 16. The other half referred more generally to “the nature and effects of ‘domestic violence,’ ‘family violence,’ or ‘physical, sexual or psychological abuse’ on the beliefs, behavior and perceptions of the person being abused.” *Id.* The California statute originally referred to “Battered Woman Syndrome” evidence, but the legislature amended it, effective 2005, to refer to “Intimate partner battering and its effects.” S. 1386, 2003–2004 Leg., 2004 Sess. (Cal. 2004) (codified as amended at CAL. EVID. CODE § 1107 (West 2018)).

²²² For example, in *People v. Humphrey*, 921 P.2d 1 (Cal. 1996), Lee Bowker, a sociologist, was the expert admitted under the “battered woman syndrome” evidence statute. *Id.* at 3. Bowker was an expert on help-seeking; he had studied strategies women used to end violence in their relationships without leaving. *Id.* He emphasized the efforts battered women made and the constraints they faced. Battered women employed “strategies to stop the beatings, including hiding, running away, counter-violence, seeking the help of friends and family, going to a shelter, and contacting police.” *Id.* His discussion of remaining in a relationship emphasized social circumstances and constraints including “lack of money, social isolation, lack of self-confidence, inadequate police response, and a fear (often justified) of reprisals by the batterer.” *Id.*; cf. BOWKER, *supra* note 217, at 68–70 (listing several strategies that battered women employ to protect themselves from their abusers, most of which are non-violent). Expert testimony on battering and its effects (without dependence on syndrome terminology) had been admitted since the 1970s, often without judicial resistance. See WOMEN’S SELF-DEFENSE CASES., *supra* note 220, at 289–300 (providing chart of fifty of the first one-hundred cases coordinated by the Women’s Self-Defense Project).

²²³ See, e.g., MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 41–42 (1992) (naming formal and informal help-seeking strategies used by battered women to escape, avoid, and protect themselves against abuse); Mary Ann Douglas, *The Battered Woman Syndrome*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 39, 43 (Daniel Jay Sonkin ed., 1987) (“It is essential to remember that learned helplessness is often based on the realistic belief that it is not safe to engage in help-seeking behaviors.”); see also Kathleen J. Ferraro, *The Words Change, but the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN 110, 113 (2003) [hereinafter *Words Change but Melody Lingers*] (discussing active help-seeking strategies and how social constructs of femininity “define[] working women, lesbians, and women of color as ‘less feminine.’”).

²²⁴ See, e.g., Mary Ann Dutton et al., *Update of the “Battered Woman Syndrome” Critique* VAWNET 3 (2009), http://vawnet.org/sites/default/files/materials/files/2016-09/AR_BWSCritique.pdf (“It is in the legal (rather than clinical) arena that BWS continues to be most firmly embedded and to receive the most attention.”). See *infra* note 244 and accompanying text (discussing explanation by sociologist Kathleen Ferraro of changes in the field and the persistence of “syndrome” concepts).

scientists. Legal actors who treated “learned helplessness” as a literal term distorted Walker’s theory. That approach ignored both her repeated criticism of the idea that battered women were in fact helpless and her acknowledgment of both the genuine possibility of lethal danger and the *increased* danger of lethality at the time of separation.²²⁵

The belief that Walker meant *literal* helplessness led some legal scholars to assume that experts would describe a battered woman’s sense of entrapment as a belief that a reasonable person would not share, usually described as only a *subjective* belief. For example, Joshua Dressler supported the relevance of expert evidence to the defendant’s *subjective* belief but not to *reasonable* belief: “Although some subjectivization of the ‘reasonable person’ standard is appropriate . . . it is a contradiction in terms to describe the ‘reasonable person’ as one who suffers from emotional paralysis or whose fear causes her to misperceive reality.”²²⁶ To be fair, Walker’s work created some ambiguity on this point because she believed women could perceive options to escape more clearly when they overcame learned helplessness.²²⁷ Nonetheless, her rejection of absolute helplessness was clear and consistent.

As sociologists and psychologists studied coercive control, they examined the patterns and effectiveness of physical and nonphysical

²²⁵ See, e.g., LENORE E.A. WALKER, *THE BATTERED WOMAN SYNDROME* 42 (2d ed. 2000) [hereinafter BWS 2d 2000]. Walker stated that:

[T]he issue of the woman’s response to violent attacks . . . has been further clouded by the mythology that she behaves in a manner that is either extremely passive or mutually aggressive. Rather, . . . battered women develop survival or coping skills that keep them alive with minimal injuries.

Id. at 40. “Learned helplessness was confused with being helpless, and not its original intended meaning of *having lost the ability to predict that what you do will make a particular outcome occur.*” *Id.* at 116. Reflecting the better-known aspect of her theory, Walker stated in the same work that, “There is also some evidence that [survival or coping] skills are developed at the expense of escape skills.” *Id.* at 40.

²²⁶ See Dressler, *supra* note 10, at 269 (“Even if syndrome evidence is properly introduced to support a battered woman’s subjective belief that the sleeping abuser is an imminent threat to her life, there is no basis for claiming that such a belief is reasonable unless the ‘reasonable person’ is characterized as a ‘reasonable battered woman suffering from BWS.’”); see also Dressler, *supra* note 29, at 464 (“How can we say that a belief is reasonable when we are judging the reasonableness from the perspective of someone who, by definition, [because of Battered Woman Syndrome] is experiencing a set of symptoms that renders her state of mind abnormal?”); cf. Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 95–96 (1994) (treating learned helplessness as “a form of psychological impairment” and battered woman syndrome as a mental disorder or mental illness).

²²⁷ Walker makes similar statements about overcoming learned helplessness repeatedly. See, e.g., BWS 2d 2000, *supra* note 225, at 118 (“If a woman is to escape such a relationship, she must overcome the tendency to learned helplessness survival techniques She must learn to use escape skills compatible to the survival behaviors already adopted.”).

measures men used to entrap and control women.²²⁸ Batterers chose coercive methods based on intimate knowledge of their partners, using approaches that would cause the most humiliation or fear or that would best demonstrate the futility of resistance.²²⁹ Details of abusive behavior varied in different relationships because coercive control was an evolving experiment performed on a living target.²³⁰ Personal threats may have vastly different power over different women. For example, a threat to tell an employer that a woman had not completed the college degree on her resume might threaten job loss and inability to support a family for one person, but the same threat might be less important to someone in a job based more on performance than credentials.

In 1988, Edward Gondolf and Ellen Fisher proposed survivor theory as an alternative to learned helplessness.²³¹ From their own data and Lee Bowker's study of women who ended the violence without ending their relationships,²³² Gondolf and Fisher found that "the majority of women made extremely assertive efforts to stop the abuse."²³³ In 2008, sociologist Michael Johnson summarized these developments: "[S]urvivor theory has been the mainstream feminist analysis of battered women for at least twenty

²²⁸ See, e.g., DOBASH & DOBASH, *supra* note 217, at 15 (treating violence as "the extension of the domination and control of husbands over their wives"); OKUN, *supra* note 217, at 113–19 (comparing coercive control in Chinese communist thought control with woman abuse); R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 434 (1978) (emphasizing uses of violence by men to control wives and maintain hierarchy). See also STARK, *supra* note 50, at 113–14 (describing "entrapment enigma").

²²⁹ See STARK, *supra* note 50 at 206 (explaining the personal quality of coercive control).

²³⁰ See *id.* at 112–32 (detailing the different dimensions of coercive control).

²³¹ GONDOLF & FISHER, *supra* note 76, at 11. Goodman et al. summarize Walker's use of learned helplessness, criticism by scholars—including Walker—of the idea that battered women were passive in response to violence, and discuss the development of survivor theory:

Based on [Gondolf & Fisher's] survey of 6,612 victims of IPV [intimate partner violence] in Texas shelters and Bowker's . . . survey of 1,000 community women, [the survivor] theory held that battered women actually become increasingly active in their attempts to stop violence as it grew more frequent or severe. Not only were participants in these studies more likely to seek help as the violence worsened, but they also were also likely to seek a wider variety of forms of help. A number of other studies—both qualitative and quantitative—have since demonstrated support for the finding that IPV victims are tremendously active and persistent in their attempts to stop the violence.

Strategies Index, *supra* note 195, at 165–66 (internal citations omitted).

²³² See BOWKER, *supra* note 217, 63–73 (1983) (noting that women used a variety of informal strategies in their attempts to stop the abuse themselves, from within their relationships, with varying levels of success).

²³³ See *id.* 21–29 (describing the statistical demographics and testimonials of the couples involved in the study); GONDOLF & FISHER, *supra* note 76, at 28–37 (detailing analytical models of help-seeking).

years. Feminists long ago debunked the idea that battered women were helpless victims.”²³⁴

Survivor theory “now dominates our understanding of the reactions of women to intimate terrorism. The core idea is that battered women respond to severe abuse with innovative coping strategies and active help-seeking.”²³⁵ Survivor theory was consistent with coercive control, but not with Lenore Walker’s “syndrome.”²³⁶ Gondolf and Fisher did not find learned helplessness in battered women; rather, they said that *professionals*—such as social workers—developed learned helplessness because their efforts to help battered women were frustrated by the extraordinary obstacles the women faced.²³⁷ Scholars also began to identify different types of domestic violence—for example, distinguishing “common couple violence” or “situational couple violence” from coercive control, intimate terrorism, or “patriarchal terrorism.”²³⁸

In a 1993 law review article, psychologist Mary Ann Dutton criticized problems with “syndrome” terminology and adopted the term “battered women’s experiences” to describe the subject of expert evidence.²³⁹ Dutton rejected Walker’s treatment of “Battered Woman Syndrome” as a subset of Post-Traumatic Stress Disorder (PTSD),²⁴⁰ pointing out that battered women’s reactions to abuse either might not be explained by PTSD or might

²³⁴ MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 133 (2008) [hereinafter *TYPOLGY OF DOMESTIC VIOLENCE*].

²³⁵ *Id.* at 49 (footnote omitted).

²³⁶ *See id.* at 133 (offering an analysis of mandatory arrest and prosecution policies as support).

²³⁷ GONDOLF & FISHER, *supra* note 76, at 22–23.

²³⁸ *See* MICHAEL S. DAVIS ET AL., NEW YORK LEGAL ASSISTANCE GROUP, CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS 16 (2010) (discussing typologies proposed by Johnson); *TYPOLGY OF DOMESTIC VIOLENCE*, *supra* note 234, at 6–7 (describing typologies of violence); Evan Stark, *Coercive Control*, in *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 166, 170 (Nicky Ali Jackson ed., 2007) (discussing Johnson’s typology and Stark’s distinction between ordinary “fights” and “partner assaults” where violence “was used to hurt or control a partner rather than to resolve a conflict”); Claire Dalton et al., *High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions*, 54 JUV. & FAM. CT. J. 11, 14 (2003) (distinguishing “conflict-initiated” and “control-initiated” violence); *Strategies Index*, *supra* note 195, at 181 (“[I]ncreasing evidence points to the need to distinguish between what Johnson called ‘patriarchal terrorism’ (ongoing violence in the context of coercion and control) and ‘common couple violence’ (discrete acts of violence that exist outside a context of coercion and control).” (citation omitted)).

²³⁹ Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1196 (1993) [hereinafter *Understanding Women’s Responses: A Redefinition*]. As of May 2019, a Westlaw search showed that this article had been cited 160 times in law reviews and journals.

²⁴⁰ *See, e.g.*, Lenore E. Walker, *Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome*, 28 PSYCHOTHERAPY 21, 21 (1991) (“Post-Traumatic Stress Disorder (PTSD) comes closest to describing battered woman syndrome, the group of psychological symptoms often observed after a woman has repeatedly experienced physical, sexual and/or serious psychological abuse.” (citation omitted)).

not meet the specific criteria for PTSD.²⁴¹ Emphasizing the variety of women's responses to violence, Dutton reframed expert analysis through four questions:

- (1) The cumulative history of violence and abuse experienced by the victim in the relationship at issue, including, where relevant, the nature and extent of violence or abuse in a specific episode;
- (2) The psychological reactions of the battered woman to the batterer's violence;
- (3) The strategies used (or not used) by the battered woman in response to prior violence and abuse, and the consequences of (or the expectations that arise from) those strategies; and
- (4) The contextual factors that influenced both the battered woman's strategies for responding to prior violence, and her psychological reactions to that violence.²⁴²

A 1996 report to Congress mandated by the Violence Against Women Act (VAWA) recommended the terms "battering and its effects" or "battered women's experiences" and criticized the term "battered woman syndrome" for its susceptibility to misunderstanding and stereotyping.²⁴³ Some forensic experts already used the recommended approach; others adopted it.²⁴⁴

²⁴¹ See *Understanding Women's Responses: A Redefinition*, *supra* note 239, at 1198–1200 (comparing battered women's reactions with specified PTSD criteria). A woman's psychological response may not meet PTSD criteria for one or more reasons: (1) Her reactions are not considered "clinical" phenomena, and thus do not appear within diagnostic nomenclature; (2) her reactions are either more circumscribed than the full spectrum PTSD diagnosis or are not characteristic of PTSD *per se*; and/or (3) her reactions are indicative of an even more complex clinical picture than that suggested by PTSD. *Id.*

²⁴² *Id.* at 1202 (footnote omitted).

²⁴³ See VALIDITY AND USE OF EVIDENCE, *supra* note 220, at xii–xiii (summarizing the benefits of using the terms "battering and its effects" or "battered women's experiences"). The working group for the report included representatives from agencies and organizations including the Office of Policy Development, the Office of Justice Programs, the National Institute of Justice, the Bureau of Justice Statistics of the Department of Justice; the National Institute of Mental Health, the Administration for Children and Families, and the Office of the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services, as well as the National Association of Women Judges. *Id.* at v.

²⁴⁴ See, e.g., KATHLEEN J. FERRARO, NEITHER ANGELS NOR DEMONS: WOMEN, CRIME, AND VICTIMIZATION 166 (2006) [hereinafter NEITHER ANGELS NOR DEMONS] ("The use of expert testimony on the effects of battering in criminal trials has changed since it was first introduced in the early 1980s." (footnote omitted)); *Words Change but Melody Lingers*, *supra* note 223, at 111 (describing Ferraro as a sociologist with extensive experience as an expert at trial beginning in 1983 and having conducted training on the effects of battering for law enforcement officers, attorneys, and other groups). Ferraro described her own experience with changing knowledge and terminology: "Although I originally used the language of syndrome . . . in accordance with the literature of the time, since 1995 I have described my testimony and expertise as being about 'the effects of battering,' as suggested in the literature and by

After the mid-1990s, research on violence against women increased exponentially. VAWA poured tens of millions of dollars into research, allowed pilot programs, and required evaluations of the pilots.²⁴⁵ The ensuing expansion in knowledge did not rest on the terminology of “syndrome” or “helplessness.” Some cases and codes did not use syndrome terminology, and some courts and some legal scholars began to recognize the change.²⁴⁶

By 2005, Dutton and other psychologists had produced a model of coercive control that illustrated the patterns and dynamics that linked

the National Clearinghouse for the Defense of Battered Women.” *Id.* (footnote omitted). Ferraro attributes the persistence of syndrome terminology and framework to its consistency “with dominant paradigms for viewing violence against women as individualistic pathology.” *Id.* at 110.

Also, in 1996, a report by the National Academies of Science did not mention “learned helplessness.” See generally PANEL ON RESEARCH ON VIOLENCE AGAINST WOMEN ET AL., UNDERSTANDING VIOLENCE AGAINST WOMEN v–vi (Nancy A. Crowell & Ann W. Burgess eds., 1996) (explaining the background of the report). “Battered woman syndrome” appeared only fleetingly as a term used in some legal cases that was not a “recognized psychiatric syndrome.” *Id.* at 84.

²⁴⁵ See, e.g., Carol E. Jordan, *Advancing the Study of Violence Against Women: Evolving Research Agendas Into Science*, 15 VIOLENCE AGAINST WOMEN 393, 398 (2009) (“An examination of the annual reports issued by [the National Institute of Justice] reveals that between 1995 and 2005, more than \$50 million was awarded in [violence against women]-related research grants.”) (citations omitted)).

²⁴⁶ For judicial recognition of rejection of the “syndrome” framework, see, e.g., *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996). The *Humphrey* court used the term “battered woman syndrome” only because the Evidence Code section and cases considered in the opinion used that term. *Id.*

We note . . . that according to amici curiae California Alliance Against Domestic Violence et al., “. . . the preferred term among many experts today is ‘expert testimony on battering and its effects’ or ‘expert testimony on battered woman’s experiences.’ Domestic violence experts have critiqued the phrase ‘battered woman’s syndrome’ because (1) it implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than women’s psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer’s coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.”

Id. (quoting Brief for California Alliance Against Domestic Violence et al. as Amici Curiae Supporting Appellant, *People v. Humphrey*, 921 P.2d 1 (Cal. 1996) (No. S045985)). After *Humphrey*, the California legislature changed the statutory terminology to “battering and its effects” in 2001 and then to “intimate partner battering and its effects” in 2004. S. 1386, 2003–2004 Leg., 2004 Sess. (Cal. 2004) (codified as amended at CAL. EVID. CODE § 1107 (West 2018)).

For other examples of courts and commentators recognizing the changed framework in the 1990s, see *Weiland v. State*, 732 So. 2d 1044, 1048 n.3 (Fla. 1999) (noting that amicus curiae criticized use of the term “battered woman’s syndrome” but continued to use the term because Lenore Walker had used it at trial); Diane R. Follingstad, *Battered Woman Syndrome in the Courts*, in 11 HANDBOOK OF PSYCHOLOGY 485, 485–486 (Alan M. Goldstein & Irving B. Weiner eds., 2003) (criticizing the syndrome framework); Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1314–17 (1993) (explaining revisions to syndrome framework); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 976–82 (detailing the changes to the legal response to partner violence).

controlling behavior with intimate partner violence.²⁴⁷ This is an example of expert analysis that does not apply a “syndrome” formula or predict any particular response by the woman. Rather, experts organize common phenomena into cognizable and well-established patterns in battering.

If learned helplessness had in fact been the cornerstone of expert evidence, then these changes in terminology and the recognition of a variety of responses to violence might have undermined its effectiveness in court—but research and experience showed that was not the case. The earliest litigation on battered women’s self-defense often used expert testimony on battering that was admitted without reliance on “syndrome” terminology.²⁴⁸ In 1996, a study of three alternative trial strategies—the Walker approach, the Dutton approach, and no expert at all—found that experts helped jurors reach more lenient conclusions, but excluding the terms “battered woman syndrome,” PTSD, and “learned helplessness” did not change the way jurors utilized the testimony.²⁴⁹

The use of expert knowledge in law raised questions of evidence and substantive law.²⁵⁰ To the extent that some work in criminal law theory relied heavily on Walker’s syndrome or “learned helplessness” as predicates for analysis of battering and legal testimony, the shift in framework challenged that analysis and its relevance in scholarly debates. But even as psychologists and sociologists discarded the term “syndrome” with its prescriptive implications, criminal law theorists embarked on a new round of extensive debates in which “syndrome” terminology and its implications had profound importance.²⁵¹ Law professors used a research style created for work with judicial precedent. When they saw the words “battered woman syndrome” and read judicial summaries of Walker’s work in the early cases, they looked back at Walker’s definitions and treated those early theories as predictors of what experts on intimate partner violence would say—largely

²⁴⁷ Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 746 (2005) (illustrating coercive control); see *infra* Appendix (same); see also MARY ANN DUTTON ET AL., DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE, FINAL TECHNICAL REPORT 4 (2005), <http://www.ncjrs.gov/pdffiles1/nij/grants/214438.pdf> (same).

²⁴⁸ See discussion of expert testimony, Macpherson et al., *supra* note 220, at 87–104 (discussing expert testimony at length without referring to a “syndrome.”).

²⁴⁹ Regina A. Schuller & Patricia A. Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 L. & HUM. BEHAV. 167, 168 n.3, 171, 182–83 (1996); see also NEITHER ANGELS NOR DEMONS, *supra* note 244, at 166–68 (describing the effects of various types of expert witness testimony); *Words Change but Melody Lingers*, *supra* note 223, at 111 (describing experience of a forensic expert).

²⁵⁰ For a magisterial analysis of the law of self-defense including comprehensive discussion of evidence issues, see Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 409–31 (1991).

²⁵¹ See *infra* Section III.B (describing ways in which legal scholars misunderstood and misapplied the concept of “battered woman syndrome”).

ignoring the cases, articles, books, and reports that had moved past the syndrome framework.²⁵²

In addition to misunderstanding theories applied in expert testimony, legal scholars often over-simplified Walker's theories. Some authors confused the psychological theory of learned helplessness with literal helplessness.²⁵³ Learned helplessness had several definitions, but none of them meant the woman had "learned to be helpless."²⁵⁴ Even though virtually all courts admitted expert evidence as relevant to reasonableness, several scholars treated that testimony as if it must concern only abnormal psychology and, therefore, could be relevant only to a defendant's "subjective" state of mind.²⁵⁵

²⁵² For examples of statutes, articles, and reports applying other theories or criticizing "syndrome" theory, see *supra* notes 221–65, 239–88 and accompanying text. See also SCHNEIDER, *supra* note 218, at 23 ("The use of the term 'battered woman syndrome' has intensified the general confusion about domestic violence and battered women, and has increased the likelihood that the law will be misapplied to battered women when they seek protection in the courts or appear as defendants."); VALIDITY AND USE OF EVIDENCE, *supra* note 220, at i–ii ("Among the most notable findings was the strong consensus . . . that the term 'battered woman syndrome' does not adequately reflect the breadth or nature of the scientific knowledge now available concerning battering and its effects."); Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and Its Effects*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 226 (Donileen R. Loseke et al. eds., 2d ed. 2005) ("Unfortunately, it did not take long for some scholars and practitioners to mischaracterize this BWS testimony . . ."); Marina Angel, *The Myth of Battered Woman Syndrome*, 24 TEMP. POL. & C.R. L. REV. 301, 302 (2015) (noting that a "bad result" of Walker's invention of the term "Battered Woman's Syndrome" is "that the term 'syndrome' is associated with mental illness, which created the perception that battered women are mentally defective"); Angel, *supra* note 10, at 65 ("Discredited theories that label abused women who kill their abusers as suffering from insanity, a syndrome, or learned-helplessness, must be rejected."); Holly Maguigan, *It's Time to Move Beyond "Battered Woman Syndrome"*, 17 CRIM. JUST. ETHICS 50, 50 (1998) (reviewing DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW) (explaining the challenge of explaining "the impact of intimate partner violence without appearing to pathologize battered women and deny their reason and capacity"; noting that for some years before her 1998 essay, many experts had "offered instead testimony described more generally as relating to "battering and its effects" because Walker's "cycle of violence" and "learned helplessness" fail to "capture the full experience of battered women, and it risks subjecting them to stereotypes which deny their great diversity and which portray them as helpless and incapacitated.").

²⁵³ See SCHNEIDER, *supra* note 218, at 80 ("Lawyers . . . have primarily focused on the passive, victimized aspects of battered women's experiences—their 'learned helplessness' . . .").

²⁵⁴ Cf. Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 470 ("Thus, we would test the abused woman . . . against the standard of reasonable firmness, not one who has learned to be helpless."); see Dutton, *supra* note 239, at 1197 ("Originally, battered woman syndrome was defined as the psychological sequelae to domestic violence. The definition emphasized 'learned helplessness,' a theory originally developed to explain why some animals fail to protect themselves in certain situations. The theory was reformulated in terms of human depression, and was eventually applied to victimization." (footnotes omitted)).

²⁵⁵ See *infra* Part III ("Stereotypical ideas about expert evidence persisted."); see also Nourse, *supra* note 22, at 1279 ("Jurisdictions flirted with or adopted 'reasonable woman' standards; indeed, a majority have, by legislative fiat if not judicial decision, permitted the admission of expert syndrome testimony based on the defendant's 'subjective state,' known as battered woman syndrome." (footnotes omitted)).

Among professors, jurors, and the public, one of the sticking points in understanding battered women's experiences is the conflict between each person's own perceived autonomy and the impact of violence and control that Evan Stark calls the "entrapment enigma."²⁵⁶ Many people find it difficult to imagine how anyone can force another person to do something against their will—especially when they do not see forcible constraints on kidnap victims or visible chains holding a prisoner.²⁵⁷ Research on coercive control addressed that question by studying nonphysical methods of control and their interaction with intimate partner violence.²⁵⁸ Common threads in expert testimony include the interaction of help-seeking and constraint with the circumstances that create a lack of options, controlling tactics and strategies of survival and resistance, and the reasons why well-established patterns of abuse and control are effective.²⁵⁹

B. *What Experts Really Said at Trial: Dr. William Tyson (Forensic Reconstruction and Coercive Control) and Dr. Robert Rollins (Psychiatric Evaluation and Competency)*

"It worked in Korea and it worked in J. T. Norman's home."²⁶⁰

Judge Gardner appointed forensic psychologist Dr. William Tyson as an expert.²⁶¹ Court-appointed experts do not represent either side.²⁶² Either party can depose these experts, either party or the court can call them; either party—including the party that called the witness—can cross-examine them; their compensation comes from funds provided in criminal cases.²⁶³ Dr. Tyson retained an investigator and made an exhaustive independent

²⁵⁶ See STARK, *supra* note 50, at 113–14 ("And yet, the same question, 'Why doesn't she leave him?' or its obverse, 'Why does she stay?' continues to gnaw at the moorings of the domestic violence revolution. . . . This chapter deals with the entrapment enigma: why women who are no different from any of us to start, who are statistically normal become ensconced in relationships where ongoing violence is virtually inevitable, and are prone to develop a unique problem profile when they do so.").

²⁵⁷ *Id.* at 113.

²⁵⁸ See, e.g., *infra* Appendix (containing Dutton and Goodman's *Model of Coercion in Intimate Partner Violence*).

²⁵⁹ See NEITHER ANGELS NOR DEMONS, *supra* note 244, at 167 (listing "many factors" that "influence women's perceptions of their safety and alternatives in a violent relationship").

²⁶⁰ Transcript, *supra* note 1, at 165 (emphasis added) (testimony of Dr. William Tyson).

²⁶¹ *Id.* at 107, 155 (statement by Mr. Robert W. Wolf and testimony of Dr. William Tyson).

²⁶² See N.C. GEN. STAT. § 8C-1, Rule 706(a) (2018) ("The court may appoint any expert witnesses agreed upon by the parties" (emphasis added)).

²⁶³ See *id.* at Rule 706(a)–(b) ("The court may appoint any expert witnesses agreed upon by the parties A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness The compensation thus fixed is payable from funds which may be provided by law in criminal cases").

investigation of the facts so that he could base his analysis on empirical findings rather than the memory or opinion of any one person.²⁶⁴

His testimony applied a coercive control framework. He emphasized the importance of degradation and humiliation as strategies to break the spirit of a human being and make that person more vulnerable to abuse.²⁶⁵ Through coercive control, Tyson linked the details of humiliation, such as forcing Judy to eat from pet dishes and bark like a dog, with the physical violence.²⁶⁶

Dr. Tyson compared Judy's experience to the experience of prisoners of war. Invoking the reactions of soldiers to violence and degradation, the military model is generally male or at least not distinctively female. Unlike Walker's "learned helplessness," Tyson's approach did not emphasize unique feminine vulnerability or compare human beings to Seligman's lab animals:

It was part of the process that whenever you want to brainwash somebody, dehumanize them, degrade them, bring them completely under your power and remove whatever humanity they have; those are the kinds of things that you do. It's consistent with the kind of behavior that was observed in prisoner of war camps during the Second World War as practiced by the Nazis; it's consistent with the type of behavior, deprivation of information; deprivation of normal human functioning that was consistent in the brainwashing techniques of the Korean War. Anything that will reduce and degrade an individual's concept of themselves as human and

²⁶⁴ Transcript, *supra* note 1, at 156–58 (testimony of Dr. William Tyson). Dr. Tyson defined "empirical facts" as those determined to be reliable, with agreement that they had happened, and not dependent on the memory or impressions of any one witness. *Id.* at 158. He interviewed Judy Norman and Laverne Laws twice, first in a meeting partially attended by her lawyers and then after he had obtained all the materials. *Id.* at 156–57. He obtained background materials and information on sources from her lawyers. *Id.* at 156. He got records on the Norman family from the Rutherford County Department of Social Services. *Id.* He obtained Dr. Rollins's forensic report from Dorothea Dix Hospital and reanalyzed and interpreted the raw test data. *Id.* He obtained records from Judy's hospitalization at the Chicago-Reid Mental Health Center from July 21 through July 23, 1973, and records from the Illinois Department of Mental Health and Disabilities. *Id.* at 156–57. He retained an investigator, and together they obtained interviews and/or records for both Judy and J.T. from several agencies: the Rutherford-Polk Area Mental Health Program; the Prevention of Child Abuse in the Home, Inc.; the PATH Program of Forest City; Rutherford County Emergency Medical Services; Rutherford County Sheriff's Department employees who had contact with Judy as responders; investigative officers; jailers; employees of the county Emergency Medical Services who had contact with Judy or J.T. around the time of his death; and employees of PATH who had contact with Judy or family members around that time. *Id.* at 157–58.

²⁶⁵ *Id.* at 161–65 (testimony of Dr. William Tyson).

²⁶⁶ *Id.* at 164.

make them totally dependent on the oppressor. *It worked in Korea and it worked in J. T. Norman's home.*²⁶⁷

Dr. Tyson linked Judy's belief that death was inevitable to the fear that if she left the children behind, the violent abuse would transfer to them.²⁶⁸ The prosecutor argued that the defense could not ask Dr. Tyson whether Judy reasonably believed it was necessary to shoot her husband because the defendant could not have been defending herself from someone who was asleep.²⁶⁹ Because the standard for self-defense was not whether there was actual danger, but whether it reasonably appeared to the defendant that danger existed, the judge allowed the question.²⁷⁰ Dr. Tyson's answer addressed both Judy's actual belief and the rational factors supporting that belief:

Yes [I]n examining the facts of this case and examining the psychological data . . . Mrs. Norman believed herself to be doomed . . . to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable I believe she also came to the point of beginning to fear for family members and her children, that were she to commit suicide that the abuse and the treatment that was heaped on her would be transferred onto them. There is evidence that Mr. Norman had begun to make threats

. . . .

The answer very simply is, yes, I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family.²⁷¹

Dr. Tyson gave further support to the reasonableness of Judy's belief when he summarized the evidence from his independent review of the record:

Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. There was no place to go

²⁶⁷ *Id.* at 164–65 (emphasis added); see also *State v. Norman (Norman II)*, 378 S.E.2d 8, 17–18 (N.C. 1989) (Martin, J., dissenting) (discussing portions of this part of Dr. Tyson's testimony); *State v. Norman (Norman I)*, 366 S.E.2d 586, 589 (N.C. Ct. App. 1988) (same).

²⁶⁸ Transcript, *supra* note 1, at 170.

²⁶⁹ *Id.* at 168.

²⁷⁰ *Id.* at 166–69.

²⁷¹ *Id.* at 170–71; see also *Norman II*, 378 S.E.2d at 11 (discussing the same quotation from Dr. Tyson's testimony); *Norman I*, 366 S.E.2d at 589 (same).

.... [S]he had left before; he had come and gotten her She had gone to the Department of Social Services. He had come and gotten her. The law, she believed the law could not protect her; no one could protect her, and *I must admit, looking over the records, that there was nothing done that would contradict that belief*. She fully believed that he was invulnerable to the law and to all social agencies that were available; that nobody could withstand his power. As a result, there was no such thing as escape.²⁷²

Dr. Tyson's evaluation followed a full investigation. His review validated Judy's perception that help was not available and the law could not protect her. But over the years that followed, only the dissent and one law review article quoted the statement that the record did not contradict her.²⁷³

The lawyers asked both experts whether Judy fit the "profile" of an abused spouse, and both agreed that she did.²⁷⁴ Dr. Tyson said she "fit[] and exceed[ed] the profile."²⁷⁵ He described different types and levels of battering in terms notably different from the central focus on psychological "learned helplessness" in Walker's "syndrome."²⁷⁶ His description was closer to, though not identical with, the typology of intimate partner violence that sociologist Michael Johnson would develop ten to twenty years later.²⁷⁷ Dr. Tyson distinguished terroristic abuse and degradation (the pattern that Johnson calls "intimate terrorism") from ongoing marital violence (similar to Johnson's situational couple violence).²⁷⁸

²⁷² Transcript, *supra* note 1, at 163 (emphasis added); see also *Norman II*, 378 S.E.2d at 17 (Martin, J., dissenting) (discussing the same quotation from Dr. Tyson's testimony); *Norman I*, 366 S.E.2d at 589 (same).

²⁷³ *Norman II*, 378 S.E.2d at 17 (Martin, J., dissenting); Mahoney, *supra* note 10, at 92.

²⁷⁴ See Transcript, *supra* note 1, at 159, 175–76 (concluding Judy Norman fit the profile of an abused spouse); *Norman II*, 378 S.E.2d at 11 (majority opinion) (same); *Norman I*, 366 S.E.2d at 589 (same).

²⁷⁵ Transcript, *supra* note 1, at 159; *Norman II*, 378 S.E.2d at 17 (Martin, J., dissenting); *Norman I*, 366 S.E.2d at 589.

²⁷⁶ Compare Transcript, *supra* note 1, at 159–61, with THE BATTERED WOMAN SYNDROME, *supra* note 225, at 118 (discussing learned helplessness as the resultant depression and helplessness of a period of violence that diminishes a "woman's motivation to respond.").

²⁷⁷ See TYPOLOGY OF DOMESTIC VIOLENCE, *supra* note 234, at 5 (identifying four types of domestic violence that "constitute a typology of individual violence that is rooted in information about the couple and defined by the control context within which the violence is embedded . . .").

²⁷⁸ *Id.* at 5–12. For Tyson, the "simplest" level of violence involved occasional fights without severe violence; the "second stage" involved sustained fighting and violence, a prolonged vendetta "punctuated by the wife getting slapped or in some cases, the husband; or beaten [] in some way that ends that current round of the fight." Transcript, *supra* note 1, at 159–60. Implicitly, this analysis emphasizes some control (ending the argument by violence), but does not include terrorism and lethality. Both of these stages have some similarity to Michael Johnson's common couple violence. See TYPOLOGY OF DOMESTIC VIOLENCE, *supra* note 234, at 11–12, 115 ("What makes it situational couple violence is that it is rooted in the events of a particular situation rather than in a relationshipwide [sic] attempt to control.").

Dr. Tyson testified that J.T.'s abuse had characteristics different from ordinary abuse. The abuse of Judy Norman had progressed "far beyond what would be called '[w]ife battering or family violence,' and into a realm which could be only considered as torture, degradation and reduction to an animal level of existence, where all behavior was marked purely by survival"²⁷⁹ Dr. Tyson distinguished J.T.'s violence from "disagreements or fighting between a husband and wife" and described "a deliberate, studied, and effective attempt to completely subordinate another human being[,] humiliating them and degrading them to the point where they became less than human."²⁸⁰ For Tyson, Judy's belief that escape was impossible was her conclusion after previous efforts.

Dr. Robert Rollins, clinical director of the forensic unit at the state mental hospital, did use the term "syndrome" in testimony.²⁸¹ Rollins had evaluated Judy's competency to stand trial and administered several psychiatric tests, but he had not hired an investigator or reviewed the evidence.²⁸² He testified that Judy fit the profile of an abused spouse.²⁸³ He diagnosed her with "marital problems" followed by "abused spouse syndrome" in parentheses.²⁸⁴ To Rollins, the "syndrome" involved a situation in which one spouse achieved control over the other through "both psychological and physical domination."²⁸⁵ He emphasized individual psychological vulnerability to abuse saying that abused women usually lacked "a strong sense of their own adequacy . . . [or] a lot of personal or occupational resources."²⁸⁶ In contrast, Walker had addressed the impact of abuse on women with professional careers and resources.²⁸⁷ He came closer to Walker in describing the effects of a long period of physical abuse emphasizing control and the belief in the inability to escape.²⁸⁸

²⁷⁹ Transcript, *supra* note 1, at 160–61. See also *Norman I*, 366 S.E.2d at 589 (quoting substantial portions of Dr. Tyson's testimony).

²⁸⁰ Transcript, *supra* note 1, at 161.

²⁸¹ *Id.* at 176.

²⁸² See *id.* at 172–74 (discussing Dr. Rollins's credentials); *id.* at 175 (explaining psychiatric evaluation and testing).

²⁸³ *Id.* at 175–76.

²⁸⁴ See *id.* at 174–78 (discussing abused spouse syndrome and "marital problems" diagnosis); *State v. Norman (Norman II)*, 378 S.E.2d 8, 11 (N.C. 1989) (discussing Dr. Rollins' testimony); *Norman I*, 366 S.E.2d at 589 (same).

²⁸⁵ Transcript, *supra* note 1, at 177.

²⁸⁶ *Id.*; *Norman I*, 366 S.E.2d at 589.

²⁸⁷ See *THE BATTERED WOMAN*, *supra* note 214, at 21–23 (discussing the myths that middle-class, well educated women are abused less frequently than poorer, less educated women); *BWS 2d 2000*, *supra* note 225, at 7–8 (discussing the impact that abuse has on women and the factors that make it difficult for them to leave).

²⁸⁸ "[T]he abused spouse comes to believe that the other person is in complete control; that they themselves are worthless and they cannot get away; that there's no rescue from the other person." Transcript, *supra* note 1, at 177; *Norman I*, 366 S.E.2d at 589.

Rollins left open a question that the terminology of “syndrome” and “learned helplessness” sometimes muddled: Would a reasonable person in these circumstances form the same set of beliefs? He said “Mrs. Norman had the ability to make decisions, and understand herself to the extent of the average person.”²⁸⁹ When Judy’s lawyer asked whether she reasonably believed it was necessary to use deadly force, Rollins replied that Judy believed it was necessary.²⁹⁰ Much of his testimony tended to support Judy’s perceptions, but he did not discuss Judy’s efforts to escape or her lack of options.

Regarding Tyson’s coercive control approach, some readers may question his analogy between prisoner of war camps in Korea²⁹¹ and a small house in Spindale, North Carolina. They may not see the Norman home as duplicating the conditions of captivity in a prison camp. Lenore Walker tried to address that gap when she treated “learned helplessness” as an answer to the question of why a woman had not left a violent relationship.²⁹² But her approach makes an implicit concession to the false premise underlying that question—the idea that leaving had been possible and that it would have brought safety.²⁹³ Tyson did not share Walker’s approach to this question. On the issue of entrapment, Dr. Tyson emphasized Judy’s escape attempts, the reasons for the failure of those attempts, her concern about danger for the children, and her lack of material resources. He could find no possibilities that Judy had overlooked.²⁹⁴

Judges and scholars who read meekness and paralysis into this story misunderstand both “learned helplessness” and Dr. Tyson’s testimony. To Martin Seligman, who coined the term, and in much of Lenore Walker’s work, “learned helplessness” meant giving up low-probability strategies that

²⁸⁹ Transcript, *supra* note 1, at 181. Dr. Rollins had also used the term “syndrome” in a portion of his report that did not reach the jury. See *id.* at 185–87 (including a query by Judge Gardner, a conference with Judy Norman, and the defense decision not to introduce it).

²⁹⁰ *Id.* at 178; State v. Norman (*Norman II*), 378 S.E.2d 8, 12 (N.C. 1989); *id.* at 18 (Martin, J., dissenting); *Norman I*, 366 S.E.2d at 589. In addition, the judge and attorneys used the phrase “battered spouse syndrome” a few times outside the presence of the jury in general reference to evidence on the effects of battering—for example, in a discussion of the admissibility of the history of violence by Judy Norman’s father against Judy’s mother. Transcript, *supra* note 1, at 148–50. This context fits the common legal usage of “battered woman syndrome” as a term referring generally to use of expert testimony in battering cases. See *supra* notes 218–19 and accompanying text (“In legal contexts, the term ‘battered woman syndrome’ is often generic, an umbrella term for expert evidence on intimate partner violence and its effects . . .”).

²⁹¹ Transcript, *supra* note 1, at 164 (containing Dr. Tyson’s testimony that compared the dehumanization process that J.T. inflicted on Judy to Nazi deprivation tactics and the brainwashing techniques utilized during the Korean War).

²⁹² THE BATTERED WOMAN, *supra* note 214, at 43 (introducing Learned Helplessness as a social-learning theory that helps to describe why women stay in violent relationships).

²⁹³ See *Why Didn’t WE Leave?*, *supra* note 218, at 22–25 (explaining that “why didn’t she leave?” is a classic example of a “loaded question” or complex fallacy).

²⁹⁴ See *supra* note 272 and accompanying text (quoting testimony of Dr. Tyson).

failed and choosing high-probability strategies.²⁹⁵ Walker stated that women took that approach because they had lost the ability to predict successful outcomes for low-probability strategies.²⁹⁶ Seligman notes that people may appear to be passive while they plan the next attempt at a solution.²⁹⁷

But the very term “helplessness” is misleading. Consider a military commander confronted by an overwhelming enemy force. There are no reinforcements that can reach him. In a direct battle, victory would be impossible. Scholars would not describe the decision to retreat or reorganize into a guerrilla-style force as “learned helplessness.” We would recognize this as common sense and tactics.

When the experts said Judy had come to believe she could not get away, and the law would not help her, they described her assessment of the situation. That assessment did not, in itself, imply incorrect or impaired perception. Dr. Tyson’s statement that he saw nothing in the record to contradict her provided direct support for the rationality of her perception.²⁹⁸

After Judy’s conviction, the defense brought Dr. Tyson back at sentencing. He described Judy’s diagnosis as “Post-Traumatic Stress Disorder-Chronic Type.”³⁰⁰ Tyson described PTSD as symptoms that follow a psychologically traumatic event that is generally outside the range of normal human experience.²⁹⁹ Judy’s PTSD was “chronic-type” because the

²⁹⁵ See PETERSON ET AL., *supra* note 216, at 8 (describing how helplessness studies measure a person’s passivity versus activity in certain situations and whether they take certain actions with varying probability of success); see also Lenore E.A. Walker, *Psychology and Violence Against Women*, 44 *American Psychologist* 695, 698 (1989) (comparing her findings regarding battered women to Martin Seligman’s studies and stating that battered women “increasingly choose actions that have the highest probability of success in minimizing pain and enhancing survival rather than taking a chance that they might be hurt more seriously or killed if they tried to escape.”).

²⁹⁶ See Walker, *supra* note 240, at 24–25 (citing Seligman and Walker’s earlier works explaining that learned helplessness does not mean that a woman is helpless; it means that because she cannot predict successful outcomes for low-level probability behaviors, she will only resort to behaviors that have a high probability of success); Lenore E. A. Walker, *The Battered Woman Syndrome is a Psychological Consequence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 133–35 (Richard J. Gelles & Donileen R. Loseke eds. 1993). Walker acknowledges that “the name Seligman gave to his theory is unfortunately confusing” *Id.* She says the term “does not mean they learn to behave in a helpless way Even if learned helplessness were another way of labeling the [“Battered Woman Syndrome,”] which it is not, the process does not suggest the alleged helplessness or inherent weakness of battered women.” *Id.* at 135.

²⁹⁷ See PETERSON ET AL., *supra* note 216, at 239 (criticizing the application of learned helplessness theory to battered women and pointing out that passivity can be instrumental). This framework seems to concede something to the *appearance* of passivity and behaviors that the Strategies Index would classify as placating—a less “passive” term. Goodman et al., *Strategies Index*, *supra* note 195, at 169.

²⁹⁸ Transcript, *supra* note 1, at 163.

³⁰⁰ *Id.* at 235.

²⁹⁹ *Id.*

symptoms had “been in existence for more than six months following the initiation of the stresses.”³⁰⁰

The term “helplessness” does not appear until sentencing, where it is not used as a term of art, but rather grouped with anxiety and depression.³⁰¹ Dr. Tyson testified that Judy could be rehabilitated and overcome the aftermath of abuse: “her anxiety and depression could be relieved; . . . her feelings of helplessness and despair and uselessness and worthlessness that have been, just to be frank, beaten into her over the last twenty years”³⁰² He suggested vocational training, working, getting a GED, volunteering, and “doing what normal members of the community do to contribute to society; something she’s been deprived of doing.”³⁰³

Almost immediately, judges and scholars retelling Tyson’s testimony changed its emphasis and coverage.³⁰⁴ Most noticed only the statements about Judy’s sincere beliefs, not the support for those beliefs that emerged from his independent investigation and review of the record. The retold story framed false dichotomies between entrapment and the struggle for self-preservation, between help-seeking and the experience of frustration and despair. This version of the story would frame legal scholarship for decades, and law school classrooms would structure discussion of *Norman* and imminence around stereotypes of “battered woman syndrome.” Part III.D analyzes the process through which testimony on coercive control turned into Walker’s “syndrome” in the opinions.

C. *Judy Norman Through Differing Forensic Lenses*

Despite differences in emphasis and overarching frameworks among various experts and theories, common threads emerge in expert testimony, which is “usually much more comprehensive” than many critics suggest: most experts “testify both about the social and practical experiences of battered women, and about the psychological impact of being battered.”³⁰⁵ Even in the early cases describing expert testimony on “battered woman syndrome,” “expert testimony rarely focused solely on the psychological consequences of being battered. . . . Rather, . . . [it] included discussion of

³⁰⁰ *Id.* at 235–36. The prosecutor asked Dr. Tyson whether his diagnosis differed from that of Dr. Rollins, who recorded a diagnosis of “marital problems” followed by “abused spouse syndrome.” *Id.* at 182. Tyson said that Rollins’s diagnosis was more “conservative,” that Tyson had more facts on which to base his diagnosis, and that the doctors had discussed and agreed on the issue. *Id.* at 239–40.

³⁰¹ In the text of the transcript, the only other use of “helpless” appears in the mental health counselor’s definition of depression. *See id.* at 92–93 (describing Mrs. Norman’s state of depression as feeling “hopeless” and “helpless”).

³⁰² *Id.* at 238.

³⁰³ *Id.*

³⁰⁴ *See* legal scholarship addressed *infra* Part III (detailing assumptions and errors of scholars on Battered Woman Syndrome).

³⁰⁵ Osthoff & Maguigan, *supra* note 252, at 231.

the practical realities of having an abusive partner and what is today called testimony about battering and its effects.”³⁰⁶ This Section applies two distinct frameworks to the *Norman* case to illustrate similarities, differences, and the relative susceptibility to misunderstanding.

1. “Battered Woman Syndrome”—Lenore Walker

If Lenore Walker had testified at Judy Norman’s trial, she would—like other experts—have provided general information on domestic violence, the social and practical experiences of battered women, and the psychological impact of battering. In self-defense cases, that information would be relevant both to whether the defendant *actually believed* a threat was imminent, and to whether a *reasonable* person would have shared that perception.³⁰⁷ The balance of social context and psychological factors in her testimony varied, though law professors generally noted only her psychological theories.

The comparison of two other judicial opinions that summarized Walker’s testimony shows the various threads in her work.³⁰⁸ One example included *both* social context (emphasizing actual danger and obstacles to leaving) *and* psychological reactions to violence (framed largely within the “syndrome” and “learned helplessness”):³⁰⁹

Terminating the relationship usually has adverse economic consequences. Separating from a battering partner may be very dangerous, and the battered woman is aware of the danger. The batterer may have threatened to kill the battered woman or to abscond with the children if she leaves. Many battered women have tried to leave and been unsuccessful. In a battering relationship, the woman loses self-esteem, is terrified, and does not have the psychological energy to leave, resulting in “learned helplessness” and “a kind of psychological paralysis.” . . . “Learned helplessness” is another aspect of BWS. The battered woman often does not know why she is beaten on any particular occasion. The

³⁰⁶ *Id.*

³⁰⁷ See *People v. Aris*, 264 Cal. Rptr. 167, 172 (Cal. Ct. App. 1989) (“[S]elf-defense may be analyzed as having two requirements: (1) the defendant’s acts causing the victim’s death were motivated by an actual (also referred to as ‘genuine’ or ‘honest’) belief or perception that (a) the defendant was in imminent danger of death or great bodily injury from an unlawful attack or threat by the victim and (b) the defendant’s acts were necessary to prevent the injury; and (2) a reasonable person in the same circumstances would have had the same perception and done the same acts.”), *overruled by* *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

³⁰⁸ See *id.* at 177–78 (describing Dr. Walker’s expert testimony); *Weiland v. State*, 732 So. 2d 1044, 1048 (Fla. 1999) (discussing the analysis Dr. Walker gave in the field of Battered Woman Syndrome), *superseded by statute*, Chapter 2005-27, 2005 Fla. Laws 199 (codified as amended at FLA. STAT. §§ 776.012–013, 031–032 (2018)).

³⁰⁹ See *Aris*, 264 Cal. Rptr. at 178 (discussing the dangers of leaving and the psychological reactions in Battered Woman Syndrome).

violence is perceived by the woman as “random and aversive stimulation.” Because of its randomness, she believes she is incapable of doing anything to prevent the abuse and, as a result, feels helpless.³¹⁰

In the other case, the judicial summary of Walker’s testimony did not emphasize “learned helplessness” even though Walker had testified at trial. That opinion listed four reasons that Walker identified to explain why that defendant did not retreat from a confrontation—only *one* of which was psychological: “[S]he felt that she was unable to leave because she had just given birth seven weeks earlier; she had been choked unconscious; she was paralyzed with terror; and experience had taught her that threats of leaving only made her husband more violent.”³¹¹

In general, Walker’s testimony emphasized the “cycle of violence” and “learned helplessness” theories that formed the lens through which she interpreted a defendant’s actions and perceptions.³¹² In *Norman*, there was no evidence of a cycle of tension building, violence, and remorseful romance. The absence of that cycle would have posed no problems for Walker’s theory, however, because she never claimed that the cycle would be found in all abusive relationships.³¹³

Walker treated the “syndrome” as a subcategory of PTSD.³¹⁴ She believed the advantage of a PTSD diagnosis was its emphasis on traumatic stress rather than on unique violence among intimate partners. To Walker, PTSD implied the possibility of healing after violence ended; she believed that diagnosis would help avoid stereotypes about battered women.³¹⁵ Walker acknowledged that some battered women did not have symptoms of PTSD,³¹⁶ but she would have agreed with Dr. Tyson’s testimony at sentencing about PTSD in *Norman* and of course with Dr. Rollins’s addition of battered spouse syndrome to the diagnosis of marital problems.

³¹⁰ *Id.* In *Aris*, the appellate court found Walker’s testimony relevant only to Aris’s actual belief, not to reasonableness. *Id.* at 179–80. The California Supreme Court soon overruled *Aris*, explicitly recognizing relevance to reasonableness. *People v. Humphrey*, 921 P.2d 1, 10 (Cal. 1996).

³¹¹ See *Weiland*, 732 So. 2d at 1048 (summarizing from Walker’s expert testimony at trial). The Florida Supreme Court recognized that battered women face danger when separation from violent relationships and did not discuss learned helplessness. *Id.* at 1052–55.

³¹² See *Aris*, 264 Cal. Rptr. at 178 (discussing the theory of “learned helplessness” and how victims of domestic violence perceive violent situations).

³¹³ See BWS 2d 2000, *supra* note 225, at 127–28 (“In 65% of all cases . . . there was evidence of a tension-building phase prior to the battering. In 58% of all cases there was evidence of loving contrition afterward.”).

³¹⁴ *Id.* at 117.

³¹⁵ See *id.* at 104 (explaining that individuals with PTSD may “respond to therapy” when they are in a safe environment).

³¹⁶ See *id.* at 28–29 (indicating that PTSD “frequently develops after direct experience of trauma,” suggesting that it is not *always* present after trauma).

Most law professors missed a crucial aspect of Walker's theory: in describing psychological reactions to the inability to stop violence, Walker was *not concerned with the accuracy or reasonableness* of the woman's perceptions that she could not escape or stop the attacks.³¹⁷ When law professors assumed that "learned helplessness" meant an unusual inability to see solutions, they misconstrued her point about psychological responses: Walker applied the term even when a woman's perceptions were accurate *and would have been shared by anyone in her position*. Walker herself contributed to these misunderstandings: she usually stated clearly that "learned helplessness" did not mean a woman was literally helpless, but at times her testimony conveyed passivity or dysfunction.³¹⁸

Walker recognized that help-seeking increased as violence increased, which could have allowed her framework to describe Judy Norman's urgent help-seeking as "learned helplessness." The *Norman* case evinced no absence of help-seeking. Walker would also have explained that battered women develop keen insight into the circumstances and cues that predict violence, that they understand when situations become more dangerous and that often they have no realistic options.³¹⁹

If Walker had testified in *Norman*, her evidence would have been more complex than the usual treatment in law reviews, but her terminology and approach would have remained susceptible to oversimplification. The jurors might have taken "learned helplessness" literally (as the appellate courts did later): that term might have displaced the detailed explanation of the defeat of Judy's help-seeking that Walker would also have provided. When courts and commentators formed that misunderstanding of the term, they transformed defeated help-seeking and brutally-coerced submission into imagined descriptions of passivity or impairment in battered women.³²⁰

2. *Intimate Partner Violence and Its Effects – Mary Ann Dutton and Others*

Mary Ann Dutton focuses on the variety and complexity of responses that women have to violence and on the context within which violence takes place and women seek solutions.³²¹ Her work, like that of many experts,

³¹⁷ Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 528–32 (1978).

³¹⁸ See, e.g., *United States v. Gordon*, 638 F. Supp. 1120, 1138 (W.D. La. 1986) ("Dr. Walker testified that this learned helplessness theory explains why women stay in an abusive relationship. She described this learned helplessness as 'a woman's loss of her voluntary will.' These women 'go into a survival mode to learn to cope They can do that quite well but they can't really escape.' " (citations omitted)).

³¹⁹ See BWS 2d 2000, *supra* note 225, at 116–25 (discussing learned helplessness in battered women).

³²⁰ See *infra* Part III.B (providing examples of scholarly discussion of helplessness or passivity).

³²¹ See Dutton, *supra* note 239, at 1215–26 (discussing the various psychological responses women have to domestic violence, as supported by academic literature).

began in the 1980s within the framework of “battered woman syndrome.”³²² Dutton became one of the leading scholars who transformed the dialogue by the early 1990s.³²³

Dutton goes beyond approaches that focus on victim characteristics such as trauma history and reactivity to explain the variety of women’s responses to violence. Dutton emphasizes the importance of cognitive threat appraisal, which involves, firstly, the level of risk or threat posed by the abuser but also includes potentially additional factors that can contribute to threat appraisal, such as her exposure to the abuser’s violence over time and her physical and emotional state.³²⁴ “The reality of continuing risk—sometimes for years following termination of the relationship—makes the phenomenon of [Intimate Partner Violence] vastly different . . . from stranger rape, combat, and most other forms of interpersonal violence.”³²⁵

For many law professors, the concept of expert testimony has been so completely defined by Lenore Walker’s theory and particularly by “learned helplessness” that it is not easy to envision expert testimony that would take a different approach. In the Appendix to this Article, the *Model of Coercion in Intimate Partner Violence*³²⁶ provides a sophisticated illustration of threats and actions as well as the impact of those threats and actions and responses to them. The expert can explain these dynamics and apply them to the particular case.

Applying Dutton’s framework, the expert would provide information on intimate partner abuse and its context and address the history of violence and abuse in this relationship and the woman’s psychological responses to

³²² See, e.g., Douglas (later Dutton-Douglas or Dutton), *The Battered Woman Syndrome*, *supra* note 223, at 39–53 (applying battered woman syndrome terminology and discussing battered woman syndrome); Ferraro, *supra* note 223, at 111 (“Although I originally used the language of syndrome in my own testimony in accordance with the literature of the time, since 1995 I have described my testimony and expertise as being about ‘the effects of battering,’ as suggested in the literature and by the National Clearinghouse for the Defense of Battered Women.”).

³²³ For examples of representative leading scholarship of the period, see Ferraro, *supra* note 223, at 110 (describing persistence of the term “battered woman syndrome” among judges and attorneys “[d]espite the clarity of arguments rejecting the use of the term [] in favor of testimony describing the full range of social, institutional, relational, and psychological impacts of battering” and describing legal actors as relying on “a mythical stereotype that constricts perceptions of what ‘real’ battered women look like”), 111 (explaining change in terminology of expert witness); Follingstad, *supra* note 246 (discussing battered woman syndrome in the courts and the major legal issues in the use of battered woman syndrome); Osthoff & Maguigan, *supra* note 252 (reviewing developments in social science and the law and discussing the current use of social science testimony in battered women’s homicide trials); Dutton, *supra* note 239, at 1196 (“Referring simply to testimony concerning battered women’s experiences, rather than to ‘battered woman syndrome,’ more accurately captures the range of information typically covered in expert testimony.”).

³²⁴ Mary Ann Dutton, *Complexity of Women’s Response to Violence: Response to Briere and Jordan*, 19 J. INTERPERSONAL VIOLENCE 1277, 1278–80 (2004).

³²⁵ *Id.* at 1277.

³²⁶ See Dutton & Goodman, *supra* note 247, at 746 fig.1 (providing schemata illustrating the dynamics of coercive control in intimate partner violence); see *infra* Appendix (same).

abuse.³²⁷ The expert would also describe the strategies with which women respond to abuse and the strategies this woman used (or did not use). Strategies have consequences—the expert would explain the effects, successes, and failures of the woman’s strategies; the expectations she formed as a result; and the contextual factors that affected the woman’s choice of strategies in response to violence and her psychological reactions to that violence.³²⁸ In Judy Norman’s case, expert explanation would help jurors understand both the strategies Judy adopted and the reasons that she did not pursue others.

For Dutton, PTSD illustrates the methodological problem when experts rely only on the effects of past violence. She points out that a flashback from prior violence caused by PTSD “might explain why a particular woman (unrealistically, but understandably) perceives her partner’s behavior as threatening . . . ; however, it provides little clarity in explaining why she might perceive realistic danger from an intimate partner.”³²⁹ Dutton’s approach would apply clinical forensic analysis to each issue separately, including the danger of leaving children with the abusive partner.³³⁰ The assessment of the level of risk—risk of death, looming certainty of trafficking worse than she had ever known—was a core issue in Judy Norman’s trial.

At trial, Dr. Tyson’s testimony addressed many of the issues that Dutton’s work later brought together.³³¹ He described J.T.’s violence against Judy and the extreme degradation and dehumanization that accompanied that violence.³³² He summarized the strategies Judy had adopted and the outcome of those strategies.³³³ He emphasized contextual factors, including her desire to protect the children, the threats and violence that had forced her to return whenever she tried to leave, her conviction from past experiences that outright defiance of J.T. would bring worse violence or death, and the failures that convinced her “the law could not protect her.”³³⁴ Dr. Tyson also testified about her psychological responses when help-seeking failed. He

³²⁷ See Dutton, *supra* note 239, at 1193–1203 (offering a framework for examining, in the context of the legal system, the diversity of women’s responses to violence; criticizing and redefining battered woman syndrome).

³²⁸ See *id.* at 1202 (explaining that these four components allow the expert witness “to within the overall social context, the various legal issues to be considered by the factfinder”); 1226–31 (reviewing the academic literature and discussing the array of strategies that battered women use in attempting to stop the violence).

³²⁹ Dutton, *supra* note 324, at 1278.

³³⁰ *Id.* at 1279.

³³¹ Compare testimony of Dr. Tyson, *supra* notes 264–80 and accompanying text (quoting and summarizing Dr. Tyson’s testimony), with the questions formulated by Dr. Dutton, *supra* note 242 and accompanying text (quoting and discussing the four questions posed by Dr. Dutton).

³³² Transcript, *supra* note 1, at 164.

³³³ *Id.* at 171.

³³⁴ *Id.* at 163.

said that she could find no way to escape worsening torture and degradation and he explained that she shot J.T. in an attempt to save herself and her family.³³⁵

That account contains no formula like the cycle of violence. It does not imply inaccuracy or distortion in Judy's judgment—Dr. Tyson's testimony supported her perceptions. Feeling unable to escape was not learned helplessness in that she had not stopped trying—even on that last morning, Judy was still trying to find help. Her continuing inability to find help was part of her appraisal of her risk.

A well-founded belief cannot be reduced to the psychological response that it may elicit. Focusing solely on psychological responses—and misunderstanding those responses—leads law professors to lose track of what experts actually say in these cases. Confusion about the content of expert testimony leads in turn to bad policy recommendations by scholars, explored further in Parts III and IV below.

These self-defense cases need experts because the questions are difficult. Most jurors do not know enough about intimate partner violence to formulate Dutton's queries or answer them without expert help. Expert analysis could help jurors who struggle to understand the woman's experience and evaluate her credibility. Experts may also help avoid the impediments created by myths and stereotypes while jurors evaluate the woman's story, the sincerity of her belief in the need to use deadly force, and the reasonableness of that belief.

D. *After Conviction: The Appellate Path from Coercive Control to "Battered Woman Syndrome"*

1. *Post-Conviction—Dignity, Personhood, and Community at Sentencing and in Petitioning for Clemency*

Judge Gardner denied the self-defense instruction,³³⁶ but his instruction on manslaughter clarified that provocation could include terror as well as rage.³³⁷ The jury convicted Judy of manslaughter.³³⁸ At sentencing, the defense emphasized her good character and other factors in arguing for mitigation.³³⁹

³³⁵ See *supra* notes 265–280 (summarizing testimony of Dr. Tyson; his emphasis on degradation, dehumanization, and the defeat of Judy's help-seeking efforts; and Judy's belief that she had to use deadly force to defend herself and her family).

³³⁶ Transcript, *supra* note 1, at 224.

³³⁷ *Id.* at 218–19; see also Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1685–86 (1986) (discussing terror and provocation).

³³⁸ Transcript, *supra* note 1, at 226.

³³⁹ Her landlord, neighbor, and work supervisor spoke to her good character. *Id.* at 229–34. Judy's attorney also emphasized that she had cooperated with law enforcement after the shooting and

Attorney Robert Wolf argued for rehabilitation, rebutting justifications for criminal punishment. He emphasized that Judy posed no danger to the public because the person who threatened her was gone and she had no record of serious criminal acts (no need for incapacitation). Because of the violence to which Judy had been subjected, she had already been punished (no need for retribution).³⁴⁰ Furthermore, the community did not think that Judy deserved punishment; people agreed that she should go home (no support for retribution or deterrence). "Everyone is sympathetic to her, [and] empathizes with what she went through."³⁴¹ In support of rehabilitation, Wolf focused on her character as a mother and an employee with a good chance of promotion to supervisor, and on her willingness to undertake programs such as the GED.³⁴²

In conclusion, he spoke about Judy's dignity and personhood.³⁴³ Some legal scholars assume that arguments for battered women emphasize passivity and victimhood.³⁴⁴ In contrast, Wolf's argument emphasized economic and social disadvantage:

So the final thing you have to look at is whether or not she can be rehabilitated, and I would submit to Your Honor, that she can. This lady has never had a break. She wasn't born into the high station in life that some of the rest of us have been privileged to have. She has only an eighth-grade education. She was married at fifteen. She's got four children. She hasn't had the kind of breaks that allow you to move up socially, economically, whatever. But, this is a lady that Bob Harris and I both have come to realize has a lot going for her. She's got dignity. She is a kind compassionate lady. She's got a sense of humor. And, it's been a privilege for us to represent her, and I hope we've done a good job, but I'm afraid maybe we didn't do enough. But, I honestly submit to Your Honor, that she does not deserve nor need to go to prison. And, rehabilitation would be the most appropriate thing.³⁴⁵

acknowledged her actions, acted under duress or compulsion (even if insufficient to constitute a complete defense), and acted under strong provocation. *Id.* at 243. He urged the court to consider Dr. Tyson's diagnosis of PTSD as a severe "mental/physical condition." *Id.* at 243; *see also id.* at 237–38 (testimony of Dr. Tyson).

³⁴⁰ *Id.* at 243–45.

³⁴¹ *Id.* at 244.

³⁴² *Id.*

³⁴³ *Id.* at 245–46.

³⁴⁴ *See, e.g.,* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 67 (1994) (arguing that a "battered woman syndrome defense" "transforms the woman into a pet or thing that is brutally misused by its owner").

³⁴⁵ Transcript, *supra* note 1, at 245–46; *see also id.* at 244 ("[Y]ou could take your . . . robe and walk through this courthouse and walk down any main street in this county, and no one in this community

After the North Carolina Supreme Court reinstated Judy's conviction,³⁴⁶ her attorneys turned to the community for support and executive clemency for relief. Wolf and Harris distributed petitions for clemency in accessible locations around Rutherford County, including convenience stores and gas stations.³⁴⁷ The community responded, and the attorneys collected several thousand signatures.³⁴⁸ Wolf and Harris submitted those petitions, with the case record and additional files, in the petition for clemency.³⁴⁹ Two months after Judy went to prison, "Governor James T. Martin commuted her sentence to time already served."³⁵⁰

In the world of justice, executive clemency is not law but relief from law.³⁵¹ Clemency for Judy Norman came shortly before some other governors began systematic clemency reviews for battered women.³⁵² The extraordinary support from her attorneys and the community must have been critically important. Clemency is not a "safety valve" on which battered women can depend.³⁵³ Legal debates focused on *Norman* because the case illustrated continuing issues of inequality and injustice in self-defense law.

2. *Intimate Partner Violence—"Syndrome" Emerges in the Opinions*

The appellate court held that sleep should not make self-defense unavailable "as a matter of law."³⁵⁴ The opinion by Judge (later Chief

is calling for you to, the Court, to put this lady in prison. Everyone is sympathetic to her, empathizes with what she went through.").

³⁴⁶ State v. Norman (*Norman II*), 378 S.E.2d 8, 9 (N.C. 1989).

³⁴⁷ E-mail from Robert W. Wolf, Attorney for Judy Norman, to author (July 4, 2016, 11:16 AM) (on file with author).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Rosen, *supra* note 30, at 391 n.56 (citing Mark Barrett, *Norman Set Free*, ASHEVILLE CITIZEN-TIMES, July 8, 1989, at 1).

³⁵¹ See *id.* at 391 (describing executive clemency as a "safety valve" to correct injustice which arises from application of the law).

³⁵² See, e.g., Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 10 (1994) (describing Ohio clemencies); Virginia Ellis, *Two Women Given Clemency in Killings: Prison: Wilson Considers Battered Spouse Syndrome as Mitigating Factor*, L.A. TIMES (May 29, 1993), http://articles.latimes.com/print/1993-05-29/news/mn-41281_1_battered-spouse-syndrome (describing California clemencies); Al Schoch, *Clemency Granted for Battered Woman*, UNITED PRESS INT'L (Mar. 10, 1993), <https://www.upi.com/Archives/1993/03/10/Clemency-granted-for-battered-woman/9255731739600/> (describing Florida clemencies).

³⁵³ See Carol Jacobsen & Lynn D'Orio, *Defending Survivors: Case Studies of the Michigan Women's Justice & Clemency Project*, 18 U. PA. J.L. & SOC. CHANGE 1, 4 (2015) ("[T]he notion that clemency functions properly as a safety valve for justice creates the erroneous impression that those who do not receive relief deserve their punishment while legitimating the current oppressive criminal legal system." (footnote omitted)); Rosen, *supra* note 30, at 391 (discussing clemency and concluding that focusing on necessity over imminence in domestic violence cases will help battered women more than executive clemency).

³⁵⁴ State v. Norman (*Norman I*), 366 S.E.2d 586, 590 (N.C. Ct. App. 1988) ("The State contends that since decedent was asleep at the time of the shooting, defendant's belief in the necessity to kill

Justice) Parker set forth the facts in detail, including Judy's efforts to get help, the lethal threats from J.T. that stymied her efforts, and the ongoing threat to her life.³⁵⁵ A jury could find "that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself."³⁵⁶ Taken together, the 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."³⁵⁷

The appellate opinion alternated between an approach based on a reasonable person in Judy's circumstances and an approach based on characteristics of "battered spouse syndrome," which the court defined by "cycles of violence," paralysis under attack, and "learned helplessness."³⁵⁸ Toward reasonableness: "[T]he record is replete with sufficient evidence to permit but not compel a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself."³⁵⁹ In evaluating the reasonableness of Judy's fear of death or serious injury, the opinion considered J.T.'s rage, the evidence that his battering on June 12th was constant and more violent than usual, her previous efforts to get away, her fear that the beatings would resume, and her belief that he would carry out the threat to kill her if she swore out a warrant.³⁶⁰ "The inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim."³⁶¹

Intertwined with that discussion of circumstances, lethal threat, and crisis, the appellate court also treated "battered spouse syndrome" as a crucial element in its own right. The opinion cited Walker's "cycle of violence" to explain a battered woman's inability to fight back during "the

decedent was, as a matter of law, unreasonable."). The court explained further that "a jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense." *Id.* at 592.

³⁵⁵ *Id.* at 587-89.

³⁵⁶ *Id.* at 592.

³⁵⁷ *Id.*

³⁵⁸ See *id.* at 591 (citing Loraine Patricia Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 927 (1981); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 38-39 (1986)) ("Through this repeated, sometimes constant, abuse, the battered spouse acquires what the psychologists denote as a state of 'learned helplessness,' defendant's state of mind as described by Drs. Tyson and Rollins.").

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 588, 591.

³⁶¹ *Id.* at 591. In addition, the court commented that the "existence of battered spouse syndrome . . . distinguishes this case from the usual situation" *Id.*

violent phase, the time when the traditional concept of self-defense would mandate that defendant protect herself, *i.e.*, at the moment the abusing spouse attacks” and said that in this violent phase the battered spouse is “immobilized by fear, if not actually physically restrained.”³⁶²

The conclusion wavered again between the circumstances generating reasonable fear and “syndrome” phenomena. The penultimate paragraphs treated “the realities of the condition” as the reason not to wait until the beginning of an actual deadly attack.³⁶³ In conclusion, the court returned again to the reasonable person in Judy’s circumstances, emphasizing the “reign of terror” and the idea that deadly force “reasonably appeared necessary.”³⁶⁴ That final review of her circumstances and danger did not depend on whether Judy had a “condition.”³⁶⁵

The dual reasoning of the appellate opinion showed the pathologizing effect of Walker’s approach. The court did not make the mistake of treating the “syndrome” as a separate defense; it concluded that the jury should weigh syndrome testimony “merely as some evidence to be considered along with all other evidence in making its determination whether there is a reasonable doubt as to the unlawfulness of defendant’s conduct.”³⁶⁶ But the appellate opinion created the linkage to Walker’s framework that became the basis for part of the majority opinion and for much of the commentary, even though the case had been litigated as coercive control.

Justice Mitchell’s majority opinion in the state supreme court said the appellate court had relied on evidence of worsening violence, “learned helplessness,” and “meekness” in battered women.³⁶⁷ (The appellate court had not used the term “meekness.”) The majority saw the core of the appellate reasoning as dependent on the admission of “syndrome”

³⁶² *Id.*; see also THE BATTERED WOMAN, *supra* note 214, at 55–70 (introducing Walker’s theory of the cycle of violence and explaining why a woman could perceive it as futile to resist her attacker during the violent phase of the cycle). This move toward Walker’s theory relied on opinions from other jurisdictions and law review notes and articles citing Walker, as well as on Walker’s own work. See *State v. Norman (Norman I)*, 366 S.E.2d at 591–92 (first citing Eber, *supra* note 358, at 927; then citing Rosen, *supra* note 358, at 38–39; and then citing *State v. Leidholm*, 334 N.W.2d 811, 821 (N.D. 1983)) (applying a subjective standard to the beliefs of a defendant in a self-defense situation, rather than “[what] a jury might determine to be objectively reasonable”).

³⁶³ *Id.* at 592 (“Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore *the realities of the condition*.” (emphasis added)).

³⁶⁴ *Id.* at 592.

³⁶⁵ See *id.* (instructing the jury to consider the condition only as a portion of the evidence).

³⁶⁶ *Id.*

³⁶⁷ *State v. Norman (Norman II)*, 378 S.E.2d 8, 15 (N.C. 1989). The appellate court had not used the term “meekness.” See generally *Norman I*, 366 S.E.2d 586.

testimony.³⁶⁸ This opinion summarized the testimony of Doctors Tyson and Rollins in relation to “battered wife syndrome,” a “condition” characterized by “such abuse and degradation that the battered wife comes to believe she is unable to help herself and cannot expect help from anyone else. She believes that she cannot escape the complete control of her husband and that he is invulnerable to law enforcement and other sources of help.”³⁶⁹ The opinion *did quote* testimony that Judy believed escape was impossible and law would not protect her but *did not quote* the testimony on coercive control.³⁷⁰

The justices saw no evidence that Judy had “any belief . . .—reasonable or otherwise—that she faced a threat of imminent death or great bodily harm from the drunk and sleeping victim.”³⁷¹ The opinion was emphatic: the phrase “reasonable or otherwise” appears three times on that page in addition to another statement that there was no evidence of any “*imminent* threat nor of any fear by the defendant of death or great bodily harm, imminent or otherwise.”³⁷² The majority ignored the aspects of the expert testimony that supported the reasonableness of Judy’s belief.

By linking her perception to the “syndrome,” the opinion implied a distinction from reasonable perception.³⁷³ The majority considered a “battered woman’s defense” as a separate strategy that “could be extended in principle to *any type of case* in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat.”³⁷⁴ This approach treats reasonableness and “syndrome” testimony as if they were in tension with each other and appears to treat Judy Norman’s perceptions as relevant only under a “subjective” standard. However, the admission of expert testimony could not change the requirements of imminent threat and reasonableness in self-defense, even if Dr. Tyson had actually testified about Walker’s “battered woman syndrome” and “learned helplessness.” The court erred in treating these ideas as a change in self-defense.³⁷⁵

³⁶⁸ *Norman II*, 378 S.E.2d at 9 (referencing the appellate opinion’s statement that “the defendant’s evidence that she exhibited what has come to be called ‘the battered wife syndrome’ entitled her to have the jury consider whether the homicide was an act of perfect self-defense and, thus, not a legal wrong”).

³⁶⁹ *Id.* at 11.

³⁷⁰ *Id.* at 17.

³⁷¹ *Id.* at 14.

³⁷² *Id.*

³⁷³ *Id.* (“We are not persuaded by the reasoning . . . that when there is evidence of battered wife syndrome, neither an actual attack nor threat of attack by the husband at the moment the wife uses deadly force is required to justify the wife’s killing of him in perfect self-defense.”).

³⁷⁴ *Id.* at 16 (citing Rosen, *supra* note 405, at 44).

³⁷⁵ See *id.* (declining to “expand” the “law of self-defense beyond the limits of immediacy and necessity”). Feminists have not advocated for the creation of a separate defense. See, e.g., Maguigan, *supra* note 250, at 426–27 (“By the offer of battered-woman-syndrome expert testimony, a defendant does not assert her entitlement to a completely new defense. Rather, she asserts her right to explain to

Although the majority recognized that J.T. was “angrier than ever” and his abuse had become more frequent, they found no qualitative shift, no lethal threat, and no possibility of mortal danger in his escalation.³⁷⁶ They found predictions of lethal force against Judy “entirely speculative” because J.T. had never “inflicted any harm . . . that approached life-threatening injury, even during the ‘reign of terror.’”³⁷⁷ The discussion of previous life-threatening injury probably responded to the fact that the judges saw no imminent threat. However, relying on *past violence* makes it difficult to address questions important in many battered women’s self-defense cases—the *increasing credibility of lethal* threats and the need to respond to *changes in behavior* from prior abuse.

As to the timing of threat and death, the majority stated that J.T. had been asleep for “some time” when Judy got the gun.³⁷⁸ If taken literally, that statement must be accurate, because “some time” could mean anything from two minutes to twenty hours. But Judy’s testimony shows that the time was actually very brief.³⁷⁹ Preoccupation with the appellate discussion of “syndrome” theory and psychological response may have discouraged the majority from grappling with the contrast between the idea that Judy had “ample time and opportunity to resort to other means of preventing abuse”³⁸⁰ and the opposing view of the people around Judy who did not see a way for her to escape or find help.

Inability to see threat interacted with reliance on the “syndrome.” The failure to see *any* imminent threat supported the idea that the appellate court had intended to justify a taking of a human life on a “purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat.”³⁸¹ The majority saw a parade of horrors in these relaxed requirements that could categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives’ testimony

the jury the effects of intimate violence and the relationship of its effects to her self-defense claim under existing self-defense law.” (footnotes omitted)); *id.* at 427 n.169 (“No state has adopted a separate defense based solely on the admission of expert testimony.”); Brief for California Alliance Against Domestic Violence et al. as Amici Curiae at 4 n.3, *People v. Humphrey*, 921 P.2d 1 (Cal. 1996) (stating that in 1993, the California Senate considered a bill that would have created a special self-defense law for battered women, and the California Alliance Against Domestic Violence opposed that legislation).

³⁷⁶ *Id.* at 10.

³⁷⁷ *Id.* at 15. Richard Rosen criticized this holding in light of North Carolina precedent. *See* Rosen, *supra* note 30, at 374 n.5 (“It is hard to take this contention seriously, since Mr. Norman, among his other actions, actually threatened to kill his wife. In any event, . . . the amount of bodily harm Mr. Norman actually inflicted on his wife, as well as that threatened, easily meets [the standard for use of deadly force in self-defense] under prevailing North Carolina law.” (citation omitted)).

³⁷⁸ *Norman II*, 378 S.E.2d at 13.

³⁷⁹ *See supra* text accompanying note 186 (Judy Norman’s testimony).

³⁸⁰ *Norman II*, 378 S.E.2d at 13.

³⁸¹ *Id.* at 15.

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."³⁸² The majority concluded: "[W]e decline to expand our law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified and, thus, lawful by reason of perfect self-defense."³⁸³

Despite the discussion of "reasonable perception" in the appellate court, *both* the appellate and majority opinions linked expert testimony with Walker's syndrome and struggled with its relationship with reasonableness. In contrast, the dissent discussed battered women and fear but did not rely on the syndrome framework. The arguments in the dissent relied on both the evidence of Judy's actual perception of threat *and* the evidence that her perception was reasonable.

3. "And Its Effects"—Reasonableness in the Dissent

The majority and dissent agreed on the *legal* standard for reasonableness in self-defense: "[The defendant's] belief must be reasonable . . . in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness."³⁸⁴ But they disagreed on the application of that law to the *Norman* facts.

Justice Martin's dissent began with precedent, stating that the duty of the court was to instruct the jury on all defenses arising on the evidence, even if the evidence had discrepancies or was contradicted by evidence from the state.³⁸⁵ "This rule reflects the principle in our jurisprudence that it is the jury, not the judge, that weighs the evidence."³⁸⁶ Judy Norman was not arguing for an expansion in the law of self-defense, but rather, that self-defense law should protect her, and the dissent agreed, working through the elements of self-defense and explaining why each could be met in *Norman*.³⁸⁷

For the dissent, *all* the evidence established Judy's actual belief that J.T. was going to kill her.³⁸⁸ In discussing the way a jury would analyze the reasonableness of her belief, the dissent emphasized several factors,

³⁸² *Id.*

³⁸³ *Id.* at 16.

³⁸⁴ *Norman II*, 378 S.E.2d at 12 (citing *State v. Gappins*, 357 S.E.2d 654, 659 (N.C. 1987)); *id.* at 17 (Martin, J., dissenting) (describing the "ordinary firmness" element).

³⁸⁵ *Id.* at 17 (Martin, J., dissenting) (citing *State v. Dooley*, 203 S.E.2d 815 (N.C. 1974)).

³⁸⁶ *Id.*

³⁸⁷ *See id.* (discussing the elements of self-defense and explaining how the evidence supported the defendant).

³⁸⁸ *See id.* at 17–18 (stating that testimony from the defendant and the experts supported the defendant's actual belief).

including the escalating crisis and the eyewitness testimony that showed that her family shared her perceptions of threat and impossibility of escape.³⁸⁹ The dissent quoted extensively from the testimony on coercive control.³⁹⁰ It quoted Dr. Tyson's statements that he could find nothing in the record to contradict Judy's perception that she could not get help and that Judy had begun to fear for her family and her children if she died or left.³⁹¹

Justice Martin discussed articles that relied on Walker's theory for their description of a continuing state of threat and fear, but his dissent did not use the terminology of "syndrome" or "learned helplessness." He emphasized Judy's fear of imminent death and the impossibility of escape:

Defendant's intense fear, based on her belief that her husband intended not only to maim or deface her, as he had in the past, but to kill her, was evident in the testimony of witnesses who recounted events of the last three days of the decedent's life. This testimony could have led a juror to conclude that defendant reasonably perceived a threat to her life as "imminent," even while her husband slept. Over these three days, her husband's anger was exhibited in an unprecedented crescendo of violence. The evidence showed defendant's fear and sense of hopelessness similarly intensifying, leading to an unsuccessful attempt to escape through suicide and culminating in her belief that escape would be possible only through her husband's death.³⁹²

The dissent also emphasized Judy's right to defend against *great bodily harm*, taking that threat as seriously as the threat of death.³⁹³

The testimony of eyewitnesses supported Judy's perception that she could not escape; the family's inability to resist J.T. or help her proved her lack of options. Captivity was relevant to the reasonableness of her perception of threat.³⁹⁴ In the dissent, "helplessness" was not a psychological condition. Rather, it described Judy's awareness of her lack of resources, informed by her family's inability to protect her and the failures of social service agencies and the law:

In addition to the testimony of the clinical psychologist, defendant presented the testimony of witnesses who had actually seen defendant's husband abuse her. These witnesses

³⁸⁹ See *id.* at 18 (noting that the testimony of the defendant's family supported the reasonableness of the defendant's actual belief); *id.* at 19 ("[J.T.'s] rage was such that defendant's mother feared he might kill the whole family . . .").

³⁹⁰ *Id.* at 17–18. But see *id.* at 14 (majority opinion) (finding no evidence that she had *any* belief he would kill her).

³⁹¹ *Id.* at 17 (Martin, J., dissenting) (quoting Dr. Tyson's testimony).

³⁹² *Id.* at 19.

³⁹³ *Id.* at 20.

³⁹⁴ *Id.* at 17–18.

described circumstances that caused not only defendant to believe escape was impossible, but that also convinced *them* of its impossibility. Defendant's isolation and helplessness were evident in testimony that her family was intimidated by her husband into acquiescing in his torture of her. Witnesses also described defendant's experience with social service agencies and the law, which had contributed to her sense of futility and abandonment through the inefficacy of their protection and the strength of her husband's wrath when they failed. Where torture appears interminable and escape impossible, the belief that only the death of the oppressor can provide relief is reasonable in the mind of a person of ordinary firmness, let alone in the mind of the defendant, who, like a prisoner of war of some years, has been deprived of her humanity and is held hostage by fear.³⁹⁵

The crisis that the majority had treated as irrelevant was crucial to the analysis of reasonableness in the dissent:

From this evidence of the exacerbated nature of the last three days of twenty years of provocation, a juror could conclude that defendant believed that her husband's threats to her life were viable, that serious bodily harm was imminent, and that it was necessary to kill her husband to escape that harm. And from this evidence a juror could find defendant's belief in the necessity to kill her husband not merely reasonable but compelling.³⁹⁶

The dissent took a similar approach to reasonable belief about imminence, citing the Model Penal Code approach while emphasizing that "the question is not whether the threat was *in fact* imminent, but whether defendant's belief in the impending nature of the threat, given the circumstances as she saw them, was reasonable in the mind of a person of ordinary firmness."³⁹⁷

³⁹⁵ *Id.* at 18.

³⁹⁶ *Id.* at 20.

³⁹⁷ *Id.* at 19 & n.1.

III. JUDY NORMAN IN THE IMAGINATION OF LEGAL SCHOLARS—WHAT WE MISSED AND WHY WE MISSED IT

A. *Assumptions and Errors About Judy Norman, Battered Women, and Expert Testimony*

[The battered wife] does not even flinch during the beatings, as we think all other animals instinctively do to escape the pain caused, for example, by lighted cigarettes held against flesh. *It is almost impossible to imagine that a human being, rather than a thing, could really be that passive when abused.*³⁹⁸

Almost all of us in the legal academy have missed some aspects of Judy Norman's story, perhaps because the inventory of violence and degradation was clearer than the trends and larger patterns in the story. The judicial opinions recounted Judy's strategies, but many readers could not grasp them. In the epigraph to this section, Anne Coughlin confesses a difficulty that reveals failure to see Judy's desperate search for help, the combination of strategies, and the terror that paralyzed Judy's *family members*—all of which separated the person Judy Norman from a passive "thing."³⁹⁹ Coughlin's inability "to imagine" illustrates a larger problem: intimate partner violence sometimes engenders fear and revulsion that make it difficult for judges, jurors, and readers to process the facts in these cases.⁴⁰⁰

George Fletcher's article focusing on Judy Norman states without qualification that women can kill, if necessary, to protect their "sexual autonomy"—in the context of his discussion, rape—but makes no mention of Judy Norman's sexual autonomy.⁴⁰¹ For Fletcher, the violation in forced prostitution was so different from rape as to merit no discussion.⁴⁰² But why use the phrase "sexual autonomy" and ignore violent trafficking?

Fletcher believes that those who perceive threat in *Norman* are justifying killing in retaliation for past wrongs, even if they will not admit it. He thinks the "standard maneuver in battered-wife cases" is to argue that "the actor feared a recurrence of the past violence, thus [shifting the focus] from past to future violence, from retaliation to an argument of defending against an

³⁹⁸ Coughlin, *supra* note 344, at 67 (emphasis added) (footnote omitted) (citing *State v. Norman (Norman I)*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988)) (using the cigarette burn in the *Norman* case as an example).

³⁹⁹ See *id.* (citing *Norman I*, 366 S.E.2d at 587) (discussing Coughlin's perception of Norman's passivity).

⁴⁰⁰ Legal scholars might read impairment into Judy Norman's story because we are threatened by the idea that these awful things could happen to someone who was *not* impaired.

⁴⁰¹ George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 560 (1996).

⁴⁰² See *id.* at 555–56, 574 (discussing "when the impending violation is sufficiently proximate to trigger a legitimate response"—notably, without discussing forced prostitution).

imminent attack” and that “[i]n view of her prior abuse, the wife arguably has reason to fear renewed violence.”⁴⁰³ This approach ignores the escalating quality of threat that led Judy’s mother Laverne to arm herself and the continuation of threat after separation.

Relying on Anne Coughlin’s critique of learned helplessness and “battered woman syndrome,” Fletcher says that “[i]f married women can now be held liable for their crimes . . . *they can be held accountable for their failure to leave abusive husbands.*”⁴⁰⁴ By tying criminal responsibility to lack of previous success at separation, Fletcher adopts the requirement that Victoria Nourse calls “pre-retreat.”⁴⁰⁵ Fletcher’s forthright statement is unusual in its candor. More commonly, “pre-retreat” appears in judicial opinions that rely implicitly on the idea that a woman should have removed herself *before* her husband’s violence became critical.⁴⁰⁶ As Nourse explains, this approach is a departure from the usual law of self-defense.⁴⁰⁷

The *Norman* case seems to invite scholarly errors on facts and legal points,⁴⁰⁸ and those errors reveal assumptions made by the authors. For example, some say that Judy “retrieved” a gun.⁴⁰⁹ “Retrieve” means to *regain* possession, to get something back.⁴¹⁰ There is no indication in the

⁴⁰³ *Id.* at 558.

⁴⁰⁴ GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS 139 (1995) (emphasis added); cf. Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1618 (1996) (criticizing Fletcher for referring to the “gulag” Judy called home and then treating her as autonomous and her actions as freely chosen: “[I]n a gulag, how is one ‘free?’”).

⁴⁰⁵ Nourse, *supra* note 18, at 1284–85.

⁴⁰⁶ *Id.* at 1284.

⁴⁰⁷ *Id.*

⁴⁰⁸ For example, some authors describe the issue in *Norman* as the admission of expert testimony. See Jane Campbell Moriarty, “While Dangers Gather”: The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 24 (2005) (stating that *Norman* did not allow expert testimony because that testimony would have made “[h]omicidal self-help . . . a lawful solution” (citing *State v. Norman (Norman II)*, 378 S.E.2d 8, 15 (N.C. 1989))); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 81 (1997) (stating that “some courts remain adamantly opposed to the introduction of this evidence on the basis of legal doctrine” (citing *Norman II*, 378 S.E.2d at 12–14)).

⁴⁰⁹ Jeffrey P. Gray, *Was the First Woman Hanged in North Carolina a “Battered Spouse?”*, 19 CAMPBELL L. REV. 311, 323 (1997) (describing Judy as having “retrieved a pistol” (citing *Norman II*, 378 S.E.2d at 13)); see also *id.* at 311 n.* (noting in his biography that Gray was the assistant state attorney who briefed and argued the only two cases the North Carolina Supreme Court considered on battered woman syndrome); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 228–29 (2002) (“When her husband got drunk and fell asleep, Norman retrieved a gun from her mother’s house and shot him.” (citing *Norman II*, 378 S.E.2d at 9)); Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725, 737 (1996) (“[T]he *Norman* court thought that the fact that Judy Norman walked to her mother’s house to retrieve a gun while Mr. Norman was asleep suggests that she could have fled her own house . . .” (citing *Norman II*, 378 S.E.2d at 13)); Faigman & Wright, *supra* note 408, at 84 n.100 (describing that Judy “retrieved a gun from her mother’s house” (citing *Norman II*, 378 S.E.2d at 12–16)).

⁴¹⁰ See *Retrieve*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (defining retrieve as “to get back; regain”).

record that Judy had handled this gun before or knew it was there; according to the record, her purpose was first to bring the baby to her mother and then to get something to help with her headache.⁴¹¹ The term “retrieve” implies a suspicion that she had gone across the road with the purpose of getting the gun, or that she had formed a more developed decision to end his life.⁴¹² Those concepts might affect the conclusion that she had enough time to reach other decisions.⁴¹³

The most important errors may be those that minimize the dangers facing Judy Norman. Professor Dressler has access to the *Norman* transcript—his casebook quotes Judy’s entire response to her lawyer’s question about why she killed her husband, including her certainty that the coming night at the truck stop would be worse than ever.⁴¹⁴ Yet Dressler asserts that there was no crisis: “As far as we know, tomorrow was going to be no different than yesterday or the day after tomorrow.”⁴¹⁵ That statement contradicts all the judicial opinions⁴¹⁶ and the eyewitness who had never seen J.T. that angry before.⁴¹⁷ Like the failure to consider the temporal implications of “nap,” the inability to see crisis is a crucial factor in the

⁴¹¹ See Transcript *supra* note 1, at 85 (describing Laverne Laws’s testimony that Judy visited her mother’s house to get medication for her headache and found the gun when Laverne directed Judy to her purse to get pain pills for her headache); *Norman II*, 378 S.E.2d at 11 (describing why Norman visited her mother’s house).

⁴¹² See, e.g., Kaufman, *supra* note 9, at 347 (“[A]fter returning home from the hospital, she decided to take matters into her own hands. Her husband had been asleep for some time; Ms. Norman walked to her mother’s house, obtained a gun, and then returned and shot her husband three times in the back of the head while he slept, killing him.”).

⁴¹³ Joshua Dressler’s account condenses the chronology of June 11–12 and omits both the baby and her fear of waking J.T. See Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy*, 48 ST. LOUIS U. L.J. 1143, 1158–59 (2004) (mentioning that Judy Norman had four children and explaining the abuse she endured in the days leading up to the incident but choosing *not* to mention the baby and Judy’s fear of waking her husband). Dressler’s description implies that Judy went to her mother’s house with the purpose of obtaining a gun and killing her husband and, like Kaufman, describes Judy as taking matters “into her own hands.” *Id.* at 1158; Kaufman, *supra* note 9, at 347.

⁴¹⁴ JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 521 (6th ed. 2012).

⁴¹⁵ Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law*, *supra* note 29, at 1489–90.

⁴¹⁶ See *State v. Norman (Norman I)*, 366 S.E.2d 586, 588, 592 (N.C. Ct. App. 1988) (reciting the overdose incident in which J.T. told emergency personnel that Judy “don’t [sic] deserve to live” and describing the “decedent’s sleep [as] but a momentary hiatus in a continuous reign of terror”). But see *Norman II*, 378 S.E.2d at 12, 15 (holding that there was no evidence proving that Judy Norman was under “imminent” threat of “death or great bodily harm” and arguing that a different holding could have the effect of “mak[ing] opportune homicide lawful as a result of mere subjective predictions of indefinite future assaults and circumstances”); *id.* at 19 (Martin, J., dissenting) (reciting Judy Norman’s intense fear in the days before the killing and recounting the deceased’s attempt to interfere with the first responders after Judy overdosed, telling them, “Let the bitch die”).

⁴¹⁷ Transcript, *supra* note 1, at 57–58 (testimony of Mark Navarra).

argument that no reasonable person could possibly have perceived the threat in this situation.⁴¹⁸

A similar minimization of violence and danger appeared in a study that tested public perceptions of appropriate punishment using two hypotheticals, one based on the case of New York subway shooter Bernhard Goetz, and the other—the authors stated—on *Norman*.⁴¹⁹ In each hypothetical, an expert testified about a “syndrome”: “posttraumatic stress” or “battered-spouse.”⁴²⁰ In both hypotheticals, the facts were arguably less threatening than in the actual cases. In the *male* hypothetical, the facts evoking threat were similar to *Goetz* except that the hypothetical defendant was approached by only one teenager on a subway platform who stated, “give me some money, man” rather than being approached by one or two of a group of four teenagers who were together on the subway train.⁴²¹ The *female* hypothetical bore less resemblance to the facts of *Norman*, and the

⁴¹⁸ The failure to see crisis may also explain Professor Dressler’s interpretation of the dissent. The dissent concludes the argument about reasonableness by stating that “[J.T.’s] barbaric conduct . . . reduced the quality of the defendant’s life to such an abysmal state that . . . the jury might well have found that she was justified in acting in self-defense for the preservation of her tragic life.” *Norman II*, 378 S.E.2d. at 21 (Martin, J., dissenting). To Professor Dressler, this statement suggests that Justice Martin considered J.T. to have forfeited his right to life by abusing Judy; Dressler criticizes “moral forfeiture” theory but does not address Justice Martin’s arguments about reasonableness, the fears shared by eyewitnesses, and the impossibility of escape. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 247–48 (7th ed. 2016) [hereinafter UNDERSTANDING CRIMINAL LAW 7TH ED.].

⁴¹⁹ Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1587–88 (2010).

William had persistently abused Julie during their ten-year marriage. This mistreatment included physical beatings, some of which resulted in injuries (facial cuts; broken ribs; twice a broken nose) requiring emergency medical treatment. Three times the police arrested William for assaulting Julie, but released him from custody each time after Julie declined to press charges.

Testifying in her own defense, Julie told the jury that William had beaten her on the morning of the shooting after returning home from a night of hard drinking and then fallen asleep in the bedroom. Julie testified that she then went to her mother’s nearby home and obtained the hand gun used in the shooting. “I felt I had no choice except to shoot him,” she stated, “because I knew when he woke up this time he was going to hurt me really bad.”

The defense also called an expert witness: Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university. Based on a thorough psychiatric examination of Julie, Wallace offered his opinion that Julie was suffering from “battered woman syndrome.” “Like other victims of chronic domestic violence,” Wallace testified, “Julie believed that she was powerless to leave and that no one could or would help her.” “In my opinion, Julie honestly perceived that her husband would attack her if she didn’t kill him first; that belief was quite reasonable, given the beatings she had previously suffered, and the effect of those beatings on her psyche,” he concluded.

Id. (quoting Dan M. Kahan & Donald Braman, *The Self-Defense Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 25–26, 65 (2008)).

⁴²⁰ *Id.* at 1586–87.

⁴²¹ Compare *id.* at 1586–88 (creating a hypothetical in which a fictitious forty-eight-year-old white male shoots a seventeen-year-old African American male), with *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986) (stating that four youths sat together on the subway train and that it appeared from the evidence before the Grand Jury that one of them approached Goetz, possibly with a second youth beside him, and stated, “give me five dollars”). The hypothetical also shifted location from subway car to subway platform, which could also affect the interpretation of threat.

differences were significant: it omitted the existence of children and Judy's frustrated efforts at help-seeking.⁴²² It omitted all the factors that pointed to lethal danger, including the abuser's threats to kill, and it omitted forced prostitution—the threat Judy had identified first on the witness stand.

One way to measure the difference between this hypothetical and the published opinions in *Norman* is to apply the respected Danger Assessment Scale, which asks about facts and patterns correlated with risks of lethality.⁴²³ The published facts in *Norman* yield “yes” answers to nine of the twenty questions in the Danger Assessment: whether physical violence had increased in severity or frequency; whether he was unemployed; whether he had avoided being arrested for domestic violence; whether he threatened to kill her; whether he forced unwanted sex; whether he controlled her daily activities; whether she had been beaten while pregnant; whether she believed he was capable of killing her; whether he followed her;

⁴²² See Braman et al., *supra* note 419, at 1587–88 (presenting a hypothetical based on Judy Norman).

⁴²³ During the 1980s, Jacquelyn Campbell studied patterns and risk factors in femicides—the deaths of battered women—and developed the Danger Assessment [DA] for use by counselors collaborating with the women to assess their risks and choices. See Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, ADVANCES IN NURSING SCI., July 1986, at 36–37 (explaining the study of risk and development of the DA); Campbell revised the DA in 2004 to create a list of twenty questions still used today. See Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 655 (2009) (reproducing revised DA questions); *id.* at 657–59 (describing revision of the original questionnaire and citing three validation studies); *id.* at 661–63 (describing the revision process); D. Alex Heckert & Edward W. Gondolf, *Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault*, 19 J. INTERPERSONAL VIOLENCE 778, 778 (2004) (finding an earlier version of DA combined with women's perceptions of risk to be among the accurate methods of prediction); *id.* at 778 (“Women's perceptions of risk by themselves were much better predictors than [two other risk assessment tools] and not quite as accurate as the DAS”); Jill Theresa Messing & Jonel Thaller, *The Average Predictive Validity of Intimate Partner Violence Risk Assessment Instruments*, 28 J. INTERPERSONAL VIOLENCE 1537, 1543 (2013) (noting high values in DA when applied to attempted femicides and severe reassaults); *cf.* Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 307 (2009) (describing research methods including interviews with close friends or relatives of women killed by partners who provide information of their experience and patterns in their relationships). Other threat assessment tools also emerged but in future studies. Among these, only the DA proved to be more accurate than battered women's predictions about abuse. The DA has been validated repeatedly, but its application in law enforcement raises important questions. See, e.g., Hitt & McLain, *supra*, at 307 (discussing the validation of risk factors); Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 526 (2010) (discussing “weaknesses that undermine the DA's effectiveness” when the DA is used in screening by law enforcement, including a potentially flawed belief that separation from the abuser will stop future violence).

and whether he was an alcoholic or drug addict.⁴²⁴ (As to alcoholism, the hypothetical mentions only a night of hard drinking.)⁴²⁵

Using the facts in the published opinions, the weighted result on the Danger Assessment places Judy Norman's risk in the highest category, *Extreme Danger*.⁴²⁶ The statements about threats to children—in the transcript but not the opinions⁴²⁷—would have raised the raw score but could not have changed the assessment of lethal risk, simply because the Danger Assessment scale has no higher risk category. In stark contrast, the facts from the female hypothetical in the Braman law review article do not produce a single “yes” answer to the Danger Assessment questions.⁴²⁸ The hypothetical does not reflect—and may not have produced in readers—the lethal danger that appears in the facts in *Norman*.

The gap between hypothetical facts and *Norman* may or may not have affected the study. For the authors' purposes, the hypothetical might stand on its own, but they should not have associated it with *Norman*. That association reveals a story we tell ourselves about *Norman*: a story that omits constraint and danger. That story avoids hard questions about what justification would mean if our sisters or our daughters faced a night at the truck stop under J.T. Norman's threat of death.

This hypothetical illustrates the academy's overreliance on the *idea* of a “syndrome” rather than the substantive *content* of expert testimony. Uttering the word “syndrome” cannot, in itself, transform the trial of a criminal defendant or the evaluation of threat by jurors. Experts do not speak in a vacuum. They explain intimate partner violence; they discuss patterns and common reactions; they analyze facts from this case or similar facts;

⁴²⁴ See *supra* Part IA (a history of the marriage), describing severe escalation in violence; J.T.'s long history of unemployment; the failure of police to arrest J.T. when they were called; forced prostitution; extreme control of daily activities including preventing her from eating; J.T.'s violent attack during Judy's pregnancy that resulted in the premature birth of the baby; the testimony of Judy and her mother that they feared J.T. would kill her; J.T.'s successful pursuit of Judy to the food stamp office and on previous occasions when she fled seeking help; and J.T.'s drinking and alcoholism).

⁴²⁵ See hypothetical and reference to “hard drinking,” *supra* note 419.

⁴²⁶ See Johnson, *supra* note 423, at 529–30 (defining the highest risk as “Extreme Danger”). The published *Norman* facts score in the *Extreme Danger* category.

⁴²⁷ See Transcript, *supra* note 1, at 83 (recounting a situation in which the children were threatened).

⁴²⁸ Compare the hypothetical facts in Braman et al., *supra* note 419, at 1587–88 (portraying a less severe set of facts and threats than Judy Norman experienced), with the DA factors listed in Johnson, *supra* note 423, at 528 (enumerating DA scale). The authors of the hypothetical linked to *Norman* may have believed that describing a record of arrests and failed prosecutions for domestic violence made the abuser seem *more* dangerous—indeed, people responding to these questionnaires may have seen it that way. However, the lethality factor in the DA involves *avoiding arrest for domestic violence entirely*—which described J.T. Norman's experience but not the experience of the abuser in the hypothetical. See Johnson, *supra* note 423, at 529 (listing number seven on the DA scale as avoiding arrest for domestic violence).

they educate juries away from stereotypes.⁴²⁹ Factors predicting lethal danger are an important part of the substance a jury will consider in weighing reasonableness.

B. *A Vulgarized Version of the “Syndrome”—Evidence and Influence*

Misogyny is not the cause of this persistent confusion among legal scholars. Errors about the *Norman* case and “syndrome” testimony appear in the work of men and women who define themselves as feminists. Professor Dressler, who has written several articles rejecting any self-defense claim for Judy Norman, has at the same time worked to find another theory that would help her.⁴³⁰

The interesting question is *why* feminists and scholars who are not misogynists turned day into night, missed the urgent crisis while imagining that the threat had not grown more severe, missed the threat of sex slavery entirely, and reframed testimony on “coercive control” as testimony on “learned helplessness.”⁴³¹ These misunderstandings spring in part from stereotypes about passivity in battered women and about expert explanation as defined by simplistic, vulgarized versions of Walker’s theory.

In addition, legal research methods may have perpetuated these misunderstandings. Any search for the phrase “battered woman syndrome” in legal sources will yield results that give disproportionate weight to older precedent, such as cases that often cite Walker’s first book⁴³²—only one of many works from that first wave of social science research. In contrast, the expert at Judy Norman’s trial approached Norman’s experience through a lens of coercive control, an approach that was valid in 1987 and even better

⁴²⁹ See, e.g., Osthoff & Maguigan, *supra* note 252, at 235 (explaining that social science testimony is not limited to a woman’s psychological makeup even though psychological reactions are sometimes important; experts also explain common patterns found in battering relationships, including general dynamics and common responses to abuse or particular dynamics in a particular case; they educate juries away from preexisting bias and expectations); VALIDITY AND USE OF EVIDENCE, *supra* note 220, at iv (explaining that judges, prosecutors, and defense attorneys are helping juries better understand the issues surrounding battered women and helping to “dispel myths and stereotypes related to battered women”); Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN’S L.J. 75, 82 (1996) (explaining that experts have “expressed concern about the use of the term ‘syndrome’ in connection” with battered women).

⁴³⁰ See, e.g., Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 469 (discussing an alternate theory for acquittal that is not based on the approach he saw as mental incapacity); Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law*, *supra* note 29, at 1491–92 (arguing for a duress defense to apply in cases like Norman’s).

⁴³¹ See discussion *supra* Part III.A.

⁴³² See, e.g., *United States v. Nwoye*, 824 F.3d 1129, 1132 (D.C. Cir. 2016) (citing Walker’s books from 1979 and 1984); *State v. B.H.*, 870 A.2d 273, 279 (N.J. 2005) (referring to Walker’s work to define battered woman syndrome); *State v. Stewart*, 719 S.E.2d 876, 884–85 (W. Va. 2011) (citing Walker’s work to define battered woman syndrome and noting that the syndrome has been part of West Virginia jurisprudence for over 30 years).

supported today.⁴³³ The concept of “learned helplessness” that gripped many professors and judges trumped the actual testimony about coercive control in the case.

Anne Coughlin contradicts virtually all serious scholars by treating “battered woman syndrome” as a separate defense.⁴³⁴ Scholars who differ on many other points agree that the “syndrome” is *not* a defense but a theory that is part of the evidence provided by some experts.⁴³⁵ Indeed, Coughlin cites several cases and articles that explain clearly this is not a defense.⁴³⁶

⁴³³ See DUTTON ET AL., *supra* note 247, at 1 (describing how battered women’s advocates have defined intimate partner violence as a “pattern of coercive control” . . . in which the batterer asserts his power over the victim through the use of threats, as well as actual violence”) (citing ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL (1993)); JOHNSON, *supra* note 234, at 7–8 (discussing “intimate terrorism” as a type of domestic violence that “involves the general exercise of coercive control” that is “embedded in a general pattern of power and control”); OKUN, *supra* note 217, at 86–87, 115–33 (discussing coercive control and woman abuse in a book published in the mid-1980s); SCHNEIDER, *supra* note 218, at 124 (“[O]ther interpretive frameworks to describe battering that have been proposed, such as ‘coercive control,’ do not focus exclusively on the woman who has been battered, but on the batterer or the relationship.”); STARK, *supra* note 50, at 5 (discussing in a 2007 book coercive control as a framework for abuse); Dutton & Goodman, *supra* note 247, at 743, 746 (stating that, for decades, advocates have “placed the notion of coercive control squarely at the center of their analysis of intimate partner violence,” exploring issues of coercive control and setting forth a new model of coercion in intimate partner violence).

⁴³⁴ See Coughlin, *supra* note 344, at 6 (arguing that the “battered woman syndrome defense” is sexist); Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 509–10, 510 n.131 (1996) (noting that Coughlin is a scholar who believes there should be a separate battered woman syndrome defense); cf. Maguigan, *supra* note 250, at 381–82 (suggesting that criminal law does not need to be redefined to include battered woman syndrome as a specific self-defense claim).

⁴³⁵ Many cases had already held that the “syndrome” was not a separate defense. See, e.g., Chapman v. State, 386 S.E.2d 129, 131 (GA 1989) (“Although evidence of the syndrome is admissible, . . . it is not a separate defense.”). Most scholars recognize that “battered woman syndrome” is not a separate defense. See, e.g., SCHNEIDER, *supra* note 218, at 124 (explaining that “battered woman syndrome” is not a separate defense and that feminists did not advocate for a separate defense); Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN’S L.J. 217, 296 (2003) (“BWS is not a defense, but rather a pattern of symptoms used to describe the effects of abuse on the victim.” (footnote omitted)).

⁴³⁶ In these instances, Coughlin cited some point that suited her argument while ignoring other statements in the same sources clarifying that the “syndrome” was not a defense. See, e.g., Coughlin, *supra* note 344, at 56 n.279 (citing State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) (“[A]dmission of expert testimony regarding the battered woman syndrome *does not establish a new defense or justification*,” but assists the trier of fact in evaluating the defendant’s honest belief in imminent danger of death or great bodily harm and that deadly force was “her only means of escape” (emphasis added))); *id.* at 51 n.248 (citing State v. Hill, 339 S.E.2d 121, 122 (S.C. 1986) (emphasizing that the court was “not recognizing the battered woman’s syndrome as a separate defense” but addressing the related testimony as relevant to self-defense)); *id.* at 67 n.334 (citing State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) (“[N]o jurisdictions have held that the existence of the battered woman syndrome in and of itself operates as a defense to murder.”)); *id.* at 56–57, nn.281, 285, 286 (citing People v. Romero, 13 Cal. Rptr. 2d 332, 388 n.8 (Ct. App. 1992), *rev’d*, 883 P.2d 388 (Cal. 1994) (“There . . . still exists a misconception by some lawyers and judges that there is a defense called ‘battered woman syndrome’ giving women who are battered some unique right simply because they are battered. That is not the law in California (or, as far as we can tell, anywhere else).”); *id.* at 28 n.138, 49 n.233 (citing Maguigan, *supra* note 250, without discussing Maguigan’s statements contradicting the idea of a separate defense).

But Coughlin's position is no accident. It is the intellectual foundation of the central argument in her article—her analogy between “battered woman syndrome” and the “marital coercion” defense.⁴³⁷ Coughlin read Walker carefully and identified many points of contradiction within her writings, yet failed to see that—from the beginning—Walker was defending her terminology *against feminist criticism*.⁴³⁸ While Coughlin's position is an outlier, it exemplifies a more general problem: when Walker explained that “learned helplessness” did not mean the woman was literally helpless, that part of her work did not gain traction in legal scholarship.

George Fletcher misunderstood both the term “battered woman syndrome” and the expert testimony in *Norman*: “The jury had heard expert testimony about the battered women's syndrome. Judy was allegedly *a paradigm of women addicted to abuse*.”⁴³⁹ “Addicted to abuse” is a gross mischaracterization of all contemporary experts, including Walker, whose work sought to rebut earlier theories of battered women's masochism.⁴⁴⁰ It had nothing to do with Dr. Tyson's testimony in *Norman*.

Accurate information has been available in law reviews for decades. Mary Ann Dutton's “redefinition” appeared in a 1993 law review symposium on domestic violence.⁴⁴¹ “Battered woman syndrome” appears in the title, and the journal is available through Westlaw and Lexis—research with conventional legal tools would have found this article easily.⁴⁴²

Stereotypical ideas about expert evidence persisted. Even when citing articles by psychologists relying on Dutton and others, law professors sometimes failed to grasp the substance of those articles. For example, Joshua Dressler described a study and used a quotation about the pathologizing effect of testimony about battered woman syndrome: “[A] juror simulation study has reported that ‘the presence of expert evidence providing a diagnosis of [BWS], compared to a no expert control, [causes]

⁴³⁷ See Coughlin, *supra* note 344, at 29. Coughlin uses the term “marital coercion” to distinguish this class of cases from the general defense of duress and argues, “The marital coercion defense was available only to married women, and it had all but disappeared in this country by the mid-1970s, when, as is my thesis, it reemerged in the guise of the battered woman syndrome defense.” *Id.*

⁴³⁸ See, e.g., *id.* at 56 (discussing Walker's work and expert testimony); BWS 2d 2000, *supra* note 225, at 11 (“[M]any advocates who worked with battered women did not like the implications of the term ‘learned helplessness’ because they felt it suggested that battered women were helpless and passive.”).

⁴³⁹ FLETCHER, *supra* note 404, at 135 (emphasis added). Lynne Henderson rebuts Fletcher's paradigm: “She was not addicted to the violence; she was held prisoner by it—a fact relevant to a claim of self defense.” Henderson, *supra* note 404, at 1618.

⁴⁴⁰ See BWS 2d 2000, *supra* note 225, at 102 (criticizing the concept of masochism in battered women as “inconsistent with feminism” and criticizing the persistence of the construct of masochism).

⁴⁴¹ *Understanding Women's Responses: A Redefinition*, *supra* note 239, at 1195.

⁴⁴² See *id.* at 1191 (showing “battered woman syndrome” in the title of Dutton's article); see also Meier, *supra* note 246, at 1314 (citing *Understanding Women's Responses: A Redefinition*, *supra* note 239); Stark, *supra* note 246, at 974 n.6 (citing *Understanding Women's Responses: A Redefinition*, *supra* note 239).

the jurors to view the defendant as more distorted in her thinking, and less capable of making responsible choices, and less culpable for her actions."⁴⁴³ But Dressler took that quote out of context. The authors had summarized a previous, less-sophisticated study. In contrast, their own study compared *three categories*: (1) Lenore Walker's "syndrome" approach; (2) a "social agency" approach based on the work of Mary Ann Dutton and others; and (3) no expert at all.⁴⁴⁴ Only Walker's "battered woman syndrome" framework made jurors more disposed to accept the idea of insanity in the battered woman.⁴⁴⁵ The "social agency" framework characteristic of Mary Ann Dutton's work did not have the same effect.⁴⁴⁶ Dressler's double-quotation out-of-context matched his own ideas about the "syndrome" but missed the very point of the work he cited, which recognized and compared different approaches.

In theoretical debates on self-defense, participants often built arguments on these misunderstandings about expert evidence. The legal question in *Norman* is not the concept of "learned helplessness" or a "syndrome" but the availability of a jury instruction on self-defense. If the judge had allowed a self-defense instruction, the *Norman* jury would *not* have been asked whether Judy had "learned helplessness." The jury had already heard about her help-seeking efforts and the lessons she had learned. She had tried many times to find help or safety, including at the hospital in Chicago, hotels, and the homes of family members. J.T. had found her and brought her back brutally so many times that she had become convinced he would find her again. Judy would not go to a shelter because she was concerned for her children. Her mother believed J.T. might kill the whole family.⁴⁴⁷ J.T. told Judy he would kill her if she filed papers to commit him or a complaint for domestic abuse. The police did not help her, and she came to believe no help was available.⁴⁴⁸ Allowing the jury to consider self-defense would not have changed the evidence introduced at trial, and admitting expert testimony would not have reshaped the legal charge to the jury. The legal question would be whether a reasonable person would have perceived the threat as Judy saw it.

Professor Dressler rules out imminent threat as a matter of law because of J.T.'s nap and then, to address the dangers Judy Norman faced without

⁴⁴³ See Dressler, *Feminist or ("Feminist,") Reform of Self-Defense Law*, *supra* note 29, at 1488 (attributing the quote to Schuller & Hastings, *supra* note 249, at 169). For the actual context, see Schuller & Hastings, *supra* note 249, at 169 (citing an earlier study by Norman J. Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 L. & HUM. BEHAV. 585, 597-98 (1991)).

⁴⁴⁴ Schuller & Hastings, *supra* note 249, at 171.

⁴⁴⁵ *Id.* at 184.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 80, 82.

⁴⁴⁸ *Id.* at 36. See Part IA (summarizing events in the history of the marriage) and Part IIB (summarizing expert testimony at trial).

allowing the jury to find her acts justified, proposes a new “non-syndrome” approach based in duress—an argument that Judy had “no-fair-opportunity” to find other solutions.⁴⁴⁹ But the points Dressler would cover are not really new; Dr. Tyson covered them thoroughly. Dressler frames the inquiry:

Think about what a jury might have asked itself if it had been given the opportunity. Could Judy have avoided the situation by walking out the door? (Remember, we are not using syndrome evidence, so the battered woman’s learned helplessness, if it exists, is not relevant.) To answer *that* question, the jury would likely ask itself other questions: Did Judy Norman have children, thus making it more difficult for her to leave? Yes. She had four living at the time of J.T.’s death. What then were her options? Leave them with J.T.? That would be unthinkable for any loving parent. Leave *with* them? Where would she have gone? How would she have supported the children? What safety nets had been set up in her community to make such an option realistic? Moreover, what would have prevented J.T. from finding her and “punishing” her for her departure? Rather than leave, could she have called the police for help? *She did*, and they did nothing to protect her. And, so on.⁴⁵⁰

Because of Dressler’s beliefs about expert testimony, he fails to see two crucial points: Dr. Tyson had indeed addressed those same facts, and Tyson had not applied Walker’s framework to those facts.⁴⁵¹ Part IV.E *infra* explores the duress proposal and its link to ideas about experts.

Imagine these professors as jurors with no expert to help them. They hear the evidence and retreat to deliberate. Probably, they could have avoided the error of “midnight shooting” if they had heard the facts themselves. But they might have told each other what they told the world after reading the facts: Judy retrieved a gun and took matters into her own

⁴⁴⁹ Dressler makes this argument repeatedly. Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 469; *Battered Women Who Kill Their Sleeping Tormenters*, *supra* note 10, at 278.

⁴⁵⁰ Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 470; *cf. supra* text accompanying notes 270–312 (quoting and discussing Dr. Tyson’s testimony about Norman’s fears for her family, inability to get help from agencies and authorities, and J.T.’s ability to find her).

⁴⁵¹ Also based on those misconceptions about experts, Dressler argues that expert (“syndrome”) testimony should be excluded from the determination of reasonable perception of imminent threat. *See* Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 464 (arguing that testimony on battered woman syndrome should be excluded because it “essentially converts the battered woman’s claim from the justification of self-defense to a mental incapacity defense”); *see also* Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law*, *supra* note 29, at 1486–88 (arguing that a “reasonable person” would not believe a sleeping man was an “instantaneous threat”); Dressler, *supra* note 10, at 266–69 (arguing that evidence of “battered woman syndrome” provides reasons to excuse the act but cannot justify it).

hands because she decided to act as judge, jury, and executioner. They might dismiss eyewitnesses who believed as firmly as Judy did that she could not escape and that her life was in danger. When the professor-jurors talked about sleep, they might forget that on the last day of his life, J.T. had feigned sleep to surprise Judy by kicking her in the head when the need to control the car left her no way to defend herself.⁴⁵² (At the time of the shooting, Judy's actions were consistent with a belief that J.T. was asleep, but his practice of surprise attacks made the appearance of sleep less useful for predicting the presence or absence of a threat). Her help-seeking might disappear into the idea that years of abuse are a sign of passivity; the professors might express dismay or disbelief and wonder that any human being could be this passive.

Listening to Dr. Tyson would have helped legal scholars. The label under which his testimony was admitted—"forensic psychology," "battered woman syndrome," or "intimate partner violence and its effects"—would not have determined the content of his testimony. Consistent with Mary Ann Dutton's redefinition, jurors would have heard the description of violence and degradation and the functions of those behaviors in the dynamic between them, heard about Judy's efforts and defeats in help-seeking, and heard Dr. Tyson say that he could not identify any options she had overlooked.⁴⁵³ If the trial happened today, the expert would also provide knowledge from decades of subsequent research, including findings on patterns in intimate partner violence. The professors would learn that "why didn't she leave" is the wrong question to ask, that lethal danger often increases at separation, and that women like Judy Norman attempt many solutions, including leaving, without success.

Law professors are analytical by training, skilled at reading arguments and applying theories. Most jurors will have no preconceived ideas about the content of expert testimony. The expert will educate jurors away from their own misconceptions. The task for jurors will be to work with the evidence presented, including the information from experts. The legal academy should also take that approach instead of relying on old summaries of expert frameworks.

C. *Locating the Helpful Points in the Debates*

Victoria Nourse proposes a powerful, simple way to cut through confusion about "subjective" and "objective" aspects of self-defense law:

It is an open secret that courts adopt a self-defense standard that is both objective and subjective; as a doctrinal matter, then, there simply is no debate, except at the margins
[P]erform a simple test. Open up a self-defense case using

⁴⁵² *Id.* at 20.

⁴⁵³ See *supra* Section II.C.2 (discussing intimate partner violence and its effects).

objectivity and subjectivity to describe self-defense law. Now black out those adjectives. You will probably be left with a better text and nothing will have been lost. The law can still speak of state of mind and conduct, it can even speak of the reasonable person and her perceptions, it can apply the age-old “appearances” test in self-defense, and announce the proper rules of aggression and proportionality. History makes it quite clear that the law of self-defense does not need the discourse of subjectivity for any of that.⁴⁵⁴

I agree with and support Professor Nourse’s approach. Confusion about expert testimony became entangled with the “discourse of subjectivity” to make it difficult for the debates on *Norman* to reach productive conclusions. The debates suffered further from the idea of a “midnight shooting” and from the inability of scholars and judges to see the threat of forcible trafficking. Nonetheless, the debates on battered women and self-defense in which *Norman* has played such an important role have been extensive, and they include many thoughtful points.

Legal scholars need a way to evaluate the strengths of those arguments without holding onto stereotypes and misconceptions. Taking a cue from Professor Nourse’s critique of the discourse of subjectivity, we should strike and replace outdated terminology before using these concepts in legal analysis.⁴⁵⁵ Except when discussing Lenore Walker’s work specifically, we should replace references to testimony on “*battered woman syndrome*” or the “cycle of violence” with testimony on “*intimate partner violence*.” For “*learned helplessness*,” substitute “*the effects of intimate partner violence*.” Then, evaluate the points that remain. That simple measure should help distinguish the core of each scholarly argument and eliminate the residual effects of outdated concepts. And that, in turn, should allow us to make the best possible use of the substantial body of literature that scholars have built around the *Norman* case.

IV. REVISITING REASONABLENESS, IMMINENCE, AND JUSTIFICATION

A. *Interrogating Sleep—Context vs. “A Matter of Law”*⁴⁵⁶

Sleep happens in a context. The word “sleep” describes a condition that varies with different times, circumstances, and sleepers. A person might sleep for a minute or a full night and might sleep lightly or deeply.

⁴⁵⁴ Nourse, *supra* note 18, at 1295–96 (footnotes omitted).

⁴⁵⁵ This proposal adapts Nourse’s suggestion that we eliminate the often-misleading adjectives “subjective” and “objective” and instead focus on the substance of self-defense requirements. *Id.*

⁴⁵⁶ *State v. Norman (Norman I)*, 366 S.E.2d 586, 590 (N.C. Ct. App. 1988) (“The State contends that since decedent was asleep at the time of the shooting, defendant’s belief in the necessity to kill decedent was, as a matter of law, unreasonable.”).

If it should matter to self-defense that there is more than one kind of sleep, then *how* should it matter? The debates on *Norman* include many arguments on the nature of the imminence requirement, how it should be interpreted, and whether it should be covered in the evaluation of necessity for the use of deadly force.⁴⁵⁷ But the literature on self-defense has not grappled much with the *variations* in sleep.

Some scholars assume that sleep should create a per se rule against reasonable self-defense,⁴⁵⁸ even though courts divide on this question.⁴⁵⁹ Paul Robinson answers the idea that the attack must be happening immediately by giving the example of an attacker who kidnaps and confines his target and announces his intention to kill one week later.⁴⁶⁰ Robinson argues that the law must permit the prisoner to kill the attacker and escape one morning before the week has passed:

The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively.⁴⁶¹

The kidnapping example recognizes both the exceptional danger and the continuing threat in that crime. Many states include kidnapping as one of the grounds for use of deadly force in self-defense.⁴⁶² A similar example would

⁴⁵⁷ See, e.g., Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 458, 467 (arguing that some degree of imminence is required to justify killing); Kaufman, *supra* note 9, at 369 (concluding that the imminence requirement is a “crucial, independent restriction on the individual right to resort to violence against others, especially deadly violence”).

⁴⁵⁸ See, e.g., *id.* at 458, 467 (arguing that a battered woman is not justified in killing her sleeping abuser because the abuser may change his behavior).

⁴⁵⁹ Some courts have allowed a self-defense instruction when the defendant killed a sleeping abuser. See, e.g., *State v. Wilson*, 487 N.W.2d 822, 823 (Mich. App. 1992) (“Defendant admits shooting the victim while he slept, but claims she acted in self-defense following forty-eight hours of abuse and death threats and years of battery.”); *State v. Hennum*, 441 N.W.2d 793, 796 (Minn. 1989) (describing facts in which a battered defendant killed her husband while he was asleep); *id.* at 797 (“The court has determined not to preclude, as a matter of law, the defense or theory of self-defense.”); *People v. Emick*, 481 N.Y.S.2d 552, 553 (N.Y. App. 1982) (defendant shot while her boyfriend was asleep); *id.* at 560 (quoting self-defense instruction given at trial); *id.* at 562–63 (reversing her conviction because of the admission of evidence “extremely prejudicial to her defense of justification” and because the self-defense instruction had incorrectly included a duty to retreat). Other courts have ruled out self-defense when the defendant killed a sleeping abuser. See, e.g., *State v. Stewart*, 763 P.2d 572, 589 (Kan. 1988) (“[T]he giving of the self-defense instruction was erroneous. Under such circumstances, a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse.”).

⁴⁶⁰ ROBINSON, *supra* note 21, at § 1311(1).

⁴⁶¹ *Id.*

⁴⁶² See, e.g., ALA. CODE § 13A-3-23 (Westlaw through Act 2018-579); N.H. REV. STAT. ANN. § 627:4(i)(c) (2011); TEX. PENAL CODE ANN. § 9.32(a)(2)(B) (West 2007) (authorizing the use of deadly force to stop a kidnapping). For an extended discussion of kidnapping and battered women, see Gregory

involve a hijacker who takes cold medicine and falls asleep while guarding captive passengers. Assuming other exit was unavailable, most scholars would find justification if passengers killed the hijacker when he dozed off.

Questions about imminence can arise outside the crime of kidnapping. Imagine a man who controls his wife by setting the alarm system so the doors and windows beep when they open. He wakes whenever the system beeps. He ran track in high school—he can always catch her before she reaches a nearby house. If she finds a gun under the bed, must she try running before she can use it even though he will catch her? Perhaps a sufficiently dangerous threat will make it unnecessary for him to run quickly. He might say, “You are free to leave any time, but when you go through that door, it will beep, and I will kill your child in the other room.” Even if she is not chained physically, a reasonable person could believe that she cannot simply leave—even while he sleeps.

In a house in Cleveland, a man named Ariel Castro kept three women chained and confined for years and raped them.⁴⁶³ Rape justifies the use of deadly force in self-defense in almost every state,⁴⁶⁴ but Castro’s victims were prisoners, chained, without weapons. If Castro fell asleep after one of those rapes and a knife fell out of his pocket, would sleep have ruled out, as a matter of law, the woman’s need to act immediately?

Dressler argues for a *per se* rule against a lethal attack during sleep because a living abuser might change his mind.⁴⁶⁵ But every time Ariel Castro slept, it was possible that in the morning he would change his mind about committing more rapes. Would that possibility make the act of killing Castro while he slept into what Fletcher saw in *Norman*⁴⁶⁶—unlawful vengeance for past rapes instead of self-defense against the next rape?

The legal questions here must be: What threat would a reasonable woman in her circumstances perceive? And would that reasonable woman in her circumstances find it necessary to act immediately before her abuser could wake up and begin again?

A. Diamond, Note, *To Have but Not to Hold: Can “Resistance Against Kidnapping” Justify Lethal Self-Defense Against Incapacitated Batterers?*, 102 COLUM. L. REV. 729, 732 (2002) and the sources gathered therein.

⁴⁶³ For articles reporting on this event, see Trip Gabriel et al., *Cleveland Man Charged with Rape and Kidnapping*, N.Y. TIMES (May 8, 2013), <https://www.nytimes.com/2013/05/09/us/cleveland-kidnapping.html?pagewanted=1>; Caroline Porter, *Kidnapper Castro Gets Life Without Parole, Plus 1,000 Years*, WALL ST. J., <https://www.wsj.com/articles/SB10001424127887323681904578641924168692486> (last updated Aug. 1, 2013, 7:21 PM).

⁴⁶⁴ See Don B. Kates, Jr. & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 881 (1982) (discussing the “long standing recognition of the right to resist rape with deadly force”).

⁴⁶⁵ Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 467.

⁴⁶⁶ Cf. Fletcher, *supra* note 401, at 558 (“Those who defend the use of violence rarely admit that their purpose is retaliation for a past wrong.”).

In the late 1990s, the Cadena sex trafficking ring forced between twenty-five and forty young women into prostitution in Florida.⁴⁶⁷ A woman recruited girls in Mexico with the promise of jobs in the United States. Instead, they found themselves trapped in brothels, beaten, and forced to have sex with up to twenty-five or thirty men per day, six days a week.⁴⁶⁸ “Armed pimps were omnipresent,”⁴⁶⁹ and guards accompanied women who left for errands.⁴⁷⁰ The women were transported to different houses every two weeks.⁴⁷¹ During the transit between brothels, they had a few moments without supervision to use public restrooms, but escape was impossible.⁴⁷² The girls could not run because they feared threats they found credible: harm to their families, brutal beatings, and death.⁴⁷³ It is worth noting that Judy Norman also believed her husband’s threats of harm to her family, brutal beatings, and death.

Some clients tried to help by offering to facilitate escapes, and some called police, but lookouts with cell phones warned the traffickers before police arrived.⁴⁷⁴ When one girl found a phone in the closet and called 9-1-1 several times, neither the dispatchers nor the police who came to the house spoke Spanish. The police left.⁴⁷⁵

What rights to use force would those young women have in their own defense? If an armed guard in that brothel fell asleep where a woman could steal his gun and efforts to escape might wake him, would the law demand that she wait until he woke up and began another attack to justify deadly force? Would the law of self-defense demand that she try calling the police *again* before using deadly force, even though several previous calls had brought no help? Put another way, would a reasonable person in her position

⁴⁶⁷ FLA. STATE UNIV., CTR. FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA RESPONDS TO HUMAN TRAFFICKING 37–38 (2003), <https://cahr.fsu.edu/wp-content/uploads/2018/01/thereport.pdf> (hereinafter FLORIDA RESPONDS TO HUMAN TRAFFICKING). This report explains how the Cadena ring entrapped women:

[T]he traffickers controlled them by a variety of means. Beatings, rapes, and death threats were the crudest forms of discipline utilized by their captors. Equally effective however, were psychological forms of coercion: ignorance of where they were, inability to speak English, an acute and constant sense of isolation, and threats that their families in Mexico would be killed were they to try to escape from the traffickers. One woman was trafficked along with her sister, and the Cadenas saw to it that the girls were always held in separate locations, each knowing that the other would suffer consequences if she tried to escape.

Id. at 42.

⁴⁶⁸ *Id.* at 39–41.

⁴⁶⁹ *Id.* at 44.

⁴⁷⁰ *Id.* at 43.

⁴⁷¹ *Id.* at 44.

⁴⁷² *Id.* at 43.

⁴⁷³ *Id.* at 42.

⁴⁷⁴ See FLORIDA RESPONDS TO HUMAN TRAFFICKING, *supra* note 467, at 45, 47.

⁴⁷⁵ *Id.* at 48.

believe that police might help *this time*, and therefore, she must try calling again before using deadly force to escape?

In situations like the Cadena brothels or the Cleveland house, the right to resist with deadly force if necessary should not depend on the particular requirements for kidnapping in each state. In a state that required removing the victim from one place to another, a right to self-defense against kidnapping might not arise until after the women were moved between brothels. That right, if it exists, must spring from the nature of the harm of violent sexual trafficking—a different crime than rape, but a crime that subjects a woman to repeated sexual violation, coerced by threat of death or violently enforced. For a full discussion of sex trafficking and self-defense, scholars will need to discuss many issues—the topic is complex. The next section of this Article will focus on questions of timing, threat, and self-defense in trafficking. This section looks at sexual slavery with its ongoing confinement and coercion to ask specifically about sleep—*should sleep rule out imminent threat?*

Law faces a choice here. If these women would not be justified in using deadly force to escape because an armed guard is sleeping, then the requirement for *instantaneous* threat during sleep is *more dangerous than a duty to retreat* that would be limited by the woman's safety.⁴⁷⁶ On the other hand, if these women were *not* required to wait until the guards woke up and the attacks began again, then *sleep itself* must not be the factor upon which justification turns.

Either imminence is always a contextual evaluation—temporal urgency of threat in *these circumstances*—or the essence of the imminence requirement must lie in necessity, not in some particular amount of time on the clock. Either way, sleep should not create a *per se* rule. The idea of “learned helplessness” interferes with the ability to evaluate threat in each particular set of facts. Judy Norman should have been able to ask the jury whether a reasonable person in her circumstances could have believed that she had to act immediately, even though he was asleep.

B. *Timing, Sex, and Death—Temporal Urgency and the Threat of Sexual Slavery*

George Fletcher takes for granted that Judy Norman could have used deadly force to defend against the harm of rape (given imminent threat and

⁴⁷⁶ Cf. Nourse, *supra* note 18, at 1285 (“[T]here may be a problem with applying an implied ‘pre-retreat’ rule in battered woman cases if American law does not apply that rule to the man in the dangerous bar or neighborhood. To ask of battered women that they leave—in whatever doctrinal guise (imminence, retreat, threat, etc.)—raises serious questions about whether the law of self-defense treats battered women less favorably than others.”).

necessity).⁴⁷⁷ That right is available in almost all states. It is worth noting, however, that some states, including North Carolina, limit rape to forced vaginal penetration.⁴⁷⁸

In North Carolina, the state supreme court had already stated that the harm of forcible sodomy could also justify the use of deadly force in self-defense.⁴⁷⁹ But J.T. was not committing forcible sodomy on Judy as that term is generally understood. He was using force to compel her to sell oral sex to strangers against her will. There are few cases addressing forcible sodomy in North Carolina and none that address this question, so it is difficult to determine whether North Carolina could have treated J.T. as an attacker based on a form of accomplice liability.

Most states do not include trafficking among the enumerated crimes that justify deadly force in self-defense, but some frequently enumerated crimes might address Judy Norman's situation.⁴⁸⁰ Transporting her to the truck stop depended on violence and, perhaps, on her fear that resistance could be fatal.⁴⁸¹ In most states, deadly force can be used against kidnapping,⁴⁸² and J.T.'s violent movement of Judy from place to place might have qualified. In North Carolina, as in most states, kidnapping depends on the purpose for which the person is held and moved.⁴⁸³

On the other hand, most cases of kidnapping wives or intimate partners involve estrangement or separation.⁴⁸⁴ Because the *Norman* court did not

⁴⁷⁷ See Fletcher *supra* note 401, at 560 and accompanying text ("No legal system in the Western world would expect a woman to endure a rape if her only means of defense required that she risk the death of her aggressor.").

⁴⁷⁸ See N.C. GEN. STAT. § 14-27.21(a) (2017) ("A person is guilty of first-degree forcible rape if the person engages in vaginal intercourse with another person by force and against the will of the other person . . ."). The Model Penal Code also makes deadly force available to defend against rape and defines rape as vaginal, oral, or anal intercourse. MODEL PENAL CODE §§ 3.04 (2)(b), 213(2), 213.1(1) (AM. LAW INST. 2017).

⁴⁷⁹ State v. Hunter, 286 S.E.2d 535, 540 (N.C. 1982).

⁴⁸⁰ Human Trafficking Enactments 2005–2012, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx> (last updated Dec. 31, 2012) (providing an overview of state human trafficking laws).

⁴⁸¹ State v. Norman (*Norman I.*), 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

⁴⁸² See, e.g., ALA. CODE § 13A-3-23(a), (a)(3) (LexisNexis 2016) ("A person may use deadly physical force . . . if the person reasonably believes that another person is . . . [c]ommitting or about to commit a kidnapping in any degree . . ."); COLO. REV. STAT. § 18-1-704(2), (2)(c) (2003) ("Deadly physical force may be used only if a person reasonably believes . . . [t]he other person is committing or reasonably appears about to commit kidnapping . . ."); ME. STAT. ANN. tit. 17-A, § 108(2), (2)(A)(2) (2017) ("A person is justified in using deadly force upon another person . . . [c]ommitting or about to commit a kidnapping . . ."); TEX. PENAL CODE ANN. § 9.32(a), (a)(2), (a)(2)(B) (West 2017) ("A person is justified in using deadly force against another . . . to prevent the other's imminent commission of aggravated kidnapping . . .").

⁴⁸³ See N.C. GEN. STAT. § 14-39(a)(1)–(6) (2006) (listing purpose elements of the crime of kidnapping).

⁴⁸⁴ Diamond, *supra* note 462, at 754 (reporting that the author had found only one case that involved a battered woman confined at home by a batterer with whom she cohabits "rather than being abducted in public by husbands or boyfriends from whom they have separated or want to separate").

treat the rapid escalation of violence and abuse as intensifying the threat to Judy, they would probably have found it difficult to distinguish her case from a more ordinary situation in which a husband took his wife's arm forcefully and marched her out to the car—even if that ordinary case could have been charged as battery or false imprisonment. A few weeks after Judy shot J.T., North Carolina enacted a law making “felonious restraint” a lesser-included offense of kidnapping.⁴⁸⁵ The application of that law would have been obvious, though the courts would still have had to consider whether deadly force was available to defend against the lesser included offense.

Let us assume for this discussion that defending oneself against the transportation, violence, and unwilling commercial sex acts involved in forcible trafficking can, under appropriate circumstances and necessity, justify the use of deadly force in resistance. It is not surprising that, in the mid-1980s, attorneys and courts did not treat this as the basis for Judy's defense. The term “sexual slavery” had been coined only recently; the issue had not yet drawn the advocacy, activism, and scholarly energy that had by then been invested in work on intimate partner violence.⁴⁸⁶ Forced prostitution looked more like a particularly awful form of abuse than a separate crime generating its own rights to self-defense.⁴⁸⁷

In the decades that followed, only a handful of law review articles treated forced prostitution seriously in analyzing Judy Norman's use of defensive force.⁴⁸⁸ So far, none have addressed the relationship between the particular threat of violent trafficking and the *temporal urgency of the threat*—her need to act immediately. Although the question of deadly defensive force in prostitution and trafficking also raises questions about autonomy, choice, and captivity, the discussion that follows here focuses on

⁴⁸⁵ N.C. GEN. STAT. § 14-43.3 (1994).

⁴⁸⁶ See BARRY, *supra* note 15, at 6 (noting that when the author “began to write *Female Sexual Slavery* in the mid-1970s, the subject had been . . . effectively buried” and to “study female ‘sexual slavery,’ [she] could only start with the slender file of material [she] had developed over the previous ten years”).

⁴⁸⁷ See *id.* at 6, 9–11 (discussing assumptions and findings regarding forced prostitution).

⁴⁸⁸ See, e.g., Kimberly Kessler Ferzan, *The Values and Costs of Imminence*, in CRIMINAL LAW CONVERSATIONS, *supra* note 10, at 419 (treating the forced prostitution of Judy Norman as repeated rape that did justify the use of deadly force and therefore distinguishing *Norman* from the general discussion of the imminence requirement); Angel, *supra* note 10, at 76 (“Is not forced prostitution, known as rape, grave bodily harm? . . . She correctly perceived increased violence leading to grave bodily harm and possible death because J.T.'s abuse was more frequent and worse than ever.”); Mahoney, *supra* note 10, at 91 n.449 (alteration in original) (“Forced prostitution—essentially, third-party rape—must by the terms of the discussion [in the majority opinion] have been considered something other than ‘great bodily harm.’ Or, perhaps, since she had experienced this particular bodily harm for many years, it no longer amounted to ‘great’ harm.”); Shana Wallace, Comment, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1780 (2004) (“[T]here was no question about the magnitude of harm she would face when her husband awoke. Forced prostitution, rape, severe beatings, and possible death were what she was promised[—]all forms of harm well within the traditional protections of self-defense law.”).

the *timing* of threat and defense in a pattern of violent, recurrent, interrelated criminal acts.

When does the trafficking event begin, and at which points would self-defense be justified? On the witness stand, Judy said that she shot J.T. because when he woke up, the same thing would begin again, and that night at the truck stop, his brutality and the experience of forced prostitution would be worse than it had ever been.⁴⁸⁹ The harmful event would take hours, and during those hours she would be under violent control in the car and at the truck stop.⁴⁹⁰ Was the right to use deadly force equally applicable at all points? If not, what would distinguish the crucial points or permissible moments for the use of deadly force? Put another way, in a search for a legal standard to clarify when victims of forced prostitution may or may not use deadly force, how should law choose which events mark the line across which that force becomes permissible?

Common sense indicates that Judy must be able to resist initial transportation to the truck stop. But the law should not limit Judy's options based on the possibility that while they drove, J.T. might change his mind about the destination.⁴⁹¹ The fact that she had endured previous trafficking events should not affect her right to resist this one, especially when she had reasonable grounds to believe this time would be worse.

If the urgency of using deadly force depends in part on the unavailability of legal protection, then it should matter that Judy would have had difficulty seeking help from police against violent trafficking. She probably feared confessing to illegal sex acts for which she had previously been arrested while J.T. evaded criminal responsibility.⁴⁹² While Judy and J.T. were in Chicago, the North Carolina legislature had made it a crime to hold a person in involuntary servitude and to kidnap a person for the purposes of involuntary servitude, but that legislation focused on labor and arose from an effort to protect farm workers.⁴⁹³ Twenty years passed before North Carolina expanded its laws to cover sex trafficking victims, criminalizing

⁴⁸⁹ Transcript, *supra* note 1, at 142.

⁴⁹⁰ *State v. Norman (Norman I)*, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988).

⁴⁹¹ *But cf. Dressler, Battered Women and Sleeping Abusers*, *supra* note 29, at 467 (arguing that a sleeping abuser who plans to kill might experience a change in behavior or mindset).

⁴⁹² *Id.* at 36, 136.

⁴⁹³ 1983 N.C. Sess. Laws 771 (defining the crime of involuntary servitude and amending the kidnapping statute to reflect the new statutory definition of involuntary servitude); *see also* Kelle Barrick et al., *Labor Trafficking Victimization Among Farmworkers in North Carolina: Role of Demographic Characteristics and Acculturation*, 2 INT'L J. RURAL CRIMINOLOGY 225, 234–35 (2014) (stating that about twenty-five percent of migrant workers experience trafficking in North Carolina); Charlotte Gail Blake, *North Carolina's New Involuntary Servitude Statute: Inadequate Relief for Enslaved Migrant Laborers*, 62 N.C. L. REV. 1186, 1186 (1984) (explaining that the legislature enacted the involuntary servitude bill in response to cases in which defendants were found to have violated the 1866 Civil Rights Act and the Thirteenth Amendment by enslaving agricultural workers).

human trafficking and sexual servitude and including both crimes in the kidnapping statute.⁴⁹⁴

Until 2011, self-defense was a judicially created common law doctrine in North Carolina.⁴⁹⁵ Therefore, on one hand, the absence of express coverage in the kidnapping law did not rule out self-defense against violent trafficking. After 2011, when the legislature enacted a self-defense law, the new statute preserved existing common law rules.⁴⁹⁶ If judges had seen the harm of sexual slavery at the time of the *Norman* case, they could have considered whether the harm was comparable to forcible sodomy and whether courts should allow similar use of defensive force. On the other hand, even if judges perceived the harm of sexual slavery, they might have discounted the gravity of a harm committed many times or had trouble seeing the escalating threat that made Judy Norman turn to deadly force.⁴⁹⁷ Future legal scholarship can help by exploring the complex issues in self-defense against the brutal recurring criminal acts and particular harms involved in the forcible trafficking.

C. Reasonable Belief and Eyewitnesses

I looked at my dad's head. I seen the blood . . . and I ran out of the room and hollered that he killed her. I kept on hollering, 'He killed her.'⁴⁹⁸

These witnesses described circumstances that caused not only [the] defendant to believe escape was impossible, but that also convinced them of its impossibility. Defendant's isolation and helplessness were evident in testimony that her family was

⁴⁹⁴ See Act of July 27, 2006, No. 2006-247, § 20(c) 2006 N.C. Laws 1084 (rewriting the offense of kidnapping to include "[t]rafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude" and "[s]ubjecting or maintaining such other person for sexual servitude"). The federal government also took action against sex trafficking. In 2000, Congress made it safer for trafficking victims from other countries to testify against those who exploited them. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533-34 (2000) (codified in scattered sections of Title 8 of the United States Code) (creating a new nonimmigrant visa classification to strengthen the ability of law enforcement to prosecute cases of human trafficking).

⁴⁹⁵ See, e.g., *State v. Rawlings*, 762 S.E.2d 909, 913 (N.C. Ct. App. 2014) (noting that North Carolina recognized the common law right to self-defense prior to the statute).

⁴⁹⁶ N.C. GEN. STAT. ANN. § 14-51.2 (West 2011).

⁴⁹⁷ See, e.g., Mahoney, *supra* note 10, at 91 (criticizing the majority opinion because "[f]orced prostitution—essentially, third-party rape—must by the terms of the discussion have been considered something other than 'great bodily harm.' Or, perhaps, since she had experienced this particular bodily harm for many years, it no longer amounted to 'great harm.'"); Angel, *supra* note 10, at 87 (arguing that the majority either forgot or ignored that severe beatings and forced prostitution constitute grievous bodily harm); *People v. Humphrey*, 921 P.2d 1, 20 (Cal. 1996) (quoting the prosecutor's argument that because the abuser had threatened to kill her many times, this time could not be taken seriously).

⁴⁹⁸ Transcript, *supra* note 1, at 61 (emphasis added).

intimidated by her husband into acquiescing in his torture of her.⁴⁹⁹

People around Judy thought J.T. was going to kill her.⁵⁰⁰ Judy believed his death threats.⁵⁰¹ When she attempted suicide, J.T. tried to block intervention and then increased his threats of mayhem and death.⁵⁰² The family found his lethal threats so credible that Laverne armed herself. Phyllis showed her belief in the imminent deadly threat to her mother when she reacted to the sight of her dying father by shouting repeatedly that *he had killed her mother*. J.T.'s threats to kill might have seemed routine because he repeated them so frequently but the witnesses around Judy took those lethal threats seriously.⁵⁰³ Justice Martin's dissent emphasized the conviction of those around Judy that she could not escape and could not find help.⁵⁰⁴ Judy believed it, and the people around her believed it. The family believed they could not help her and stood by, "intimidated by her husband into acquiescing in his torture of her."⁵⁰⁵ In some cases, intimate partner violence takes place in secret; in other cases, family, friends, or others see incidents of violence. J.T. may have liked having witnesses to his performances of violent power and control. "[H]e did it a lot when other[s] . . . [were] around; he was showing off . . ."⁵⁰⁶

Eyewitness belief presents an important issue in self-defense. When evidence is available that a defendant's actual fear of a threat was shared by eyewitnesses, that shared belief speaks to the very essence of reasonableness in self-defense—the question of whether others familiar with her circumstances would share her perception. Similarly, when witnesses share a perception that escape is impossible, the jury should be allowed to consider that evidence when weighing imminence and necessity.⁵⁰⁷ The dissent relied on that approach in its conclusion: "If the evidence in support of self-defense is sufficient to create a reasonable doubt in the mind of a rational juror

⁴⁹⁹ *Norman II*, 378 S.E.2d 8, 18 (N.C. 1989) (Martin, J., dissenting).

⁵⁰⁰ See Angel, *supra* note 10, at 70–71 (discussing witness testimony that addressed the abuse and Judy's mother's belief that J.T. would kill Judy).

⁵⁰¹ *Supra* text accompanying note 189 (quoting Judy that she believed J.T.'s threat to kill her).

⁵⁰² Transcript, *supra* note 1, at 36–37; Mahoney, *supra* note 10, at 92 ("[T]he day before he died, her husband had essentially attempted her murder: rather than fulfilling his duty to save her life when she attempted suicide, he had done all he could to cause her to die and prevent others from saving her."); Angel, *supra* note 10, at 70–71.

⁵⁰³ Angel, *supra* note 10, at 71.

⁵⁰⁴ See *State v. Norman (Norman II)*, 378 S.E.2d 8, 18 (N.C. 1989) (Martin, J., dissenting) (noting that witnesses were convinced Judy could not escape and that witness accounts described Judy's interactions with social service agencies and the law that convinced Judy she could not find help).

⁵⁰⁵ *Id.* at 269–70.

⁵⁰⁶ See *supra* text accompanying note 90 (quoting testimony of Mark Navarra).

⁵⁰⁷ In his dissent, Justice Martin cited the belief of witnesses that Judy could not escape the family's inability to defend her against torture and the testimony of witnesses about Judy's fear that J.T. would kill her. *Norman II*, 378 S.E.2d at 17–19 (Martin, J., dissenting).

whether the state has proved an intentional killing without justification or excuse, self-defense must be submitted to the jury. This is such a case.”⁵⁰⁸ Indeed, *Norman* had so many eyewitnesses that we must remember not to create a standard that would demand a similar abundance of eyewitness evidence to reach the jury.

If courts ignore that shared perception of threat, judges can create a different moral problem by disqualifying or disregarding the perceptions of the closest witnesses. Even though Laverne was still struggling to help, intimate terrorism had persuaded the family that Judy could not escape. Her help-seeking continued to fail. A juror might find that the witnesses had evaluated the situation correctly. These witnesses’ perceptions of danger cannot be treated as relevant only to “subjective” belief—that approach would move away from the core principle that gives the determination of reasonableness to the jury.

If courts fail to treat shared terror as relevant to the “objective” prong of self-defense, they will create a new moral hazard in which the most lethal batterers could convince more people of lethal danger without adding to the evidence in favor of *reasonable* self-defense. The fact that witnesses shared Judy’s belief would not automatically validate her perception as reasonable, but their belief must be relevant to whether the jury must evaluate reasonableness. Scholarly debates suffered from the idea of impaired perception in battered women. The debates on *Norman* should have recognized the importance of the discussion of eyewitness perception in the dissent.

D. *Was it Possible to Help Judy Norman?*

Was help more available than Judy and her family believed? What kind of intervention or assistance would have made Judy Norman safe? An example from a rural area in the early 1990s illustrates some elements of a successful intervention. Kathy Strahm, a young prosecutor in rural Brown County, Indiana, met Martha Boroughs, a defendant charged with writing a bad check who sought a continuance to allow her to repay the money.⁵⁰⁹ Martha Boroughs said that her husband John Boroughs had written the check, but begged Strahm to allow her to pay it off anyway; she feared her husband. The next week, a state police detective told Strahm that Martha was in “real trouble” because John had begun choking her into unconsciousness and might kill her soon. Together, the detective and the prosecutor arranged for John to begin serving a jail sentence on traffic charges in another county. Then they offered Martha an opportunity to press

⁵⁰⁸ *Id.* at 21.

⁵⁰⁹ This account of Martha Boroughs’s experience is based on an interview with Kathy Strahm reported in Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59, 83–84 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

charges. After John had been in jail for more than a month, Martha felt safe enough to reveal a story of grotesque violence in a marriage that lasted only two years. Repeatedly, John had beaten and raped her; he had kicked, confined, and choked her. The battering caused an abscess in the bone that scarred her face. John tortured her with electric shocks, and during his calls from jail, Martha recorded his threats to apply electrical shocks to her eyes when he returned.

Martha Boroughs had made complaints to police, but that record looked like complaints filed by many women—separate incident reports, each on a recent episode of abuse. She had not pursued prosecution. John always eventually got out of jail. He had threatened that if she left, he would punish her and force her to return by killing her children and her father, one after another, and she believed him.

The state brought fifty-two criminal charges against John Boroughs, including five counts of attempted murder, eight counts of battery, fourteen counts of intimidation, and several counts of rape and deviate sexual conduct. Every incident of violence became part of the pattern of controlling and abusive behavior. The judge split the case into several separate trials covering different time periods. In the first trial, the jury convicted John Boroughs and the judge sentenced him to eighty-five years; the appellate court affirmed his conviction. Strahm concluded that serious concern for Martha's safety had been crucial to successful prosecution.⁵¹⁰

Such an intervention might have helped Judy Norman, but that intervention required a knowledge of households and relationships that exists in very few communities, then or now. Saving Martha Boroughs brought together a young prosecutor and a veteran detective who paid attention to details and people. Is this a story of alert law enforcement, or is it a fairy-tale ending possible only in a small community under ideal conditions?⁵¹¹ What would it take to institutionalize this kind of support and to enable domestic violence victims to rely on it?

Many years later, the U.S. Attorney's Office in Washington, D.C. developed a Victim-Informed Prosecution program to serve victim-witnesses who had the most severe histories of violence: "A special team, including criminal prosecutors, civil lawyers, and victim advocates provides intensive and fully coordinated legal, social, and safety services for these women. Team members receive extensive training and meet bimonthly to engage in detailed planning and strategy sessions that uniquely meet each

⁵¹⁰ *Id.* at 83–85.

⁵¹¹ In 1990, Brown County had a population of about 14,000 people. IND. BUS. RESEARCH CTR. AT THE IND. SCH. OF BUS., *1990 Census of Population and Housing*, STATSINDIANA, http://www.stats.indiana.edu/c90/counties/brown_prof.html (last visited Oct. 29, 2018).

victim's needs."⁵¹² Perhaps multiple team members, specializing in fully coordinated services, could have protected Judy Norman with her nontraditional household. But Victim-Informed Prosecution was a pilot program.⁵¹³ It could not have served everyone in need, and it is not clear whether any victim could rely on finding such extensive help. When family networks and local police did not protect her, Judy Norman had no comparable resources to which to turn.

E. Context and Imminence, Justification and Excuse

Imminence is a contextual evaluation. It must matter to temporal urgency whether the person threatened is mobile or chained in place; it must matter whether an attacker appears capable of moving quickly or slowly. The legal evaluation of threat is based on both what the defendant actually perceived and what a reasonable person in her situation would have perceived.⁵¹⁴ Scholars err when they treat the perception of threat in battering as if arguing for imminence in *Norman* necessarily involves making reasonableness more "subjective."⁵¹⁵ The claim that *no reasonable person could possibly see imminent threat in a sleeping man* depends on unspoken premises that death is the only relevant threat, escape is possible, and sleep will last for a while.

Professor Dressler has written extensively in this field, rejecting justified self-defense for Judy Norman. He argues that no reasonable person could see imminent threat in J.T. Norman as he slept. "Indeed, if Judy Norman *did* believe, because of BWS, that her sleeping husband represented an instantaneous threat, . . . [i]t should suggest that there was something wrong with Judy Norman's psychological connection to reality."⁵¹⁶ He sees expert evidence as incompatible with the reasonableness standard because reasonableness cannot be judged "from the perspective of someone who, by definition, is experiencing a set of symptoms that renders her state of mind abnormal[.]"⁵¹⁷

⁵¹² See Goodman et al., *supra* note 56, at 331 (citation omitted) (proposing that these programs may help address the needs of women for whom social support networks do not diminish the recurrence of abuse).

⁵¹³ See Lauren Bennett Cattaneo et al., *The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence*, 15(10) VIOLENCE AGAINST WOMEN 1227, 1228 (2009) (evaluating whether the program increased the sense of voice for women who participated).

⁵¹⁴ See Nourse, *supra* note 18, at 1295–96 ("[C]ourts adopt a self-defense standard that is both objective and subjective.").

⁵¹⁵ See *id.* at 1239, 1277–78; Mahoney, *supra* note 218, text accompanying notes 324–44 (recounting a long history of majority and minority trends in self-defense standards that are later categorized as "subjective" and "objective").

⁵¹⁶ Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 464 (asserting that lack of connection to reality "is an argument of excuse, *not* justification by self defense.").

⁵¹⁷ *Id.*

Dressler seeks a defense for Judy Norman consistent with perceived lack-of-threat in the facts. He argues for the adoption of an excuse defense based in duress rather than justified self-defense in cases like *Norman*.⁵¹⁸ His reasoning illustrates the interaction of ideas about the “syndrome” with arguments about substantive law.⁵¹⁹ Treating the subject of expert evidence as “intimate partner violence and its effects” and replacing “learned helplessness” with “the effects of intimate partner violence” can change these debates.

There are two kinds of errors built into the argument as Dressler constructs it. There are underlying factual mistakes involving time and the nature of the threat: a nap or a “midnight shooting”; the threat of death or the threat of violent, forcible sex trafficking. But the argument also rests on mistaken ideas about “syndrome” evidence. Even if Dressler reconsidered the time of day and trafficking, some of his objections to a self-defense instruction rest on his concepts of “battered woman syndrome” and “learned helplessness.”

His argument against justification was built on the idea that expert evidence on intimate partner violence necessarily describes pathology *and* also on the idea that a pathologizing account or an account of impairment is inconsistent with a finding of reasonableness.⁵²⁰ The first of these linked concepts misunderstands expert evidence on intimate partner violence, but the second misunderstands reasonableness itself. For example, if Judy Norman had been intoxicated, impairment would be relevant but would not rule out self-defense if a sober person would have perceived the same threat. The vulgar version of “learned helplessness” influences this treatment of impairment, especially when applied to the prior conclusion that reasonable perception of imminent threat is impossible in the *Norman* facts.⁵²¹ There is some circular reasoning here: expert testimony seems to support or justify a threat perception that—if honestly held—would necessarily show impaired perception; therefore, support for the perception of imminence must rest on treating impaired perception as reasonable. This reasoning led Dressler to reject justified self-defense and turn to duress.

⁵¹⁸ See Dressler, *Battered Women Who Kill Their Sleeping Tormenters*, *supra* note 10, at 278 (“As it turns out, the no-fair-opportunity claim suggested here looks a great deal like the rationale for the existing defence of duress.”).

⁵¹⁹ *Id.* at 276–77 (criticizing “syndrome-type” evidence as potentially demeaning to an accused, and promoting “no-fair-opportunity” excuses as providing a “potential syndrome-free zone” where an accused can show that she is not blameworthy because she “acted as an ordinary individual might have behaved in similar circumstances”).

⁵²⁰ See, e.g., *id.* at 268–69 (“The conceptual—and even practical—effect of BWS evidence is to pathologize the Judy Normans of the world. . . . Even if [BWS] evidence [supports] a . . . belief that the sleeping abuser is an imminent threat . . . there is no basis for claiming that such a belief is reasonable . . .”).

⁵²¹ Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 463.

Professor Dressler understands that imminence is contextual. He approves the Model Penal Code approach that “asks whether the necessity to use the defensive force is immediately at hand.”⁵²² Invoking *Norman*, Dressler offers an illustration of the difference between the Model Penal Code and common law:

For example, suppose that Judy Norman had been in her kitchen making dinner when J.T. entered the kitchen and said to her, “This is it, bitch. Today you die. I am going to the bedroom, getting my gun, and killing you here and now.” He then turns toward the bedroom, and Judy takes this moment with his back turned to lethally stab him in the back with a large kitchen knife Judy would very likely win in a Model Penal Code jurisdiction: The use of force was “immediately necessary . . . on the present occasion.” If she waited for J.T. to return with the gun, to be sure that he meant business, she would have been helpless.⁵²³

His view of context and imminence has evolved or been clarified over time. In an exchange with Professor Holly Maguigan at Fordham in 2011, Dressler found sufficient evidence to send self-defense to the jury in some hypotheticals that involved a sleeping abuser: one in which the abuser had a baby in the bed and said he would shoot the baby as soon as he woke up, and one in which the abuser had a weapon and said he would shoot the woman as soon as he woke up.⁵²⁴ He went even further with a hypothetical in which the man had made no explicit threat and had previously attacked without killing her.⁵²⁵ Although Dressler noted those facts were weaker, he would allow a self-defense instruction if the woman testified that *she could tell* circumstances had changed, and that the abuser was going to kill her when he woke up.⁵²⁶ He would trust the jury to evaluate the timing of sleep and danger to determine the reasonableness of deadly force.⁵²⁷ “*The longer*

⁵²² *Id.* at 468 n.27 (emphasis omitted).

⁵²³ *Id.* (quoting MODEL PENAL CODE § 3.09(2) (AM. LAW INST. 2016)). I agree with this discussion of the Model Penal Code standard and its application to the kitchen hypothetical.

⁵²⁴ Dressler & Maguigan, *supra* note 11, at 13–14.

⁵²⁵ *See id.* at 14–15 (“I knew, I could tell from the look in his eye, I knew. He had never done this before. I knew that when he woke up he was going to blow me away.”) (internal quotation marks omitted).

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 14–15. This approach represents some shift in Dressler’s position from previous work in which he used the term “nonconfrontational” broadly and opposed justified self-defense in “nonconfrontational” homicides. *See* Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 457 (grouping together as nonconfrontational situations in which abusers are sleeping, watching television, and eating dinner); Dressler, *Feminist (or “Feminist”) Reform of Self-Defense Law*, *supra* note 29, at 1485 (grouping together as nonconfrontational situations in which abusers are sleeping or watching television).

*the period of time during the night between when she did it and when he was going to wake up, and whether or not she should have really believed his threat, given everything we know about them, etc., etc., I would let the jury make that determination.*⁵²⁸

Professor Dressler's 2011 position moves toward a time-frame that might allow a self-defense instruction in *Norman* if his analysis recognized the difference between the nap and "midnight"⁵²⁹ and addressed self-defense against violent sexual slavery. He did not choose any bright line for the length of sleep that a jury could evaluate. But if the Model Penal Code allows the jury to consider self-defense in his kitchen hypothetical,⁵³⁰ it should allow that instruction in *Norman*. J.T. might awaken from his nap in less time than would be required to get a gun from another room in Dressler's hypothetical. The uncertain time involved in leaving the kitchen and returning with a gun undermines the moral argument against allowing any time lapse because an abuser might have a change of heart.⁵³¹ Uncertainty does not answer the question of reasonableness: the timing of a nap is more difficult to estimate than a walk to and from another room. Nonetheless, if a reasonable juror could find that in the kitchen Judy had a right to stab J.T. in the back, then a nap should not make jury consideration unavailable as a matter of law.

Most scholars writing on imminence and justification have not yet addressed Judy's statement that she could not endure more trafficking with increased violence.⁵³² Recognizing that looming threat would not ensure a

⁵²⁸ Dressler & Maguigan, *supra* note 11, at 14 (emphasis added). Dressler also said that it would be a "different situation" if there were a specific statement of intent, for example, "when I wake up I'm going to kill you." *Id.* Of course, the imminent trafficking in *Norman* was so well-established that the judicial opinions and scholars treated it as a fact, not a threat. However, consistent with almost all scholarly discussion, the hypothetical facts posed to Dressler and Maguigan in the Fordham exchange included only the threat of death, not a threat of trafficking.

⁵²⁹ Dressler, *Battered Women and Sleeping Abuser*, *supra* note 29, at 468 n.27.

⁵³⁰ See hypothetical in text accompanying note 523, *supra*.

⁵³¹ A change of heart remains a possibility in the kitchen hypothetical. J.T. might get to the other room and reach for the gun but, seeing a family Bible nearby, be overcome by awareness that murder is wrong and divorce is a better option. (Religion did appear briefly in the *Norman* record when Mark Navarra testified about an exchange between Judy and her niece about going to church. Transcript, *supra* note 1, at 51–52. Or, J.T. might trip and break his leg on the way, creating a period of disability in which Judy could organize the family to reach safety—or his heart might soften. Dressler concedes that a reasonable person would not be required to rely on a possible change in the threat. See Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 468 n.27 ("The common law, if strictly followed, would probably suggest that she acted prematurely But, Judy would very likely win in a Model Penal Code Jurisdiction If she waited for J.T. to return with the gun, to be sure that he meant business, she would have been helpless."). That should also be true of J.T. Norman's nap.

⁵³² Dressler's casebook quotes her full statement from the transcript about this fear, see DRESSLER & GARVEY, *supra* note 414, at 521, but that fear is not part of Dressler's analysis of threat. This omission is similar to George Fletcher's unqualified statement that Judy could kill to defend her sexual autonomy and his simultaneous lack of discussion of the threat of violent trafficking that Judy described from the stand. Fletcher, *supra* note 405.

jury finding that deadly force was reasonable. The crucial point is that the *invisibility* of trafficking in the legal imagination has been a silent basis for arguments that reject self-defense in *Norman*. This issue of resistance to violent trafficking invites scholarly debate to address its ramifications.⁵³³

At Fordham, Dressler explained that his objection to self-defense in *Norman* depended on his ideas about the “syndrome”: “My criticism of that case . . . is the infusion of the Battered Woman Syndrome evidence as the way to prove imminence”⁵³⁴ That statement might change if he reconsidered expert evidence as testimony on intimate partner violence and its effects. It would also be necessary to reevaluate the relationship of expert evidence to the jury instruction. A tactical decision to call or not call an expert cannot trigger a per se rule against relevance to a self-defense instruction—expert evidence is part of all the evidence in a case. The legal question involves the burden on the state to disprove self-defense beyond a reasonable doubt: once the defendant has introduced evidence toward self-defense, might even one juror conclude that the prosecution had failed to prove that a reasonable person in Judy’s position would *not* find it necessary to act immediately while J.T. slept? Understanding intimate partner violence and its effects (or a close reading of Dr. Tyson’s testimony on coercive control) should answer Dressler’s concern that “syndrome” evidence would use impairment to prove reasonableness in the perception of imminence.

The argument for an excuse defense based in duress seeks to avoid “learned helplessness” while framing an explanation for the reasons Judy had not separated from J.T.⁵³⁵ (Here, substituting “the effects of intimate partner violence” for “learned helplessness” should address his concerns.) Dressler’s proposal builds on earlier suggestions that duress claims are appropriate when a defendant has had “no-fair-opportunity”⁵³⁶ take other actions.⁵³⁷

The duress proposal has serious problems. As others have pointed out and Professor Dressler has recognized, J.T. did not compel Judy to kill him in a way similar to the legal concept of duress.⁵³⁸ In some domestic violence

⁵³³ Dressler & Maguigan, *supra* note 11, at 1, 15.

⁵³⁴ *Id.* at 15.

⁵³⁵ See Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 470 (asserting that “battered woman’s learned helplessness . . . is not relevant” and proposing alternative reasons Judy did not separate from J.T.).

⁵³⁶ See *id.* at 469 (discussing situations in which a defendant has no fair opportunity).

⁵³⁷ UNDERSTANDING CRIMINAL LAW 7TH ED., *supra* note 418, at 245; see also Rosen, *supra* note 358, at 22, 24 (discussing excuse and the lack of fair opportunity in battered women’s self-defense cases, citing Joshua Dressler’s earlier discussion of no-fair-opportunity).

⁵³⁸ See Dressler, *Battered Women and Sleeping Abusers*, *supra* note 29, at 470 n.31 (discussing duress and the Model Penal Code § 2.09); Krause, *supra* note 32, at 567–68 (comparing Dressler’s approach to the Model Penal Code’s duress defense). See also Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 22 (1986) (discussing excuse when the circumstances allow “no fair opportunity to choose whether to

cases, the facts sound in both self-defense and duress—for example, if an abuser puts a gun in the middle of the table and says, “Kill me or I will kill you.”⁵³⁹ But basic self-defense inquiries about threat, reasonableness, and initial aggressor can address those facts without turning to the law of duress.

The criminal defense of duress—the claim that someone acted because another person made a threat that a reasonable person could not withstand—speaks to Judy’s circumstances but does not address the reasons she gave for killing J.T.⁵⁴⁰ J.T. compelled Judy to live in a way that allowed no escape, but he did not make her kill him. He held her there through pain, deprivation, and credible threats including death; duress forced her to commit prostitution. He was going to commit acts worse than the terrible things he had already done to her. She was trying to avoid trafficking more violent than ever, and she was trying not to die. Duress does not capture that struggle.

The duress proposal falls short in several ways. It does not eliminate questions about reasonableness, since both approaches require that a “person of reasonable firmness”⁵⁴¹ would have responded the same way. Applying duress to homicide would abandon one of its bright-line rules.⁵⁴² And duress creates a slope at least as slippery as self-defense. Duress would not solve concerns about jury nullification—a jury that cannot bear to convict can use whichever theory the instructions offer. If it is appropriate to change the duress rule itself, the arguments for and against such a change should not rest on the *Norman* case.

Dressler’s criticism of self-defense in *Norman* does not address the question jurors must answer. Placing the imminence of a threat in context does *not* mean asking jurors whether J.T. was a bad man. It asks the jury to look closely at what Judy feared in the context she faced. J.T. created circumstances in which the family believed Judy was going to die while simultaneously ensuring that, if she did not take the steps for which he had threatened *instant* death, no one could predict the exact moment *when* death would come. Brutal trafficking loomed. Judy saw no way to escape, neither did her family, and Dr. Tyson saw nothing in the record to contradict her

commit the harm,” citing several sources including Joshua Dressier, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY, 421, 444–50 (1982)).

⁵³⁹ Cf. *R v. Lavallee*, [1990] 1 S.C.R. 852, 857 (Can.) (recounting the defendant’s statement that her boyfriend pulled her out of the closet where she was hiding from him, hit her repeatedly, then handed her a gun; she considered killing herself but did not; then she shot him after he told her “something to the effect of ‘either you kill me or I’ll kill you’” and turned around.).

⁵⁴⁰ See *Duress*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining duress and providing examples).

⁵⁴¹ Krause, *supra* note 32, at 567.

⁵⁴² *Id.* at 568 (“Few jurisdictions have followed the MPC . . . and the defense cannot be invoked for homicides.”).

belief that help was unavailable.⁵⁴³ The reasonable evaluation of imminent threat should consider both escalating danger and J.T.'s strategic destabilization and defeat of all other methods of coping with those threats.

Persistent ideas about "learned helplessness" shape Professor Dressler's discussion of duress and excuse. Even though Dressler acknowledged in the Fordham exchange that testimony on "battering and its effects" might be relevant to the question of reasonableness,⁵⁴⁴ his subsequent work has not been not consistent on this point.⁵⁴⁵ Although that discussion receded from opposition to a self-defense instruction in all cases involving sleeping abusers, "syndrome" misconceptions still interact with the analysis of self-defense doctrine.

EPILOGUE AND CONCLUSION

Judy Norman lived in the same area of North Carolina until she died in 2007 after an extended illness. Her online obituary noted that she had lived in both Chicago and North Carolina, and that she had worked at Cone Mills.⁵⁴⁶ Three of her children survived her, as did her sister and her mother.⁵⁴⁷ She probably did not know that her losing appeal became an iconic case that generated decades of debates in criminal law.

In the end, what should legal scholars learn from the *Norman* case? We could start with humility. When it seems to us that social scientists and courts have been foolish, contradictory, and trapped within outdated puzzles, legal scholars should check to see whether there is anything we have missed. (That lesson, of course, applies broadly—the mistakes about *Norman* become an example of the cost of failing to take that approach.) Here, much of the scholarly debate missed evidence in the published opinions and vast

⁵⁴³ *State v. Norman (Norman II)*, 378 S.E.2d 8, 18 (N.C. 1989) (Martin, J., dissenting) (quoting Dr. Tyson's testimony at trial: "Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible . . . [S]he believed the law could not protect her; no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief").

⁵⁴⁴ Dressler & Maguigan, *supra* note 11, at 16–17. Responding to Maguigan's description of a different framework on "battering and its effects," Dressler acknowledged that his earlier opinion that expert evidence was relevant to subjective belief was based on "the old Lenore Walker-type testimony" and seemed to reconsider relevance to reasonableness, stating: "[T]he crux of it will be whether or not it is relevant to the objective portion of the standard, whether it was a reasonable belief. And, as you say, it depends on the facts and it depends on exactly what the nature of the testimony is."

⁵⁴⁵ See UNDERSTANDING CRIMINAL LAW 7TH ED., *supra* note 418, at 245–47 (discussing whether "a battering victim who kills in *nonconfrontational* circumstances" should be able to claim self-defense); *id.* at 246 n.147 (explaining why the "syndrome" label should be avoided); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 243–44 (6th ed. 2012) (treating "battering and its effects" only as a label designed to avoid the word syndrome, continuing to equate expert testimony with Walker's theories, and arguing against the relevance of syndrome testimony to reasonableness in cases involving sleeping abusers).

⁵⁴⁶ Harrelson Funeral and Cremation Services, *Judy Norman*, <http://hosting-9639.tributes.com/obituary/show/Judy-Norman-95106577> (last visited Sept. 30, 2018).

⁵⁴⁷ *Id.* (noting that her surviving family also included brothers, another sister, seven grandchildren and two great-grandchildren).

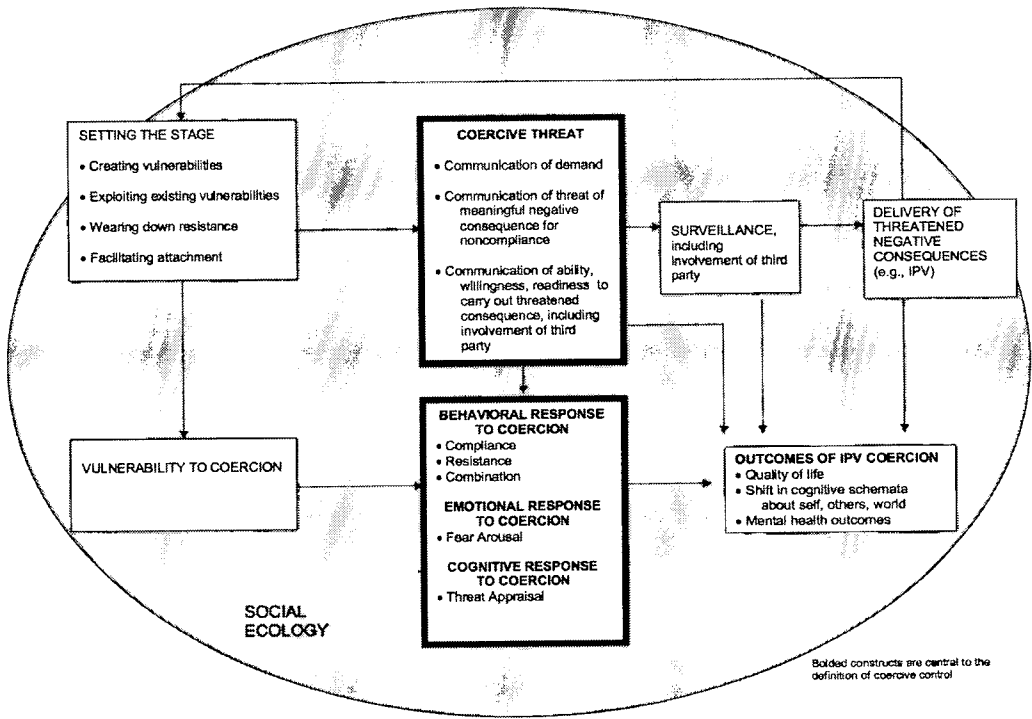
changes in the world of social science that had already entered legal cases and law reviews.

We should reckon with the threats women describe. Judy Norman testified to both her fear of death and her inability to face a night of violent trafficking worse than she had ever known. The failure of scholars to reckon with that second threat was an unforced error that has warped our debates.

More broadly, we must remember that struggle is relevant and important to understanding oppression, whether or not that struggle succeeds. It is a mistake to treat defeat as if it meant failure to try. It is a mistake to define a woman's traits by the defeat of her efforts. When Judy Norman leaves her husband repeatedly and is caught again and again, when she calls for help repeatedly and cannot find it, when she decides against strategies that he says and the witnesses around her believe would mean instant death—those desperate circumstances should not turn into a narrative about passivity. Recognizing those struggles would discourage the tendency to misread expert testimony as an explanation for passivity.

Finally, *Norman* is only one of many examples of the misunderstandings that the concepts of “syndrome” and “learned helplessness” have brought to legal scholarship. Moving away from these outdated and misunderstood constructs is vital for legal work on intimate partner violence, not only for work on the *Norman* case. Making that change will allow us to see more clearly the real dangers women face from violent intimate partners, the efforts these women make, the interventions they need, and the respect with which we should treat their capacity for resistance, survival, and change.

APPENDIX: MODEL OF COERCION IN INTIMATE PARTNER VIOLENCE (MARY ANN DUTTON & LISA A. GOODMAN)



SOURCE: Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 746 fig.1 (2005).

