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## Intimacy and Injury: How Law Has Changed for Battered Women

By Phyllis Goldfarb\*

### I. History

Law's response to the problem of violence in intimate relationships has not been swift. For centuries, legal actors neglected to notice or address the issue, an omission linked in large part to the broader problem of gender inequality deeply entrenched in the culture. Indeed, the common law of the Anglo-American world permitted the "master of the household" to "chastise" his wife using corporal punishment, as long as he did not inflict permanent physical injuries.<sup>1</sup>

Although American judges had explicitly rejected the doctrine of chastisement by the late nineteenth century,<sup>2</sup> they began substituting for it a common law doctrine of family privacy that justified legal non-intervention in the marital relationship, despite evidence that a husband was subjecting his wife to physical abuse.<sup>3</sup> Since this shift in the justification for non-intervention

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<sup>1</sup> See Reva B. Siegel, "*The Rule of Love*": *Wife Beatings as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996).

<sup>2</sup> *Id.* at 2129.

<sup>3</sup> *Id.* at 2151-55 ("During the antebellum era, courts began to invoke marital privacy as a supplementary rationale for chastisement, in order to justify the common law doctrine [of non-intervention] within the discourse of companionate marriage... A judge reasoning about marriage as a companionate relationship could invoke values of marital privacy to justify giving wife beaters immunity from prosecution much as he could invoke authority-based conceptions of marriage to justify giving husbands a formal prerogative to beat their wives.").

An emerging doctrine of marital privacy not only prevented the imposition of criminal law sanctions in cases of marital violence, it also precluded lawsuits in tort brought by the victims of marital violence. See *id.* at 2163 ("Regardless of whether a husband beat, choked, stabbed, or shot his wife, all courts reviewing such claims

coincided with the era of Reconstruction,<sup>4</sup> it is not surprising that the understanding of which families were to be accorded privacy was racialized.<sup>5</sup> When the customs of racial hierarchy were threatened by the abolition of slavery,<sup>6</sup> intimate violence came to be understood as a problem of African-American and poor immigrant men, such as those of German and Irish descent.<sup>7</sup> Legal sanctions, particularly the punishment of flogging, were imposed in some of these cases,<sup>8</sup> but not in instances of intimate violence committed by men of privileged classes.<sup>9</sup>

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initially rejected them, reasoning that spouses could not sue each other in tort – and buttressing this conclusion with justifications couched in the language of affect and privacy.”).

<sup>4</sup> *Id.* at 2119-20 (“A survey of criminal and tort law during the Reconstruction Era reveals that ... chastisement law was supplanted by a new body of marital violence policies that were premised on a variety of gender-, race-, and class-based assumptions.”). One of the most commonly cited cases justifying criminal law’s non-intervention in cases of marital violence is *State v. Rhodes*, 61 N.C. 453 (1868). One of the first cases using a privacy rationale to justify a husband’s immunity from tort liability for assaulting his wife is *Abbott v. Abbott*, 67 Me. 304 (1877).

<sup>5</sup> Siegel, *supra* note 1, at 2134-41.

<sup>6</sup> After describing a number of nineteenth century cases upholding a domestic violence prosecution against an African-American man, Siegel writes that the court opinions “seem more interested in controlling African-American men than in protecting their wives.” *Id.* at 2136.

<sup>7</sup> *See id.* at 2139:

Statistics on arrests and convictions for wife beating in the late nineteenth century suggest that while criminal assault law was enforced against wife beaters only sporadically, it was most often enforced against immigrant and African-American men. In Northern states, members of immigrant ethnic groups (e.g. German-and Irish-Americans) were targeted for prosecution; in the South, African-Americans were singled out for prosecution in numbers dramatically exceeding their representation in the population.

<sup>8</sup> By the 1880’s, prominent members of the American Bar Association advocated punishing wife beaters at the whipping post, and campaigned vigorously for legislation authorizing such a penalty. Between 1876 and 1906, twelve states and the District of Columbia considered enacting legislation that provided for the punishment of wife beaters at the whipping post. The bills were enacted in Maryland (1882), Delaware (1901), and Oregon (1906).

*Id.* at 2137.

<sup>9</sup> *Id.* at 2153 (“As courts addressed the regulation of marital violence in the wake of chastisement’s demise, judges raised concerns about invading the privacy of the marriage relationship – most often, it would appear, when they contemplated the prospect of sanctioning wife beating in households of the middle and upper classes.”).

For most of the next century, intimate violence was treated as an occasion for social services to be brought to bear on women.<sup>10</sup> The problem was understood as one in which women provoked violence.<sup>11</sup> When framed in this manner, the appropriate intervention became one of teaching women better habits to prevent their provocations.<sup>12</sup> Within this cultural framework, male violence receded from view. This notion of intimate violence as a private family dispute that women could be taught better skills to address extended late into the twentieth century.<sup>13</sup>

Due to this history of dramatic underenforcement of crimes of intimate violence against women, feminist activists and an influential victim's rights movement combined their energies to remove the cloak of privacy from the problem of intimate violence and to put the issue on the public political agenda of the 1960s and 1970s. Their efforts were tremendously successful at local, state, and national levels. In relatively short order, they were able to alter the cultural understanding of the problem of intimate violence.<sup>14</sup>

Over the past three decades, battered women's advocates have established hundreds of battered women's hotlines, shelters, and victim's advocacy programs.<sup>15</sup> They have produced

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<sup>10</sup> *Id.* at 2170 (describing how family courts sent marital violence cases to social workers who used counseling and urged reconciliation).

<sup>11</sup> *Id.* ("Battered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship...").

<sup>12</sup> See Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 991 (describing how family courts treated cases involving "domestic trouble" as occasions for teaching wives better household habits).

<sup>13</sup> Siegel, *supra* note 1, at 2170 ("The criminal justice system regulated marital violence in this 'therapeutic' framework for much of the twentieth century.").

<sup>14</sup> Elizabeth Schneider, an attorney and activist who was involved with the feminist communities spearheading these efforts, describes this groundbreaking work in ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* (2000).

<sup>15</sup> The first shelter for battered women was opened in 1972 in Chiswick, England. See R. Emerson Dobash and Russell P. Dobash, *Research As Social Action: The Struggle for Battered Women*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 51, 52 (Kerstie Yllö & Michele Bograd eds. 1988) [hereinafter *FEMINIST PERSPECTIVES*]. The first shelter for battered women in the United States was established in 1974 in St. Paul, Minnesota. See SUSAN

documentaries about battered women's experiences,<sup>16</sup> generated a cross-disciplinary professional literature on the subject,<sup>17</sup> and in some instances, pioneered treatment programs for batterers.<sup>18</sup> Medical schools have added coursework about domestic violence to standard medical training,<sup>19</sup> and a number of law schools now offer both classroom courses examining issues of domestic violence and clinical programs in which student-attorneys provide legal representation for battered women.<sup>20</sup> These extraordinary efforts have both reflected and promoted a growing cultural awareness of the nature, scope, and severity of the problem of violence between intimate partners.

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SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (Boston: South End Press 1982). By 1987, there were more than 700 shelters in the United States. See R. CHEROW-O'LEARY, *THE STATE-BY STATE GUIDE TO WOMEN'S LEGAL RIGHTS* 33 (1987).

<sup>16</sup> See *infra* notes 115, 128 and accompanying text.

<sup>17</sup> For a sampling of medical literature on domestic violence, see Jean Abbott et. al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 JAMA 1763 (1995); *American Psychiatric Ass'n, Position Statement on Domestic Violence Against Women*, 151 AM. J. PSYCHIATRY 630 (1994); Mary Brendtro & Lee H. Bowker, *Battered Women: How Can Nurses Help?*, 10 ISSUES IN MENTAL HEALTH NURSING 169 (1989); Council on Ethical and Judicial Affairs, American Medical Ass'n, *Physicians and Domestic Violence: Ethical Considerations*, 267 JAMA 3190 (1992); Susan M. Hadley, *Working with Battered Women in the Emergency Department: A Model Program*, 18 J. EMERGENCY NURSING 18 (1992); Nancy S. Jecker, *Privacy Beliefs and the Violent Family: Extending the Ethical Argument for Physician Intervention*, 269 JAMA 776 (1993); Laura Kroll, *AMA Family Violence Campaign*, 269 JAMA 1875 (1993); Marti T. Loring & Roger W. Smith, *Health Care Barriers and Interventions for Battered Women*, U.S. DEP'T OF HEALTH & HUMAN SERVICES (May 1994), reprinted in 109(3) PUBLIC HEALTH REP. QJA 328-38 (May-June 1994); Special Edition, *Domestic Violence*, 267 JAMA 3113 (1992); Nancy K. Sugg & Thomas Inui, *Primary Care Physicians' Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157 (1992); Virginia P. Tilden, *Response of the Health Care Delivery System to Battered Women*, 10 ISSUES IN MENTAL HEALTH NURSING 309 (1989); *Doctors are Advised to Screen Women for Abuse*, N.Y. TIMES, June 17, 1992, at A26 (reporting AMA advice to doctors to screen women patients for abuse as a routine matter due to prevalence of domestic violence.).

<sup>18</sup> See, e.g., David Adams, *Treatment Models of Men Who Batter: A Profeminist Analysis* in FEMINIST PERSPECTIVES, *supra* note 15, at 176.

<sup>19</sup> See Teri Randall, *ACOG Renews Domestic Violence Campaign, Calls for Changes in Medical School Curricula*, 267 JAMA 3131 (1992). Attorney Mirtha Merryman reports that Boston University School of Medicine has a four year curriculum for medical students on family violence. Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 NEW ENG. L. REV. 383, 392 n.43 (1993).

<sup>20</sup> *Id.* (surveying domestic violence curricula in law schools).

These changing cultural attitudes have wrought many changes in law, particularly on the front lines of law enforcement. Many of these changes have involved toughening the criminal laws regarding violence between intimates, and educating both law enforcement and judicial officials about the nature of the problem and the use of criminal laws to respond to it. Although the criminal justice system has been the primary locus of legal change on this issue, it has not been the exclusive one.

## II. Contemporary Legal Interventions

A variety of legal reforms have been undertaken to improve the responsiveness of law enforcement systems to victims of intimate abuse. Legal commentators have characterized domestic violence not just as a crime, but as a violation of human rights<sup>21</sup>, hate crime statutes<sup>22</sup>, and the prohibition on involuntary servitude found in the Thirteenth Amendment to the United States Constitution.<sup>23</sup> Consequently, courts have been deluged in recent years with a variety of kinds of cases brought on behalf of domestic violence victims.

### A. Civil Protection Orders

The major way in which courts now seek to address the danger posed by intimate violence is through the provision of a process by which those who have suffered violence may obtain civil orders of protection, also known as restraining orders, against their batterers. Every

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<sup>21</sup> See, e.g., Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507 (1993); Renee Holt, *Women's Rights and International Law: The Struggle for Recognition and Enforcement*, 1 COLUM. J. GENDER & L. 117 (1994); Dorothy Q. Thomas & Michele E. Easley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119 (1995).

<sup>22</sup> See, e.g., LOIS COPELAND & LESLIE R. WOLFE, *VIOLENCE AGAINST WOMEN AS BIASED-MOTIVATED HATE CRIME: DEFINING THE ISSUES* (1991).

<sup>23</sup> See Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

American jurisdiction now has legislation by which courts can issue such orders to enjoin a batterer's abuse and threats.<sup>24</sup> Different states have different procedural requirements by which victims may invoke the civil protection order process.<sup>25</sup>

Obviously, the effectiveness of the civil protection order process depends on how readily a victim of violence can access it, and how willing local criminal justice officials will be to enforce it.<sup>26</sup> Both of these are questions of resources. Jurisdictions vary as to how much outreach is provided to victims of intimate violence to assist them in using this process and in how many law enforcement resources are directed toward responding to it.<sup>27</sup> These are significant issues, as in some instances, the holder of a restraining order faces retaliatory actions and an escalation of intimate violence.<sup>28</sup>

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<sup>24</sup> See Peter Finn and Sarah Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, NATIONAL INSTITUTE OF JUSTICE, March 1990.

<sup>25</sup> These different requirements are described in Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993); Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & THE LAW 163 (1993).

<sup>26</sup> ADELE HARRIS AND BARBARA E. SMITH, *Effects of Restraining Orders on Domestic Violence Victims*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 214 (E.S. Buzawa and C.G. Buzawa, eds. 1996) [hereinafter ARRESTS AND RESTRAINING ORDERS]. Cf. Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders Don't Work*, *id.*, at 192. ). The Violence Against Women Act of 2000 provides mechanisms for the interstate enforcement of protection orders. See 18 U.S.C. sec. 2265 (2000).

<sup>27</sup> See Karla Fischer & Mary Rose, "When Enough Is Enough" Battered Women's Decision Making Around Court Orders of Protection, 41 CRIME & DELINQ. 414 (1995). A number of cities have received federal grant money in recent years to set up "one-stop shopping centers" for domestic violence victims, partnering law enforcement with social services agencies such that battered women can receive assistance from police, prosecutors, counselors, and medical personnel in a single location. In a number of these cities, police are empowered to obtain emergency protective orders for women almost instantaneously. See, e.g., Andrew Becker, *Agencies Tout 'One-Stop' Services for Victims of Violence*, BOSTON GLOBE, Feb. 1, 2004, at A17.

<sup>28</sup> See CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 499 (Foundation Press 2001) ("[A]ll of us who read the papers also know the stories of women who have died at the hands of their abusers despite, and sometimes apparently because of the restraining orders they secured.") These attacks are one example of what Martha Mahoney would call "separation assault." See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

Most states have enacted statutes criminalizing the violation of a restraining order, and others use criminal contempt laws to bolster the protection that a restraining order--a mere piece of paper--can provide.<sup>29</sup> In these jurisdictions, the restraining order process provides formal notice to the abuser that continued coercive contact with the person who obtained the order can be prosecuted as a crime. Although the crime is defined and punished in various ways depending on the jurisdiction, it has often been made a felony carrying risk of years of imprisonment and significant collateral consequences.<sup>30</sup>

#### B. Arrest and Prosecution

Beyond the prosecution of violations of civil restraining orders, legal reforms have resulted in dramatic increases in the arrest and prosecution of batterers for the assaults and the batteries that they have committed. Some states prosecute intimate violence under their general laws against assaultive behavior, while others have enacted separate statutes with separate penalties for crimes of intimate violence.<sup>31</sup> States have also enacted statutes that define new crimes related to the circumstances of intimate violence. For example, every jurisdiction adopted an anti-stalking law in the 1990s.<sup>32</sup> While the first such statutes faced constitutional challenges due to the breadth and vagueness of the conduct they covered, newer anti-stalking

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<sup>29</sup> See David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153 (1995).

<sup>30</sup> See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999).

<sup>31</sup> See Barbara Hart, *State Codes on Domestic Violence: Analysis, Commentary, and Recommendations*, 1992 JUVENILE AND FAMILY COURT JOURNAL 3 (1992). Minnesota and California are examples of states that have enacted separate statutes defining a crime and a penalty specifically for domestic abuse. MINN. STAT. ANN. § 518B.01 (West 1990 & Supp. 1997); CALIF. PENAL CODE § 273.5 (2000).

<sup>32</sup> See Carol E. Jordan, Karen Quinn, Bradley Jordan & Celia R. Daileader, *Stalking: Cultural, Clinical, and Legal Considerations*, 38 BRANDEIS L.J. 513 (2000).

legislation benefited from the more precisely worded model statute drafted in 1993 by the United States Department of Justice and other federal agencies.<sup>33</sup>

In most jurisdictions, the general rule is that police officers are forbidden to make arrests for misdemeanor offenses unless they first obtain an arrest warrant.<sup>34</sup> Battered women's advocates worked to change this general policy, such that now most jurisdictions have statutes that permit arrests for the misdemeanor of assault and battery in domestic violence cases to be made without warrants.<sup>35</sup> Some locales also have mandatory domestic violence training for law enforcement officers.<sup>36</sup>

In responding to reports of intimate violence, police in some jurisdictions are permitted to exercise their discretion in making arrests, while other jurisdictions have removed that discretion.

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<sup>33</sup> *Project to Develop a Model Anti-Stalking Code for the States: A Research Report*, NATIONAL INSTITUTE OF JUSTICE (October 1993). The Model Statute defines stalking as follows:

Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.

*Id.* at 43-44.

<sup>34</sup> Nancy James, *Domestic Violence: A History of Arrest Policies and A Survey of Modern Laws*, 28 FAM. L.Q. 509 (1994).

<sup>35</sup> See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. LAW & CRIMINOLOGY 46 (1992).

<sup>36</sup> See *infra* note 134 and accompanying text. See also Casey G. Guinn and, Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 WEST. ST. U. L. REV. 297 (1993). For examples of statutes that require domestic violence training for law enforcement, see ALASKA STAT. § 18.65.240 (Michie 2002); CAL. PENAL CODE § 13519 (West 2000); CONN. GEN. STAT. ANN. § 7-29g (West 1999); D. C. CODE ANN. § 16-1034 (2001); FLA. STAT. ANN. § 943.1701 (West 2001); KY. REV. STAT. ANN. § 403.784 (Michie Supp. 2002); MASS. GEN. LAWS ch. 6, § 116A (2002); N.J. STAT. ANN. § 2C:25-20 (West Supp. 2003); N.Y. EXEC. LAW § 642(5) (McKinney 1996); R.I. GEN. LAWS § 12-29-6 (2002). The Violence Against Women Act of 2000 earmarks funds for grants to support such training programs. See 42 U.S.C. 3796gg(b) (2000).

The 1984 publication of an experiment with mandatory arrest in Minneapolis spurred a number of states to adopt mandatory arrest statutes or policies.<sup>37</sup> These require police officers to arrest domestic violence suspects whenever the officers have probable cause to believe that a crime such as assault or battery has been committed. Other states have preferred arrest laws in these situations.<sup>38</sup>

Some jurisdictions have mandatory prosecution policies as well, such that prosecutors have no discretion to dismiss domestic violence charges once they are filed.<sup>39</sup> Even if the victim of the crime requests that the charges be dismissed and refuses to cooperate in pressing the charges, the prosecutor will be required to pursue the case nonetheless. In addition, most states have mandatory reporting laws that require medical professionals, and occasionally other social services workers, to file reports with police whenever they suspect that a patient's symptoms or injuries are caused by intimate violence.<sup>40</sup>

Mandatory reporting, arrest, and prosecution are legal reforms intended to counter the long and notorious history of law enforcement's failure to respond to victims of intimate violence. Supporters of mandatory legal interventions believe that they provide powerful deterrents to batterers, demonstrating strong cultural condemnation of battering behavior and

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<sup>37</sup> Lawrence W. Sherman and Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). Lawrence Sherman, co-author of the first influential study on mandatory arrest has since urged the repeal of mandatory arrest laws. See Janell D. Schmidt and Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?* in ARRESTS AND RESTRAINING ORDERS, *supra* note 26, at 43.

<sup>38</sup> In 1977, the state of Oregon enacted the first mandatory arrest law, requiring an arrest when police had probable cause to believe that a crime of domestic violence had occurred. By the early 1990s, many other states had followed suit. Some states simply encouraged rather than required police officers to make arrests in these situations. See DALTON & SCHNEIDER, *supra* note 28, at 595. The Violence Against Women Act of 2000 provides monetary grants for programs that require and encourage batterers' arrests. See 42 U.S.C.3793 (2000).

<sup>39</sup> See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850 (1996).

<sup>40</sup> See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1990).

reducing the likelihood of discriminatory law enforcement. Therefore they consider these policies the most effective available tool for reducing intimate violence.<sup>41</sup>

By contrast, opponents of mandatory interventions are deeply concerned when decisions to arrest and prosecute intimate violence are made without regard to the victim's wishes.<sup>42</sup> They are concerned that especially when victims remain in relationship with abusers, as many do, mandatory criminal justice interventions can be harmful to the victim in a number of ways. These harms are compounded for women who come from communities with historically troubled relationships with law enforcement, immigrant women whose batterers may be deported, and women living on the edge of poverty.<sup>43</sup> Moreover, researchers are in dispute as to the long-term effectiveness of mandatory policies in reducing intimate violence.<sup>44</sup>

A criminal conviction for a crime of domestic violence may in some instances result not in immediate incarceration, but in a sentence of probation with required conditions.<sup>45</sup> These conditions, enforced through the threat of future imprisonment for failure to comply, often require that the batterer enter individual counseling, an anger-management program, or other

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<sup>41</sup> See, e.g., Hanna, *supra* note 39, at 1886; *Forum: Mandatory Prosecution in Domestic Violence Cases*, 7 UCLA WOMEN'S L.J. 169 (1997); Evan Stark, *Mandatory Arrest of Batterers: A Reply to its Critics*, in ARRESTS AND RESTRAINING ORDERS, *supra* note 26, at 115; Guinn and O'Dell, *supra* note 36; Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 NEW. ENG. L. REV. 929 (1994).

<sup>42</sup> Linda Mills articulates this perspective. See Mills, *supra* note 40.

<sup>43</sup> See, e.g., Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281 (1997); Miriam H. Rutenber, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 (1994); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993). See also Klein & Orloff, *supra* note 25.

<sup>44</sup> See *Symposium on Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1 (1992); Zorza, *supra* note 41.

<sup>45</sup> See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WILLIAM & MARY LAW REV. 1505 (1998).

available social services.<sup>46</sup> In some jurisdictions, such as Boston, Seattle, and San Diego, there are therapeutic programs to which convicted batterers can be sentenced that are designed exclusively to treat men who perpetrate intimate violence.<sup>47</sup>

Some commentators argue that encouraging and facilitating the use of therapeutic services in domestic violence cases would be more effective than mandating their use through the criminal justice system. They worry that the coercive qualities of criminal penalties impede the effectiveness of these services.<sup>48</sup> Others suggest that in some cases providing intimate violence victims with the material resources that many of them lack, such as independent housing and income, may be preferable to policies of punishing abusers through criminal justice sanctions.<sup>49</sup>

While these controversies about the appropriateness of various kinds of legal interventions continue, there is no doubt that prosecutions of domestic violence cases have become features of the landscape in criminal courtrooms around the country. Some criminal courthouses hold specialized domestic violence sessions, and a handful of jurisdictions have established a court devoted exclusively to domestic violence.<sup>50</sup> The underlying rationale for the latter arrangement is that specialized domestic violence courts, overseeing all related civil and criminal matters, will more effectively address the complex issues -- potentially involving

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<sup>46</sup> See, e.g., Adams, *supra* note 18. See also Adele Harrell, *Evaluation of Court-Ordered Treatment for Domestic Violence Offenders*, STATE JUSTICE INST. 99 (1991).

<sup>47</sup> Barry D. Rosenfeld, *Court-Ordered Treatment of Spouse Abuse*, 12 CLIN. PSYCH. REV. 205 (1992).

<sup>48</sup> See Linda G. Mills, *supra* note 40.

<sup>49</sup> Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009 (2000).

<sup>50</sup> See S. Keilitz, H. Efkenman and P. Casey, DOMESTIC VIOLENCE COURTS: JURISDICTION, ORGANIZATION, PERFORMANCE GOALS, AND MEASURES (National Center for State Courts, 1997).

divorce, property, child custody, and other issues -- that may be implicated when efforts are underway to end an abusive relationship.

### C. Civil Lawsuits

While far less common than criminal prosecutions, some victims of intimate violence have filed civil lawsuits, known as tort actions, against their abusers. Through these lawsuits, plaintiffs seek monetary compensation for the harms that they have suffered due to the defendants' abusive behavior.<sup>51</sup> The harms compensated need not be physical injuries alone, but might include the traumatic consequences of living under the coercive control of one's intimate partner. Many jurisdictions recognize a tort action for intentional infliction of emotional distress, and some commentators have suggested that claims based on this legal theory might be used as a source of redress for victims of intimate abuse in conjunction with tort actions for physical harms such as assault and battery.<sup>52</sup>

Tort actions as a source of redress in these situations have some obvious constraints. First, victims will need the assistance of lawyers to pursue such actions, and there is a profound shortage of lawyers for those who are unable to pay for their services. Second, a batterer without sufficient financial means may be unable to pay a monetary judgment, if it is imposed. Therefore, even in situations where plaintiffs are able to hire lawyers to file such suits and their claims are upheld by courts, the victories will be merely symbolic unless the defendants have significant resources. Hence, the deterrence picture provided by this legal remedy is a limited one, although there may be some individual cases where it is a viable avenue of redress.

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<sup>51</sup> See Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543 (1992). The provision of the Violence Against Women Act of 1994 that made gender-motivated crimes of violence the basis for a federal civil lawsuit was declared unconstitutional by the United States Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000) which held that Congress lacked constitutional authority to enact such a remedy.

<sup>52</sup> *Id.* See also Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319 (1997).

Another kind of civil lawsuit that does not depend for its success on the resources of an individual defendant is a lawsuit against police departments and municipalities, alleging civil rights violations in the failure of police officers to respond to complaints of intimate violence. Evidence that the police had policies or practices of non-intervention in domestic violence cases led to a number of prominent lawsuits and multi-million dollar judgments in the 1980s.<sup>53</sup> The prospect of liability at this level of financial magnitude encouraged police departments to increase their responsiveness to victims of intimate violence. Indeed, the fear of liability may well have led some communities to favor mandatory arrest programs.<sup>54</sup>

A 1989 Supreme Court decision known as *DeShaney v. Winnebago County Department of Social Services* seems to prohibit lawsuits against police departments and municipalities for failure to protect victims from private violence that the police could not control.<sup>55</sup> Nonetheless, a plaintiff may still be able to prevail in such litigation on a claim that police enabled private violence<sup>56</sup> or engaged in discriminatory enforcement.<sup>57</sup> Although lawsuits of this sort may be

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<sup>53</sup> The most prominent case was *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (federal jury found police liable for negligence in failing to respond to plaintiff's repeated requests for protection from her abusive husband, awarding her \$2.3 million in compensation for her injuries.) Other related cases include *Hynson v. Chester*, 864 F.2d 1026 (3<sup>rd</sup> Cir. 1988) (mother and children of woman killed by boyfriend permitted to sue police for refusing to arrest boyfriend before murder because restraining order had expired); *Watson v. Kansas City*, 857 F.2d 690 (10<sup>th</sup> Cir. 1988) (police department can be liable for failing to take action against abusive husband who was a police officer, resulting in an attack on his wife and children).

<sup>54</sup> See *Dalton & Schneider*, *supra* note 28, at 595.

<sup>55</sup> *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

<sup>56</sup> Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N. Y. U. L. REV. 1280 (1990).

<sup>57</sup> George P. Choudas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069 (1995). See, e.g., *Estate of Macias v. Ihde*, 219 F.3d 1018 (9<sup>th</sup> Cir. 2000) which permitted a civil lawsuit against a sheriff's department following a domestic violence homicide on the grounds that the plaintiff had a constitutional right to police services administered in a nondiscriminatory manner. Following this decision, the Sheriff's Office of Sonoma County, California settled the lawsuit for \$1 million dollars rather than face trial for its failure to provide requested assistance to a woman threatened by her batterer.

advisable in particular situations, they are not a feasible approach in most cases of intimate violence.

#### D. Alternative Forms of Dispute Resolution

In cases involving family law, many courts prefer mediation as an alternative to litigation. This preference for mediation is sparked by a desire to reduce both case congestion and levels of antagonism in matters related to the family. Indeed, a number of states require mediation in cases involving child custody and visitation.<sup>58</sup>

The preference for mediation is controversial in cases involving intimate violence. Those who oppose mediation in cases of intimate violence argue that the posture of mediator neutrality prevents the mediator from giving the abused partner the support that she may need and inhibits any signaling of disapproval of the batterer's behavior. Consequently, mediation opponents fear that the ethos of mediation is such that it enables the batterer—and, even worse, the system—to overlook the extent of the harm that the batterer has inflicted and to avoid taking it into account in reaching agreements.<sup>59</sup>

Supporters of mediation in at least some of the cases involving intimate violence believe that many of the opponents' concerns can be addressed through the manner in which the mediation setting is structured. The mediator can meet separately with the parties and can encourage the batterer to take responsibility for his behavior. The lessened adversariness of the

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<sup>58</sup> See Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIM. LAW 447 (1997) (discussing many state statutes).

<sup>59</sup> See, e.g., Karla Fischer, Neil Vidmar, & René Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U.L. REV. 2117 (1993); Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC'Y REV. 397, 410 (1997).

mediation process is characterized as more potentially empowering to the battered woman than the formality of the courtroom setting.<sup>60</sup>

The controversies concerning the appropriateness of mediation in cases that entail intimate violence have influenced the legal regulation of access to mediation. Some of the jurisdictions that mandate mediation relinquish that requirement in cases where intimate violence has occurred. Some jurisdictions go so far as to ban mediation in these cases, whereas others permit the judge to make a discretionary judgment concerning the appropriateness of mediation in a particular case.<sup>61</sup>

Mediation is not the only potential alternative setting for resolving disputes in cases that involve intimate violence. Donna Coker has described the Navajo practice of Peacemaking as a kind of forum that may provide assistance to battered women in some circumstances.

Peacemaking processes may be initiated by the battered woman or by referral from the Navajo legal system. The peacemaker facilitates a conversation between the parties, those with a stake in the parties' lives, such as family and friends, and those with special expertise related to the pertinent issues. The group then works to try to create a plan for addressing the problem.<sup>62</sup> This kind of model has been adopted by proponents of restorative justice programs, some of whom believe that these represent promising alternative interventions for at least a portion of the cases involving intimate violence.<sup>63</sup>

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<sup>60</sup> See, e.g., Joyce, *supra* note 58, at 456-58.

<sup>61</sup> See KATHERINE T. BARTLETT, ANGELA P. HARRIS, & DEBORAH L. RHODE, *GENDER & LAW: THEORY, DOCTRINE, COMMENTARY* 650 (3d ed. 2002).

<sup>62</sup> Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1, 34-37 (1999).

<sup>63</sup> Linda Mills proposes use of a restorative justice model as an alternative to a criminal justice model to address problems of intimate violence. See LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* (2003).

### III. Self-Defense

Against the backdrop of the centuries-old reluctance to address the problem of intimate violence, all of these developments in the law were hard won and recently so. Nevertheless, attitudes often change more slowly than the law. As battered women's advocates have observed, legal decisionmakers' perceptions of battered women are often still plagued by stereotypes and misperceptions.<sup>64</sup> These problems manifest themselves acutely when the legal interventions detailed in Part II have not succeeded in preventing intimate violence, and battered women find themselves on trial for killing their abusers.

In an intimate relationship that becomes violent, the violence may become lethal. When it does so, the violence in the relationship has generally escalated to the extent that the abuser in the relationship kills the abused. Studies show that approximately one-third of female murder victims, compared to one-twenty-fifth of male murder victims, are killed by their intimate partners.<sup>65</sup>

Occasionally, lethality runs in the opposite direction than the pattern of abuse, such that a person who has suffered repeated and severe violence at the hands of her intimate partner responds by killing her batterer. Often these killings are charged as crimes, ranging from manslaughter to first-degree murder. A third of the women incarcerated for homicide have been

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<sup>64</sup> See, e.g., Martha Mahoney, *supra* note 28, at 24-26 (1991) (describing stereotypical notions of women's experience that the term "battered woman" implies); Michael Dowd, *Dispelling the Myths about the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 581 (1992) (describing images of "good" battered women and "bad" battered women that have emerged).

<sup>65</sup> See Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, BUREAU OF JUSTICE STATISTICS (February, 2003).

convicted for killing an intimate partner. Research shows that a considerable percentage of these partners had histories of abusing the women who killed them.<sup>66</sup>

In such cases, the likely defense is self-defense. To meet the criteria of self-defense and thereby avoid conviction for acts of violence against a batterer, a defendant must convince a jury that she acted from a reasonable belief that she was in imminent danger of serious bodily harm or death.<sup>67</sup> In other words, self-defense in this context entails a claim that the intimate violence had reached a point at which either the abuser or the abused would be maimed or killed. Stated more plainly, when the abused, now a criminal defendant, took the abuser's life, she must show that she did so to save her own.

#### A. Battered Woman Syndrome

Over the past three decades, psychologists have sought to understand more clearly the dynamics of abusive relationships, the experiences of battered women, and the psychological consequences of living for an extended period in an intimate relationship with a batterer. In the 1970s, psychologist Lenore Walker coined the term "battered woman syndrome", a subspecies of post-traumatic stress disorder, to explain the perceptions and behavior of women in such situations.<sup>68</sup> Following the publication of Walker's research, lawyers representing women charged with violence against their batterers saw that prosecutors, judges, and jurors might learn more about how the world looks to women trapped in violent relationships and might view them

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<sup>66</sup> See ANGELA BROWNE, WHEN BATTERED WOMEN KILL, 127-130 (1987). See also Angela Browne & Kirk R. Williams, *Exploring the Effects of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC'Y. REV. 75, 78 (1989) (40% of 132 incarcerated women in Chicago were in prison for killing an abusive partner and all had sought help from police on at least 5 prior occasions.) For more recent data, see the website of the Bureau of Justice Statistics (<http://www.ojp.usdoj.gov/bjs>) which contains considerable statistical information concerning crimes of intimate violence.

<sup>67</sup> See CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989).

<sup>68</sup> LENORE WALKER, THE BATTERED WOMAN (1979).

more sympathetically if these decisionmakers were able to become better educated about battered women's lives.

Consequently, activists and lawyers for battered women developed a trial strategy of seeking to admit experts who could offer testimony to educate jurors about battering relationships and their consequences. Since "battered woman syndrome" had a scientific flavor, similar to other sorts of psychological and scientific testimony that experts were permitted to offer at trial, the educational process that occurred in the course of battered women's litigation took the form of admitting the expert testimony of psychologists. When permitted to testify, these experts would describe for the jury the nature of battered woman syndrome and explain how it might illuminate what occurred in the case at bar.<sup>69</sup>

Battered women's lawyers believed that through the admission of expert testimony about battered woman syndrome, which focused on the experiences, perceptions, and mental states of women caught in abusive relationships, jurors could come to appreciate how the defendant reasonably believed that she had to use violence to repel the imminent life-threatening violence of her batterer. In the absence of expert testimony, battered women's advocates feared that the law of self-defense would be applied in a gender-biased fashion, since judges and jurors might fail to apprehend the contextual conditions of battered women's lives.<sup>70</sup>

Initially, litigants' efforts to admit expert testimony of battered woman syndrome met little success. Judges often refused the admission of such testimony, disputing its relevance, its scientific basis, or the notion that it would assist a jury. Battered women's advocates responded with campaigns to liberalize the evidentiary rulings to more readily allow for the admission of

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<sup>69</sup> Elizabeth Schneider explores the strategic decisions that led to the effort to admit expert testimony at trial. See Schneider, *supra* note 14, at 79-83.

<sup>70</sup> *Id.*

expert testimony in these cases. These campaigns yielded statutes adopted by some state legislatures that authorized the admission of such testimony<sup>71</sup> and case law from the highest court of many states that reached the same conclusion.<sup>72</sup> By the end of the 1980s, the admission of expert testimony on battered woman syndrome had become a far more commonly accepted practice in trials of battered women charged with violence against batterers.

When expert testimony of battered woman syndrome was admitted, it did not always work as battered women's advocates had hoped. Although some women whose self-defense trials featured testimony about battered woman syndrome did receive acquittals or convictions of lesser charges, many others were convicted of the crimes with which they had been charged.<sup>73</sup> Some argue that this pattern of results relates to inherent limitations in the concept of battered woman syndrome itself.

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<sup>71</sup> Statutes liberalizing evidentiary standards in cases involving battered women took a variety of forms. Some statutes explicitly permitted the introduction of expert testimony on "battered woman syndrome" or "battered spouse syndrome." CAL. EVID. CODE §1107 (West 1995 & Supp.2003) (enacted 1991); MD. CODE ANN. CTS. & JUD. PROC. §10-916 (2002) (enacted 1991); OHIO REV. CODE ANN. §2901.06 (West 1997) (enacted 1990) (limited to self-defense claims); S.C. CODE ANN. §17-23-170 (LAW CO-OP. 2003) (enacted 1995); WYO. STAT. ANN. §6-1-203 (Michie 2003) (enacted 1993) (limited to self-defense claims).

Other statutes allow expert testimony on the effects of domestic violence, however they avoid the "battered spouse syndrome" language: GA. CODE ANN. §16-3-21 (2003) (limited to self-defense claims); LA. CODE EVID. ANN. Art. 404 (West 1995) (enacted 1998); MASS. GEN. LAWS ANN. ch., 233, §23F (West 2000) (enacted 1993) (limited to self-defense claims); NEV. REV. STAT. ANN. 48.061 (enacted 1993), *amended by* 2003 NEV. REV. STAT. 284; OKLA. STAT. ANN. tit. 22, §40.7 (West 1992) (enacted 1992); TEX. CODE CRIM. PROC. ANN. Art. 38.36 (Vernon Supp. 2004) (enacted 1993) (limited to self-defense claims).

In comparison, other statutes have modified the standard for evaluating the defendant's mental culpability in cases involving evidence of domestic abuse: ARIZ. REV. STAT. ANN. §13-415 (West 2001) (enacted 1992); IND. CODE ANN. §§35-4-1-3.3, 35-41-3-11 (Michie 1998) (enacted 1997); KY. REV. STAT. ANN. §503.010 (Michie 1999) (amended 1992); UTAH CODE ANN. §76-2-402(5) (1999) (amended 1994).

<sup>72</sup> Expert testimony on battering has been admitted in all 50 states in cases where battered women face trial on criminal charges. Most, but not all, of these cases involved claims of self-defense. *See Dalton & Schneider, supra* note 28, at 731.

<sup>73</sup> A 1995 study conducted by the National Clearinghouse for the Defense of Battered Women, commissioned by the United States Departments of Justice and Health and Human Services, found that 63% of convictions and sentences of battered women defendants were upheld on appeal, even though expert testimony was admitted in 71% of these. *See Dalton & Schneider, supra* note 28, at 741. *See also* Browne, *supra* note 66, at 12, 163 (reporting only 9 acquittals and 1 dismissal among 42 cases of women charged with killing or injuring their partners).

While testimony about battered woman syndrome can be a vehicle for educating jurors about battered women's relationships, perceptions, and experiences, it can also reinforce a view of battered women as mentally impaired.<sup>74</sup> Commentators observe that battered woman syndrome focuses attention on the psychology of the battered woman rather than on the batterer's pattern of coercive behavior. As a result, new stereotypes about battered women have been created, such that those who fail to meet the stereotypes are perceived to be less credible when they claim self-defense.<sup>75</sup> As several commentators have noted, the battered woman stereotype has worked to the particular disadvantage of black women, lesbians, women perceived to have assertive personalities, women with substance abuse histories, and others who for a variety of cultural reasons may not be readily perceived to embody the passive virtues that fit constrained understandings of the battered woman profile.<sup>76</sup>

Success in court has been particularly elusive for battered women defendants who raise self-defense in cases in which the self-protective violence that they inflicted on their batterers did not occur in the middle of a threatening confrontation. Rather the violence they inflicted may have been during a lull in the abuse, when the batterer was sleeping or otherwise off guard.

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<sup>74</sup> Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 214-15 (1986) (arguing that "battered woman syndrome" can be seen to reinforce stereotypes of women as passive, sick, powerless, and victimized); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 5 (1994) (claiming that battered woman syndrome reinforces negative stereotypes of women).

<sup>75</sup> Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 144-50 (1985) (noting that battered women on trial for killing their abusers do not benefit from expert testimony unless they fit a rigidly defined and narrowly applied definition of a battered woman).

<sup>76</sup> See Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 193-98 (1991) (arguing that stereotypes of battered women who kill their abusers as passive, emotional, and dependent create problems for battered black women, who are not seen as fitting this image); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (same); Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 G.W.U. L. REV. 582, 605-613 (1996) (arguing that the narrow boundaries of the battered woman stereotype are rooted in traditional gender ideology and work to the particular disadvantage of women who diverge from that traditional ideology, most notably lesbians.)

While battered women's advocates have never contended that women should kill batterers in these non-confrontational situations, they also suggest that it is not unreasonable in certain of these situations to view these women as acting in self-defense, similar in fashion to hostages overtaking their captors.<sup>77</sup>

In cases in which the battered woman defendant had previously sought aid from police, courts, and social services, only to find them non-responsive or ineffective in their efforts to protect her, a predicate may well be laid for an argument that she honestly and reasonably believed that she was able to protect her life from the batterer's impending lethal violence only by the assaultive actions for which she is now on trial. Indeed, decisionmakers would have no context within which to understand her actions and perceptions unless they heard extensive evidence of the violent dynamics in the relationship, the history of abuse, and prior efforts to escape or halt the violence. Nevertheless, women have not fared well in cases of nonconfrontational assaults, likely due to fears that if the imminent harm requirement of self-defense doctrine is stretched beyond confrontational episodes, battered women may be encouraged to take violent retaliatory actions, then claim self-defense.<sup>78</sup>

#### B. Problems in Representation of Battered Women as Defendants

Problems inherent in the interpretation and application of the concept of battered woman syndrome are not the only problems faced by battered women as defendants in courtrooms. The failure of women who have defended their lives against their batterers to successfully defend

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<sup>77</sup> See, e.g., Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 11 (Martha A. Fineman & Roxanne Mykitiuk eds. 1994). See also Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757 (1996).

<sup>78</sup> See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 279 (1991) (observing that while women have not fared well in nonconfrontational self-defense cases, most of the self-defense claims arise from confrontational situations, and evidence of bias exists even in the latter cases).

themselves against criminal convictions has multiple causes. Sometimes it is related to inadequate representation, a problem that pervades the criminal justice system for those without access to considerable financial resources.<sup>79</sup>

Unfortunately, it is not an aberration to find practicing in criminal courtrooms around the country attorneys who are unschooled in the phenomenon of domestic violence, who hold misconceptions or biases about battered women, or who simply lack knowledge about the complexities of representing battered women and lack the desire to remedy this deficit.<sup>80</sup> Due at least in part to their misapprehension of the nature and the legal implications of the incidents underlying the charges, such attorneys may fail to effectively investigate the battered woman's claim of self-defense. They may fail to identify or interview potential defense witnesses such as family members or friends, to find other sources of information such as medical records or employment records that corroborate the defense, or to seek expert assistance to bolster an available defense.<sup>81</sup>

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<sup>79</sup> In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth and Fourteenth Amendment to the Constitution guarantee a defendant the right to counsel in criminal cases. Although the right to counsel was presumed to mean the right to "effective" counsel, commentators argue that, due to underfunding and the lack of political will, the promise of effective counsel has gone largely unrealized for indigent defendants facing criminal charges. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986). See also Stacey L. Reed, *A Look Back At Gideon v. Wainwright After Forty Years: An Examination of the Illusory Sixth Amendment Right to Assistance of Counsel*, 52 DRAKE L. REV. 47 (2003); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are At Stake*, 1997 ANN. SURVEY AM. LAW 783 (1997).

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From the number of claims of ineffective assistance of counsel based on faulty advice regarding plea bargains or the defendant testifying, and on attorney failure to present evidence and testimony that could have assisted the jury to understand and eradicate the very same misconceptions apparently held by counsel, it is apparent that attorneys are susceptible to misconceptions about battered women.

Schneider, *supra* note 14, at 145.

<sup>81</sup> An examination of post-conviction cases in which battered women appeal their convictions or sentences on the grounds of ineffective assistance of counsel reveals a variety of shortcomings in battered women's trial representation. Twenty-six of these cases are annotated at Gregory G. Sarno, *Ineffective Assistance of Counsel: Battered Spouse Syndrome As Defense to Homicide or Other Criminal Offense*, 18 A.L.R. 5<sup>th</sup> 871 (1994).

Attorneys who are not fully aware of the story of abuse that underlies the current charges may permit a biased jury to decide the case. This can happen when an attorney fails to properly question prospective jurors, through a procedure known as voir dire, about the misperceptions that they may hold of battered women.<sup>82</sup> It can also happen when the attorney fails to challenge the selection of jurors who reveal such biases. These attorneys may also fail to request that judges instruct jurors on how credible evidence of battering relates to a claim of self-defense.<sup>83</sup> In addition, attorneys may fail to develop relationships of trust with their clients, which when combined with the confusion and memory lapses that frequently plague battered women who have used lethal violence, may lead them to give poor advice to their clients regarding decisions to accept a plea bargain or to testify at trial.<sup>84</sup>

Despite the fact that the Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel at a criminal trial, the Supreme Court has made it exceedingly difficult to overturn a conviction on the grounds of ineffective assistance.<sup>85</sup> This is so even when

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<sup>82</sup> For a proposed set of voir dire questions designed to address these misperceptions, see Liza Lawrence and Lisa Kugler, *Selected Voir Dire Questions*, WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE 256 (E. Bochnak, ed. 1981).

<sup>83</sup> See Schneider, *supra* note 14, at 145 ("Cases involving claims of ineffective assistance based on counsel's failure to offer jury instruction on battering suggest that many attorneys lack knowledge about the particular complexities of representing battered women.").

<sup>84</sup> A number of appeals by battered women concerning ineffective assistance of counsel at trial raise claims of inadequate advice, particularly relating to plea-bargaining or testifying. See, e.g., State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); State v. Scott, 1989 WL 90613 (Rel. Super. 1989); Larson v. State, 766 P.2d 261 (Nev. 1988); State v. Gfeller, 1987 WL 14328 (Tenn. Crim. App. 1987). See also Judith McMorrow, *The Power and Limits of Legal Naming: A Case Study of "Battered Women Syndrome,"* in THE EYES OF JUSTICE 217, 224 (Roberta Kevelson ed. 1993) (describing memory problems as a consequence of battering that can impair communication of those consequences).

<sup>85</sup> The United States Supreme Court established the standard of ineffective assistance as defective representation, unsupported by reason or tactics, that prejudices the defendant. See Strickland v. Washington, 466 U.S. 668 (1983). The case sets a high burden for proof of these elements by establishing a presumption of reasonably effective assistance, even in cases in which the attorney's performance appears to be unreasonable or shoddy, and making it difficult for defendants to establish that their attorneys' errors caused the outcome of the case.

there is substantial evidence of significant inadequacies in representation. In a number of appellate cases, courts have refused to find that the ineffective assistance of trial counsel rose to the level of a constitutional violation, although counsel failed to develop a full evidentiary record of the history of battering in the defendant's relationship with a violent partner.<sup>86</sup>

### C. Problems of Judge and Juror Bias

In addition to receiving inadequate representation, women raising self-defense claims have sometimes met judicial hostility. Judges unsympathetic to defendants generally, or to women raising self-defense claims in particular, have sometimes refused to admit evidence, expert or otherwise, proffered in support of self-defense on the grounds that it is not relevant or would not be helpful to the jury. In some instances, judges have refused to permit questioning of prospective jurors during the voir dire process to uncover specific attitudes that may bias them against a claim of self-defense in these circumstances. Judges may also refuse to instruct juries to consider self-defense in these cases.<sup>87</sup>

Recent case law and legislation in a number of jurisdictions requires the admission of evidence bearing on self-defense when a factual predicate can be established that the defendant on trial suffered a history of abuse at the hands of the person she is charged with assaulting or killing.<sup>88</sup> Nevertheless, judicial hostility remains an obstacle to fair trials in some instances, as judges still retain considerable discretionary authority over the presentation of evidence.

After a careful study of appellate cases concerning battered women's claims of self-defense,

Professor Holly Maguigan concluded that the major obstacle to fair trials in these cases is error

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<sup>86</sup> See, e.g., *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991); *Martin v. State*, 501 So. 2d 1313 (Fla. Dist. Ct. App. 1986); *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. Super. Ct. 1989); *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. Ct. 1993); *People v. Day*, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992).

<sup>87</sup> See, e.g., *State v. Norman*, 378 S.E. 2d 8 (N.C. 1989).

<sup>88</sup> See *supra* notes 71-72 and accompanying text.

by the trial court judge in the application of self-defense doctrine to the evidence that the defense presents.<sup>89</sup>

If the trial judges in these cases do not instruct jurors properly on self-defense, the jurors will be unable to determine the appropriate legal relevance of any evidence that the defense has been able to present. Yet even in the absence of judicial error or hostility, when jurors receive the evidence and are fairly instructed about how to consider it as bearing on self-defense, some juries, for a variety of reasons, reject it. Especially in situations of inadequate defense representation, these reasons may include the jurors' misconceptions of the nature of the abuse and its consequences, which in turn may lead them to misinterpret as aggression or retaliation the self-defensive violence for which the battered woman is now on trial.<sup>90</sup>

After conviction, women in these circumstances may face severe penalties, ranging from a term of years, to life in prison with or without parole, to the death sentence. Sometimes the jurisdiction's statutory structure is set up such that the judge has no discretion about the sentence imposed after conviction on particular charges. In other circumstances, judges who have sentencing discretion and who harbor misconceptions of battered women's situations have exercised it harshly.<sup>91</sup> An unduly stiff sentence imposed by a judge may result from inadequate defense representation, bias, or other factors that block the judge's apprehension of the mitigating features of the underlying events that were the subject of the trial. The penalties

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<sup>89</sup> Maguigan, *supra* note 78, at 457-58.

<sup>90</sup> See *supra* notes 79-84 and accompanying text. Of course, jurors will be aided in their rejection of self-defense by a prosecutor who urges them to reach that conclusion.

<sup>91</sup> See, e.g., *Commonwealth v. Grimshaw*, 590 N.E.2d 681 (Mass. 1992), in which the defendant received an excellent "battered woman syndrome" defense by a noted trial attorney to a charge of murdering her abusive husband. When the jury failed to convict her of murder, convicting instead on the lesser charge of manslaughter, the trial judge sentenced the defendant to the maximum sentence for manslaughter. For more information about the harshness of the judge's actions, see Allison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 59 n.291 (1993); Toni Locy, *Jury Chief Urges Pardon for Convict: '89 Sentence for Woman Called Harsh*, BOSTON GLOBE, Nov. 17, 1992, at 25.

flowing from conviction involve not just the potential loss of life or liberty, but other serious collateral consequences such as the loss of custody of children, future employment opportunities, and the right to vote.<sup>92</sup>

#### IV. The Emergence of Clemency Projects

The nationwide difficulties that battered women encountered in receiving fair hearings on self-defense claims spawned another legal reform effort to address this injustice. In the 1990s, regional women's groups organized clemency projects around the country to seek a reduction in the penalties that battered women suffered after they were convicted of crimes against their batterers.<sup>93</sup> While the clemency movement has not concerned itself exclusively with battered women convicted of homicide, these are the cases to which the movement devoted its primary attention. Aided by the clemency projects, women imprisoned for killing their batterers sought executive clemency.

##### A. The Nature of Executive Clemency

Executive clemency refers to the discretionary power of the President of the United States or the governor of a state to reduce the severity of a criminal sentence. Clemency implies mercy, the application of a kind of forbearance or forgiveness of an unduly harsh sanction.<sup>94</sup>

While a form of executive clemency has existed since ancient times and can be found in virtually

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<sup>92</sup> See, e.g., INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer and Meda Chesney-Lind eds. 2002).

<sup>93</sup> The organization of clemency projects in the 1990s is described in Patricia Gagné, BATTERED WOMEN'S JUSTICE: THE MOVEMENT FOR CLEMENCY AND THE POLITICS OF SELF-DEFENSE (1998).

<sup>94</sup> See Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413 (1999).

every country's legal system,<sup>95</sup> the prerogative to provide sentence relief on the part of the executive branches of state or federal governments is rooted in their respective constitutions.<sup>96</sup>

The clemency process as a means of ameliorating unduly harsh penalties varies from state to state. In many states, an advisory board, most frequently the state's parole board, considers petitions for clemency, gathers information to investigate the petitions, holds hearings in some instances, and makes recommendations to the governor about whether a pardon—signifying full absolution for the crime—or a commutation—signifying a reduction in sentence—should be granted.<sup>97</sup> Although they typically have independent decisionmaking authority, governors tend to heed the advice of their advisory boards. In a few states, a governor's decision to grant clemency may need to be approved by another administrative body as well. In Massachusetts, this body is called the Governor's Council, established as a check on gubernatorial power.<sup>98</sup>

Battered women who have petitioned for relief through the clemency process have rarely sought full pardons. Although the assertion in a clemency petition that a claim of self-defense was erroneously denied at trial establishes a legitimate ground for a pardon, battered women incarcerated for homicide, after making pragmatic assessments of the relative probabilities of

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<sup>95</sup> See KATHLEEN DEAN MOORE, *PARDONS, JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989).

<sup>96</sup> U.S. CONST. art. II, §2Cl. 1 (“The President ... shall have power to grant reprieves and pardons for offenses against the United States, except in cases of Impeachment.”). Many state constitutions contain provisions according a state governor parallel clemency powers over state convictions. For example, see CAL. CONST. art. V, § 8 (“the Governor...may grant a reprieve, pardon and commutation, after sentence”); ILL. CONST. art. V, § 12 (“The Governor may grant reprieves, commutations and pardons, after conviction”); N.Y. CONST. art. IV, § 4 (“The governor shall have the power to grant reprieves commutations and pardons after conviction”); VA. CONST. art. V, § 12 (“The Governor shall have the power...to grant reprieves and pardons after conviction”).

<sup>97</sup> See, e.g., MASS. GEN. LAWS ch. 127, §154 (1992) and MASS REGS. CODE tit. 120, §§901.12(5)(1993) which empower The Advisory Board of Pardons, a special seating of the Massachusetts Parole Board, to make recommendations to the Governor concerning pardons or commutations based solely on a written petition or upon a hearing of the petitioner's claim.

<sup>98</sup> See MASS. GEN. LAWS ch. 127, §152 (1992).

success, have generally sought to have their sentences commuted, or reduced in duration. In these instances, the petitioners were seeking recognition that the self-defensive aspects of their cases established the mitigating grounds for sentence relief.

From the petitioner's perspective, receiving a full pardon is a preferable remedy, in that it results in the petitioner's immediate release from prison as well as the erasure of the conviction and its attendant collateral disabilities. Nevertheless, a commutation provides substantial relief, as it can reduce a sentence to time served. In other words, receiving a commutation can also result in the petitioner's immediate release from prison—often the primary concern of the petitioner—even though in such an instance the conviction remains standing. Perceiving commutations to be more politically feasible and realizing that they too can result in grants of freedom from further incarceration, the battered women's clemency movement has focused primarily on sentence commutations.<sup>99</sup>

A request for a sentence commutation was especially compelling in a case where self-defense had not been asserted as well as it might have been at trial or where it had encountered some apparent bias on the part of the judge or jury. Another compelling feature of clemency claims was that many of the incarcerated women faced trial before cultural understandings about the lives of battered women had evolved, before significant services had been made available to them, and before legal reforms responsive to their situations had been incorporated. This was easily demonstrated in jurisdictions in which the incarcerated women were convicted prior to the enactment of laws that permitted the admission of expert testimony regarding battered woman syndrome and of other types of evidence corroborating the extent and duration of the abuse the defendants had suffered at the hands of their batterers. Since these legal reforms were

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<sup>99</sup> For a description of the kinds of strategic political decisions made by battered women's advocates for clemency, see Gagné *supra* note 93, at 61-130.

prospective in nature, applying only to cases not yet finalized, those already serving sentences had not received the more enlightened legal treatment that they would have received had their cases arisen later. Hence, sentence commutations came to be perceived as a form of equitable relief that substituted for the inability to retroactively apply legal reforms.<sup>100</sup>

#### B. The Ohio Experience: Leadership in Action

In the 1980s, issues of domestic violence were something of a *cause celebre* for Governor Richard F. Celeste of Ohio, whose wife Dagmar had worked on these issues in the feminist community in Cleveland. In 1976, several women's groups in the Cleveland area had obtained a foundation grant to establish Ohio's first emergency shelter for battered women. At that time, when Richard Celeste was Lieutenant Governor, he and his wife provided their own home to serve as that shelter.

Celeste became Governor of Ohio in 1982, and he was elected to a second term in 1986. During these years, Dagmar Celeste was provided an office and a staff in the state house and became an advisor to her husband's administration. Soon after his election, Dagmar Celeste began visiting the women's prison in Marysville, Ohio, learned that many of the incarcerated women had been victims of intimate violence, and generated support for recovery programs and other services to be made available to them. These experiences led Dagmar Celeste to propose to her husband that he undertake a wide-ranging review of the cases of incarcerated battered women to determine who among them might be deserving of gubernatorial clemency.<sup>101</sup>

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<sup>100</sup> For an articulation of the justifications for clemency for incarcerated battered women, see 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. & POLICY 2 (1994).

<sup>101</sup> See Gagné, *supra* note 93, at 61-98.

The political prospects for clemency improved when the Ohio Supreme Court changed state law regarding the admission of expert testimony in trials of women charged with assaulting or killing their batterers. In 1981, just before Richard Celeste had become Governor, the Ohio Supreme Court had decided *State v. Thomas*, upholding the murder conviction of a battered woman despite the trial judge's exclusion of expert testimony on battered woman syndrome.<sup>102</sup> In March 1990, the Court reversed itself. In the landmark case of *State v. Koss*, the Court overturned a battered woman's conviction for voluntary manslaughter against her batterer due to the exclusion of expert testimony concerning battered woman syndrome.<sup>103</sup> Later in 1990, the state legislature adopted a statute permitting the admission of expert testimony about battered woman syndrome in the trial of a defendant who raises self-defense to charges that she committed violence against her batterer.<sup>104</sup>

Governor Celeste was responsive to concerns that women tried before the passage of the legislation and the decision in the landmark case might have been unjustly convicted and sentenced. He understood arguments that they had been denied a fair opportunity to explain how battering and its consequences influenced their situations and supported their defenses. The First Lady and her staff were undoubtedly helpful in formulating these arguments and urging them as a basis for political action. Consequently, the Governor initiated a clemency process.

In November of 1989, while the legislation was under discussion and the landmark case was pending, Governor Celeste instructed his staff to review the cases of battered women convicted of crimes against their batterers. He wanted to identify those women whose crimes

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<sup>102</sup> *State v. Thomas*, 423 N.E.2d 137 (Ohio 1981).

<sup>103</sup> *State v. Koss*, 551 N.E.2d 970 (Ohio 1990).

<sup>104</sup> See OHIO REV. CODE. ANN. §2901.06 (Anderson Supp. 1990).

grew out of their victimization by a violent partner. After instructing the state correctional authority to cooperate in obtaining this research, the Governor received a report recognizing over 200 such women. Many of them were serving sentences on the order of twenty-five years to life, and a few were under death sentence. The candidates for clemency were selected from among this group.

Over the course of a year, the governor's staff educated themselves and the Ohio Parole Board concerning battering, self-defense, and the trial process of those who had been convicted of violence against their batterers. The education process included meetings with the incarcerated women themselves. Since most of these women had been involved in support groups that the First Lady's previous advocacy had helped to create, they were better able to articulate their experiences with both battering and the court system, and they were better able to advocate for clemency on their own behalves. After exhaustively reviewing the incarcerated women's case files, the Governor's staff distributed applications for clemency to more than a hundred women. The women's groups in the prison and their supporters played a central role in disseminating information about the clemency process and in obtaining assistance for individual women in preparing their petitions.<sup>105</sup>

The Governor and his staff reviewed over one hundred cases, seeking to document and verify the history of abuse described in the clemency petitions. After eliminating cases of women who had convictions for prior violence or records of disruptive prison behavior, the staff sought to identify the cases in which the women had been unable to defend themselves adequately at trial. They isolated a group of cases in which they were persuaded that had jurors

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<sup>105</sup> Linda Ammons was a member of Governor Celeste's staff and was the primary staff member responsible for the clemency review in the Governor's office. Ammons describes the Ohio clemency project in considerable detail in Ammons, *supra* note 100.

been able to hear expert testimony about battered woman syndrome and evidence about a well-documented history of abuse, they may have decided differently. The Ohio Parole Board recommended clemency in eighteen of these cases.<sup>106</sup>

The national clemency movement was ignited when in the winter of 1990, a few weeks before he left office, Governor Celeste exceeded the board's recommendations and commuted the sentences of a total of twenty-seven women who had served or were serving sentences for violence, typically lethal violence, against their batterers. The Governor pardoned a twenty-eighth woman who had already been released on parole. As a condition of their release from prison or from parole supervision, the women were required to perform 200 hours of community service in a domestic violence context.<sup>107</sup>

An outcry immediately erupted in the media from those, most of them law enforcement officials, who opposed the governor's commutations.<sup>108</sup> Others praised his courage, personal integrity, and sense of fairness.<sup>109</sup> Some petitioners who had shared support groups with the twenty-eight women who received clemency from Governor Celeste were devastated when they did not receive clemency as well, and some of their supporters believed that the Governor would have been justified in granting an even greater number of petitions.<sup>110</sup>

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<sup>106</sup> See Gagné, *supra* note 93, at 61-98.

<sup>107</sup> Ammons, *supra* note 100, at 3 n.4.

<sup>108</sup> See Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, at 1; Jane Prendergast, *Reactions Mixed to Freeing Women*, CINCINNATI ENQUIRER, Dec. 23, 1990, at B-1; Mary Ann Sharkey, *O, My Darling Clemency*, CLEV. PLAIN DEALER, Dec. 26, 1990, at 8B; *Celeste Defends Commutations*, CLEV. PLAIN DEALER, Dec. 27, 1990, at 2B; Andy Rooney, *Celeste Declares Open Season on Ohio Men*, COLUMBUS DISPATCH, Dec. 28, 1990, at 11A.

<sup>109</sup> Editorial, *Justice and Battered Women*, CHI. TRIB., Dec. 27, 1990, at 18C; Lawrence Grey, *Celeste's Grants of Clemency Brought Law, Justice into Accord*, COLUMBUS DISPATCH, Dec. 30, 1990, at 3D.

<sup>110</sup> See Gagné, *supra* note 93, at 186-189.

Despite the controversies about whether Governor Celeste had done too much or too little, none of the cases in which he granted relief came back to haunt him in the future. Although a few of the battered woman he released were convicted of minor crimes thereafter, recidivism proved a negligible problem. Of the few women who returned to the criminal courts, none returned for a crime of violence. Rather, in support of the view that Governor Celeste exercised his discretionary power cautiously, most of the women who were released after receiving clemency are living and working in their communities to this day.<sup>111</sup>

Events in Ohio caught the attention of feminist activists and battered women's advocates nationwide. Governor Celeste's precedent-setting grants of clemency to a group of battered women convicted of violent crimes against their batterers reverberated widely. Drawing on the strategies and experiences of those involved in the Ohio clemency project, a legal reform movement was born.<sup>112</sup>

### C. The Maryland Experience: The Power of Narrative

In the 1980s, while litigation and legislation efforts on behalf of battered women were underway in Ohio and other states, battered women's advocates in Maryland were unsuccessful in obtaining legal rulings through the courts that authorized the admission of expert testimony on

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<sup>111</sup> See Linda L. Ammons, *Why Do You Do The Things You Do? Clemency for Battered Incarcerated Women, A Decade's Review*, 11 J. OF GENDER, SOC. POL. & L. 533, 564-65 (2003).

<sup>112</sup> Linda Ammons, Executive Assistant to Governor Celeste during the clemency review process, writes: Within days after the Ohio project was completed, I received calls from advocates from Maryland and New York. Weeks later I briefly consulted with persons, working with or for the late Governor Lawton Chiles of Florida. In the fall of 1991, I appeared before a California Assembly committee at Frontera Prison in California to talk about this issue in connection with an attempt to have Governor Pete Wilson review cases. Representatives working on behalf of battered women wanted to know how best to tell their clients' stories and what evidence would work best to persuade those who would make decisions about the women's fates. *Id.* at 564 n.145.

battered woman syndrome when battered women faced trial for violence against their batterers.<sup>113</sup>

Responding to this failure, Maryland's battered women's advocates organized a powerful educational initiative. This initiative formed the backdrop to a larger project of law reform.

The public education initiative in Maryland drew from the consciousness-raising methods that had emerged in the feminist movement and from the related storytelling strategies that groups of women and other disempowered groups had been using to convey their all-too-often-ignored experiences. Exposure to these experiences was conceived as a vehicle for promoting insights that might generate social change. In furtherance of its educational strategy to promote this exposure, the coalition of advocates arranged a number of settings in which women convicted of violence against their abusers could tell the stories of their relationships, the abuse they had suffered, and the circumstances leading to their acts of violence against their intimate partners.<sup>114</sup>

In order to disseminate these gripping, poignant, and horrifying stories to a broader audience, the Maryland advocates produced a short film entitled *A Plea for Justice* which was released early in 1990. In the film, four women serving sentences on the order of fifteen years to life for killing their batterers tell the stories of their experiences with their violent partners. The advocates' intentions were to create conditions under which viewers might experience vicariously the women's life-threatening predicaments, their suffering, fear, and isolation. Their hope was that the film would render battered women as sympathetic and their claims of self-

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<sup>113</sup> See *Kriscumas v. State*, Md. Ct. Spec. App. 86-1072 (July 9, 1987); *Friend v. State*, Md. Ct. Spec. App. 88-483 (December 12, 1988).

<sup>114</sup> See Phyllis Goldfarb, *A Theory – Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1626-34 (1991) (describing consciousness-raising and storytelling strategies associated with feminism and how they have been used to promote social change).

defense--that they killed their batterers because they saw no other way to save themselves—credible and understandable.

Unlike Governor Celeste of Ohio, Governor William Donald Schaefer of Maryland had shown no prior interest in issues of domestic violence. Yet after the Governor had viewed the film with members of his staff, he requested a meeting at the Maryland women's prison with the women interviewed on video. The meeting was arranged, giving Governor Schaefer the opportunity to communicate in person with the women in the film and to hear from other similarly situated women as well. Later the Governor told reporters that the meeting had altered his understanding of the problems that battered women face. Subsequently, he expressed interest in receiving petitions for clemency, promoted the adoption of state legislation to improve domestic violence training for judges, and supported legislation that required in appropriate cases the admission at trial of testimony about battering and its effects.

Many other state officials in the executive, legislative, and judicial branches of government viewed *A Plea for Justice*. The media covered the release of the film and the issues depicted in the film as well. When battered women's advocates eventually prevailed in obtaining legislation that authorized the admission of evidence of battered woman syndrome in battered women's self-defense cases, this success was in no small measure due to the far-reaching persuasive power of the widely viewed thirty-minute video.<sup>115</sup>

Following their dramatically effective educational and legislative campaign, the coalition of battered women's advocates embarked on a clemency project. After identifying women who had suffered abuse and were incarcerated for crimes related to that abuse and notifying them about the possibility of filing petitions for clemency, thirty women requested interviews for

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<sup>115</sup> This public education campaign in Maryland is described in Jane C. Murphy, *Lawyering for Social Change: The Power of Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243 (1993).

clemency purposes. On January 23, 1991, after a process of interviewing and verification, the advocates filed a voluminous confidential report seeking clemency for twelve women serving extended sentences for violence against their batterers.

Relying on the increased awareness of the plight of battered women, the petitions detailed the individual experiences of each petitioner, her background, the abuse she suffered, and the events leading to the crime of which she was convicted. The request for clemency was rooted in the fact that much of this information had not been offered or considered prior to the verdict or the sentence in each of the cases. In selecting twelve women to recommend for clemency, the advocates decided to pursue relief in those cases most likely to win the Governor's approval.<sup>116</sup>

On February 19, 1991, Governor Schaefer commuted the sentences of eight of the incarcerated battered women.<sup>117</sup> When he received further advocacy on behalf of the remaining four, he decided to grant early parole to two of them. The women's advocates helped those who had received clemency with the considerable transition difficulties--including housing, job placement, psychological adjustment, and media attention--that they would face upon re-entering society. Through this assistance the advocates hoped to facilitate the released women's social re-entry and thereby reduce the potential political repercussions for Governor Schaefer.<sup>118</sup> By so doing, they would enhance the chances that other battered women might receive clemency in the future.

Fueled by its rapid success and national acclaim, the notion of clemency as a kind of partial justice for battered women incarcerated for killing their batterers had caught fire. With

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<sup>116</sup> See Gagné, *supra* note 93, at 103.

<sup>117</sup> See Howard Schneider, *Maryland to Free Abused Women; Schaefer Commutes 8 Terms, Citing Violence*, WASH. POST, Feb. 20, 1991, at A1.

<sup>118</sup> See Gagné, *supra* note 93, at 103.

Governor Schaefer's clemencies in Maryland following so closely on the heels of Governor Celeste's pathbreaking actions in Ohio, the national clemency movement took hold. Feminist activists and battered women's advocates organized clemency movements in many states and began requesting state governors to provide sentence relief to battered women incarcerated for crimes of violence against their batterers.

#### D. The Massachusetts Experience: The Framingham Eight

In the late 1980s and the early 1990s, eight women who were incarcerated in the women's prison in Framingham, Massachusetts for having killed their batterers were meeting in a support and consciousness-raising group facilitated by a human rights activist. Due to similarities in their experiences, the incarcerated women took on a collective identity.<sup>119</sup> They called themselves the Framingham Eight, a sobriquet that implied solidarity among them and that, in part as a result of this implication, caught the media's attention. The battered women's advocates in Massachusetts consciously developed a media strategy to try to cultivate public understanding of battered women forced to defend their lives.<sup>120</sup>

By 1991, sympathetic stories prominently featured in the Boston press exposed the lethality of violence against women and linked cases of women killed by intimate partners to the cases of the Framingham Eight.<sup>121</sup> In that year, the legislature addressed questions of legal protection for victims of intimate violence.<sup>122</sup> Subsequently, Governor William Weld, a

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<sup>119</sup> See Goldfarb, *supra* note 76, at 587, 622.

<sup>120</sup> See Gagné, *supra* note 93, at 116.

<sup>121</sup> See, e.g., Stan Grossfeld, *Love and Terror: "Safer" and in Jail: Women Who Kill Their Batterers*, BOSTON GLOBE, Sept. 2, 1991, at M1; Stacey Kabat, *Battered Women Need Help, Not Jail*, BOSTON SUNDAY HERALD, June 23, 1991, at 23.

<sup>122</sup> See Gagné, *supra* note 93, at 114.

Republican who while socially moderate had also adopted a tough-on-crime persona, amended the guidelines for commutation of sentences to include “a history of abuse [that] significantly contributed to...the offense.”<sup>123</sup> This amendment was the first official action in the country that formally increased battered women’s access to clemency relief.

In response to this perceived invitation, a coalition of women’s advocacy groups recruited attorneys to represent each of The Framingham Eight in a quest for a commutation of her sentence.<sup>124</sup> On February 14, 1992, each of the eight respective defense teams filed a petition for commutation, detailing the petitioner’s history of abuse and arguing that because each was tried before recent improvements in legal protections, she was therefore deserving of equitable relief.<sup>125</sup> Public hearings before the Advisory Board of Pardons and Parole were held in seven of the cases. Although some of the petitioners received other forms of relief, Governor Weld officially commuted just two of the sentences.<sup>126</sup>

Before the clemency process in Massachusetts had concluded, the legislature had enacted a law that guaranteed the admission in appropriate cases of a history of abuse and expert testimony about battering and its effects.<sup>127</sup> An independent film called *Defending Our Lives* which featured interviews with four of the Framingham Eight won an Academy Award as the

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<sup>123</sup> See Doris S. Wong, *Board Urges Clemency for 2 in Cases Tied to Battered Women’s Syndrome*, BOSTON GLOBE, Mar. 4, 1994, at 35.

<sup>124</sup> Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, BOSTON B.J., Mar./Apr., 1994, at 3 (describing recruitment by the Women’s Bar Association’s “Framingham Project”). I was one of the attorneys recruited. Along with a defense team from Boston College Law School, I represented one of the members of the Framingham Eight.

<sup>125</sup> See Toni Locy, *Weld Urged to Free 8 Women*, BOSTON GLOBE, Feb. 15, 1992, at 15, 17.

<sup>126</sup> See Toni Locy, *Woman’s Life Sentence is Commuted*, BOSTON GLOBE, Apr. 29, 1993, at 1.

<sup>127</sup> See MASS. GEN. LAWS, chap. 233, §23F.

year's best short documentary film.<sup>128</sup> The Framingham Eight had obtained not only some sentence relief, but their stories had also received national attention as part of a public educational movement.

#### E. California: Many Requests, Little Relief

As in Massachusetts, the California clemency movement began with the formation of support groups for incarcerated battered women. In March of 1991, members of the group that met in Frontera, the major women's prison in southern California, wrote to Governor Pete Wilson asking him to consider sentence commutations for all of the California women who were serving time for killing their batterers. Governor Wilson responded by indicating that he would not conduct a statewide review of all of the cases of women incarcerated for killing their batterers, but that, in the absence of any other requisite clemency protocols, he would consider the letter an application for clemency by the 34 women who had signed it. He proceeded to conduct a review of the signatories' cases.<sup>129</sup>

Inspired by the Governor's apparent openness to considering such clemency requests, activists in California's battered women's movement decided to organize a large group of attorneys to prepare clemency petitions for all of the women incarcerated for killing their batterers. While they were engaged in the petition-drafting process, the California legislature considered a bill creating a right to introduce expert testimony on battered woman syndrome in appropriate cases.<sup>130</sup> A number of legislators traveled to Frontera to hear the testimony of several incarcerated battered women who spoke about their abuse, their efforts to secure help, and their

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<sup>128</sup> Frederic M. Biddle, *Award Honors Abused Women*, BOSTON GLOBE, MAR. 22, 1994, at 60.

<sup>129</sup> See Gagné, *supra* note 93, at 108-09.

<sup>130</sup> See Jane Gross, *Abused Women Who Kill Seek a Way Out of Cells*, N.Y. TIMES, Sept. 15, 1992, at A3.

need to protect themselves.<sup>131</sup> When the battered woman syndrome bill was subsequently enacted, the petitioners had an additional argument for clemency, as all of them were convicted before the right to expert testimony was guaranteed.

In 1992, attorneys filed clemency petitions for 34 battered women, a group that contained only some of the signatories to the initial letter to Governor Wilson.<sup>132</sup> In May of 1993, Governor Wilson announced that he had reviewed six of these petitioners' cases, and ten of those who had signed the letter. He reduced the sentence of two petitioners, one a 78-year-old inmate in failing health, and another, Brenda Aris, who after killing her abusive husband while he slept and failing to obtain relief through the courts, became eligible for parole a number of years earlier than her original sentence provided.<sup>133</sup>

In the next several years, Governor Wilson either denied relief or denied review in virtually all other battered women's clemency cases. Although in 1992 he signed legislation that required parole commissioners to receive training concerning battered woman syndrome and domestic violence,<sup>134</sup> in 1993 he vetoed broadly supported bipartisan legislation that would have afforded battered women convicted before the guarantee of expert testimony an opportunity for review of their original trials.<sup>135</sup> Despite a benefit showing of *Defending Our Lives* in California in 1994, combined with a concerted media campaign by incarcerated battered women and their

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<sup>131</sup> See Patt Morrison, *Legislators Listen to Women Who Killed*, L.A. TIMES, Sept. 18, 1991, at A3.

<sup>132</sup> *34 California Killers Seek Clemency, Cite Battered-Woman Defense*, COLUMBUS DISPATCH, Mar. 3, 1992, at 8A.

<sup>133</sup> See Greg Lucas and Teresa Moore, *Wilson Grants Clemency to 2 Battered Women: Petitions Denied for 14 Other Female Petitioners*, S.F. CHRON., May 29, 1993, at A1.

<sup>134</sup> See Gagné, *supra* note 93, at 111.

<sup>135</sup> Scott Gregory Baker, *Deaf Justice? Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 GOLDEN GATE U. L. REV. 99 (1994).

supporters, Governor Wilson could not be moved to provide significant relief.<sup>136</sup> With the base of his political support lying squarely among social conservatives, Governor Wilson apparently determined that his political future as a law and order politician was best protected by distancing himself from the movement to assist incarcerated battered women.

Governor Wilson's successor to office, Governor Gray Davis, borrowed the same political calculus. Seeking to bolster support among conservative voters, Davis vowed during the gubernatorial campaign to let no murderer go free during his term of office.<sup>137</sup> Under a new state law, however, the parole board was required to consider information regarding battered woman syndrome in any cases tried before such evidence had been rendered admissible. Although the parole board reviewed a few dozen cases, found battered woman syndrome to exist in a number of them, and recommended parole in eight of those cases, Governor Davis endorsed release on parole in only two of these cases.<sup>138</sup>

#### F. Florida: Selective Advocacy

Florida has restrictive rules for seeking gubernatorial clemency. No one convicted in Florida may apply for a pardon until at least ten years after the completion of any sentence or parole conditions. No one may apply for a commutation without the consent of the Governor, two cabinet members, and a recommendation of the Florida Parole Commission.

The first stage of battered women's clemency activism in Florida took the form of modifying these restrictions to enlarge the prospects for clemency.<sup>139</sup> Aided by a media

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<sup>136</sup> See Gagné, *supra* note 93, at 112-13. Wilson did, however, provide limited additional relief. See *Wilson Commutes Sentence of Woman Who Killed Husband*, ORANGE COUNTY REGISTER, Nov. 7, 1998, at A04.

<sup>137</sup> See Seth Mydans, *Clemency Pleas Denied in 14 Abuse – Defense Cases*, N.Y. TIMES, May 30, 1992, at 21.

<sup>138</sup> See Jennifer Warren, *Battered Wife Will Get Parole in Murder; Prisons: Davis Agrees for Just the Second Time to Free a Killer*, L.A. TIMES, Apr. 11, 2002.

<sup>139</sup> See *Can Panels Blaze Legal Trail for Battered Women?*, FT. LAUDERDALE SUN-SENTINEL, Dec. 13, 1992, at 1E.

campaign, these efforts prevailed.<sup>140</sup> Effective January, 1992, Governor Lawton Chiles revised Florida's clemency procedures to enable a woman who was incarcerated for killing her batterer and who could demonstrate a history of abuse, to ask the Parole Commission to waive the usual application consent policies and to refer her case to a panel of experts on issues of intimate violence. If the panel determined that the petitioner suffered from battered women syndrome at the time of the offense, then the Parole Commission would recommend that the Governor and the Cabinet review the case for a possible commutation of sentence.<sup>141</sup>

In a 1993 case known as *Rogers v. State*, the Florida Court of Appeals authorized the admission of expert testimony on battered woman syndrome in appropriate cases.<sup>142</sup> Despite the new case and the new rules for clemency, Florida's battered women's activists chose to proceed cautiously, avoiding mass applications for clemency and recommending that each petitioner file an individual request for commutation. By the end of 1993, sixteen battered women had filed an individual application for clemency under Florida's revised procedures.<sup>143</sup> After separate hearings, two women were granted clemency and they were released from prison in 1993.<sup>144</sup> Seven others ultimately were granted commutations and released, but only after completing a prison work-release program.<sup>145</sup>

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<sup>140</sup> Jeff Schweers, *Battered Woman Syndrome Defense Raised*, FLA. BAR NEWS, Mar. 1, 1993, at 14.

<sup>141</sup> See Gagné, *supra* note 93, at 119.

<sup>142</sup> *Rogers v. State*, 616 So.2d 1098 (1993).

<sup>143</sup> Donna O'Neal, *Clemency May Be Last Hope for Battered Killers*, ORLANDO SENTINEL, Sept. 2, 1993, at B1.

<sup>144</sup> See Steve Orlando and Phil Willon, *Pinellas Woman Who Killed Husband Goes Free Under New Policy*, TAMPA TRIBUNE, July 15, 1993, at B1.

<sup>145</sup> See Gagné, *supra* note 93, at 121-24.

Given the potential for politicization of the clemency issue, battered women's advocates chose not to file additional clemency petitions during the Lawton Chiles-Jeb Bush gubernatorial campaign of 1994. After Chiles was re-elected, efforts to obtain more commutations increased. Attorneys prepared and filed ten battered women's clemency petitions in 1996, focusing on the cases which had the greatest chance of success, then submitted more petitions in 1998.<sup>146</sup> After granting a couple of additional clemencies, Governor Chiles died late in 1998.<sup>147</sup>

When interim Governor Buddy MacKay took office, he granted the clemency petitions of six more women incarcerated for killing their batterers.<sup>148</sup> The clemency prospects for incarcerated battered women in Florida were significantly diminished when Jeb Bush was voted into the governorship in the next election. Battered women's advocates accuse Governor Bush of ignoring the legitimate claims to relief filed by battered women incarcerated in Florida's burgeoning prison system.<sup>149</sup>

#### G. Illinois: Electoral Strategizing

After two Chicago defense attorneys obtained individual commutations for four incarcerated women, they decided to organize a broader clemency project, staffed by attorneys, activists, law professors, and law students.<sup>150</sup> Founded in 1993, the Illinois Clemency Project conducted inmate outreach leading to the submission of twelve clemency petitions in 1994.

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<sup>146</sup> *Id.* at 123-24.

<sup>147</sup> *Six Women Who Killed Abusive Men Are Granted Clemency*, MIAMI HERALD, Dec. 31, 1998, at 6B.

<sup>148</sup> *Id.*

<sup>149</sup> Scott Talan, *Critics Say Bush Ignoring Clemency*, CAPITOL NEWS SERVICE, Tallahassee, Florida, Aug. 15, 2000.

<sup>150</sup> *See Gagné, supra* note 93, at 104.

After hearings before the Illinois Prisoner Review Board, which forwards its recommendation to the governor confidentially, Governor Jim Edgar granted four commutations in May, 1994.<sup>151</sup>

Governor Edgar's commutation decisions were likely influenced by his re-election strategy. His 1994 gubernatorial opponent was a liberal woman. As long as he could justify his decision to grant clemency to four battered women, he could capitalize on an opportunity to appeal to some of his opponent's potential supporters without risking the transfer of any of his conservative support to her.<sup>152</sup> Although the clemency petitioners had consciously avoided using the concept of battered woman syndrome in their requests for relief, based on concerns about the message that such psychological language conveys, Governor Edgar framed his justification for granting relief in those terms.<sup>153</sup>

In July of 1995, the Illinois Clemency Project filed eighteen additional petitions for commutation. In this wave of applications, the petitioners included the language of battered woman syndrome, because the Governor had previously favored granting relief on that basis. This time Governor Edgar decided to release one woman after she had served fifteen years of a twenty-nine year sentence, and to deny the seventeen other requests for commutation.<sup>154</sup>

Although additional commutation petitions were filed on behalf of incarcerated battered women during Governor Edgar's term of office, the Governor granted relief in just a few more cases.<sup>155</sup> Without an election strategy to be advanced by his clemency decisions, Governor Edgar approved battered women's petitions for clemency on an extremely meager basis. His successor

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<sup>151</sup> *Id.* at 105.

<sup>152</sup> *Id.* at 107.

<sup>153</sup> *Id.* at 106.

<sup>154</sup> *Id.*

<sup>155</sup> Cornelia Grunman and Louise Kiernan, *Edgar Sets a Battered Wife Free*, CHICAGO TRIBUNE, Jan. 4, 1998, at 1.

in office, Governor George Ryan, celebrated for his blanket commutations in death penalty cases, denied three requests for clemency by battered women, but commuted the sentence of one.<sup>156</sup>

#### H. Kentucky: A Sympathetic Governor

In a 1990 case called *Commonwealth v. Craig*, the Kentucky Supreme Court embraced an expansive understanding of battered woman syndrome. Reversing prior law, the Court indicated that battered woman syndrome was not a psychological condition about which only a mental health professional could attest, but one about which information on the dynamics of battering and its consequences was broadly relevant.<sup>157</sup> After this case was decided, battered women's advocates filed a number of petitions for clemency. In December 1991, just before he left office, Governor Wallace Wilkinson pardoned one petitioner who had already served her prison term, and denied relief to two other incarcerated battered women who had petitioned for clemency.<sup>158</sup>

In 1992, the Kentucky legislature enacted a law concerning battered women's self-defense that also established various reforms without relying on the concept of battered woman syndrome. Instead, the legislation reconceived the notion of imminent harm for purposes of battered women's self-defense. In self-defense cases involving domestic violence, the 1992 law permitted a defendant's asserted belief that danger was imminent to be supported by evidence that the victim had a history of serious and repeated abuse of the defendant.<sup>159</sup>

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<sup>156</sup> Barbara Brotman, *Woman's Request for Clemency Denied*, CHICAGO TRIBUNE, Jan. 22, 2003, at 8.

<sup>157</sup> See *Commonwealth v. Craig*, 783 S.W.2d 387 (Ky. 1990).

<sup>158</sup> See Gagné, *supra* note 93, at 126.

<sup>159</sup> KENTUCKY REVISED STATUTES 503.010.

The 1992 act also amended certain requirements that violent felony offenders serve prison terms of a prescribed minimum duration, providing an exemption from these requirements for those convicted of killing their batterers. Finally, for offenders who had not previously had the opportunity to present evidence of their history of abuse, the act afforded a right to file motions to present such evidence in their original trial courts. This provision proved less consequential than it might have been, because few trial court judges complied. Their non-compliance apparently stemmed from their failure to appreciate the rationale for providing this admittedly unusual re-hearing of a set of facts concerning a case in which the offender was already serving a prison sentence.<sup>160</sup>

These legislative changes became effective soon after Governor Brereton Jones took office. In 1993, he appointed Helen Howard-Hughes, who had expressed interest in domestic violence issues, to chair the Kentucky Parole Board. Howard-Hughes was responsive to the suggestions of battered women's activists that she review for clemency consideration the cases of women incarcerated for assaulting or killing their batterers.<sup>161</sup> In 1995, she arranged for all members of the Parole Board to receive training in domestic violence issues. Thereafter, the Parole Board reviewed a number of battered women's cases that had been identified by Howard-Hughes and developed for clemency by attorneys in the public defender's office.<sup>162</sup>

The Parole Board determined that fourteen incarcerated battered women should be considered for release on early parole. Five of these cases were scheduled for an early parole hearing, but under law nine others were prohibited from early parole review until they had served

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<sup>160</sup> See Gagné, *supra* note 93, at 126.

<sup>161</sup> *Id.* at 126-27.

<sup>162</sup> *Justice for Abused Women*, LOUISVILLE COURIER-JOURNAL, June 17, 1995, at B5.

a longer minimum prison sentence. Since these nine women had petitioned for clemency, the Parole Board recommended that the Governor commute their sentences to a level at which they could receive hearings for early parole as well.<sup>163</sup>

Due to positive relations with the media that had been developed by battered women's advocates, the press became an ally in the quest for clemency. The media had shown particular interest in the life stories of the incarcerated women, especially in a quilt that they had made in their prison support group to depict their experiences with violence. Indeed, the Governor had reportedly been moved upon viewing the quilt in 1995 when it was displayed at the Kentucky State Fair. The governor had also received many letters describing and documenting these experiences from the women themselves, and some members of the Parole Board had viewed a video in which the incarcerated women described their experiences with violence.<sup>164</sup>

On December 11, 1995, Governor Jones granted the requested clemencies, resulting in the release of nine women in January of 1996 on early parole. The Governor also pardoned a woman who had already served her prison sentence.<sup>165</sup> The Governor denied four subsequent clemency requests, but the Parole Board released other battered women who did not need clemency in order to be considered for parole.<sup>166</sup> In the course of a few years and with the help of a sympathetic governor, battered women's activists in Kentucky had achieved considerable success.

## I. Clemency Nationwide

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<sup>163</sup> See Gagné, *supra* note 93, at 128-129.

<sup>164</sup> See Fran Ellers, *Jones Explains Commuted Sentences, Governor, Abuse Victims on 'Donahue'*, LOUISVILLE COURIER-JOURNAL, Mar. 15, 1996, at 09B.

<sup>165</sup> Fran Ellers, *Jones Grants Women Clemency: Nine Inmates Say Abuse Led Them to Commit Crimes*, LOUISVILLE COURIER-JOURNAL, Dec. 12, 1995, at 1A.

<sup>166</sup> See Gagné, *supra* note 93, at 130.

Before the 1990s had ended, hundreds of battered women had petitioned dozens of governors for clemency. In some cases, the clemency movement yielded significant victories, in others, searing disappointments. Across the country more than 100 of the battered women who petitioned for clemency were successful in obtaining it.<sup>167</sup>

In addition to the clemencies in the states examined above, a limited number of battered women received sentence relief from several other governors. Governor Roy Romer of Colorado granted sentence commutations to four battered women at the same time that he denied clemency to four other petitioners.<sup>168</sup> Governors George Pataki of New York, Steve Merrill of New Hampshire, Terry Brandstad of Iowa, and Barbara Roberts of Oregon each granted clemency to one battered woman who had petitioned for relief.<sup>169</sup> Even a law enforcer as harsh as United States Attorney General John Ashcroft reduced the sentences of two battered women when he was Governor of Missouri.<sup>170</sup> Other governors who have granted clemency to battered women on at least one occasion are Fife Symington of Arizona, Charles Roemer of Louisiana, James Martin of North Carolina, and Gary Locke of Washington.<sup>171</sup>

Many of the governors defended their clemency decisions on the grounds that they believed the petitioners had been suffering from battered woman syndrome at the time of the crime, had been trapped in abusive relationships, and had been unable to offer a complete

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<sup>167</sup> For information about battered women's clemency cases across the United States, see Ammons, *supra* note 111.

<sup>168</sup> Kirk Mitchell, *4 Killers Win Clemency: Romer Cites Abuse They Endured*, DENVER POST, Jan. 12, 1999, at A01.

<sup>169</sup> See Ammons, *supra* note 111, at 553, 555-56.

<sup>170</sup> See Virginia Young, *Sentence Cut for 2 Who Killed Husbands*, ST. LOUIS POST-DISPATCH, Dec. 17, 1992, at 1A.

<sup>171</sup> See Ammons, *supra* note 111, at 550 n.82, 556-57.

account of their abuse to a jury. Most used a rhetoric of justice and proportionality to support their decisions. Occasionally notions of mercy and compassion were invoked as well.<sup>172</sup>

## V. Continuing Challenges

### A. Victims of Intimate Violence

As illuminated by the battered women's clemency movement and recent efforts to address the problems of intimate violence, the past generation's cultural support for battered women has both wrought tremendous changes and revealed profound challenges. Perhaps the most significant change is that groundbreaking legal and political developments have reconceived intimate violence as no longer a personal matter in a private relationship, but one of major social dimensions. Nevertheless, the problem of violence in intimate relationships remains frighteningly frequent and severe, and battered women's mortality rates remain tragically high.<sup>173</sup>

Battered women confront continuing problems, beyond the physical and psychological harm that they suffer and the disruption that their efforts to obtain help can entail. For a variety of reasons, some women may wish to remain in relationship with their batterers and have difficulty finding interventions that are supportive of that choice and are also effective in reducing the violence that they suffer.<sup>174</sup> Some of these women resist the mandatory nature of criminal court involvement and resent the new reality that obtaining assistance during violent episodes is conditioned on an arrest and a prosecution that they may not support.<sup>175</sup>

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<sup>172</sup> *Id.* at 552-57.

<sup>173</sup> While intimate violence against women appears to have decreased since 1993, data reveals that 1,247 women were killed by an intimate partner in 2000. *See* Rennison, *supra* note 65, at 1.

<sup>174</sup> *See* Schneider, *supra* note 14, at 4 ("Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative...").

<sup>175</sup> Linda Mills analyzes this problem in Mills, *supra* note 63, at 57-66.

Many of those who wish to sever relationships with their batterers still find that the threat of violence does not end, but rather increases, with an attempt to end the relationship.<sup>176</sup> Moreover, even in these high-risk situations, legal and social services for battered women—just as for other needy populations who cannot pay for services--remain significantly underfunded, and are especially vulnerable to further funding cuts in a declining economy.<sup>177</sup> This lack of material resources for programs and individuals makes independent living exceedingly difficult for many who try to leave their abusive partners.<sup>178</sup> Those with children have an additional need for material resources and for negotiating continuing relationships with batterers in many circumstances, due to the requirements of child custody and visitation.

The law of child custody and visitation has formally acknowledged the problem of domestic violence.<sup>179</sup> Nevertheless, decisionmaking in child custody cases is often insufficiently sensitive to the problems generated by intra-family violence.<sup>180</sup> Moreover, a perceived failure to

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<sup>176</sup> This is a well-documented phenomenon. See Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 324 (1990) (citing data indicating that up to 75 percent of reported intimate violence occurs after the victim has left the batterer.) More recent data convey a disturbingly similar picture. See Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence*, Findings from the National Violence Against Women Survey (NCJ 181867), July 2000.

<sup>177</sup> See Schneider, *supra* note 14, at 27 (“Although federal, state, and private resources devoted to these reform efforts have increased substantially, they are still minimal.”).

<sup>178</sup> See Coker, *supra* note 49.

<sup>179</sup> Most states have statutes requiring courts to consider domestic violence in child custody determinations and some have adopted presumptions that batterers be denied custody and receive no more than supervised visitation. See Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, in DOMESTIC VIOLENCE LAW 334 (Nancy K.D. Lemon ed. 2001).

<sup>180</sup> Studies show that psychologists who serve as custody evaluators often react adversely to women who alienate the child from the other parent by raising the issue of abuse. *Id.* at 335. Some family court judges misinterpret existing statutes, particularly regarding presumptions, and fail to give sufficient weight to the problem of intimate violence in adjudicating the issues of custody and visitation. See Amy Levin, *Comment, Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Involving Domestic Violence?*, 47 UCLA L. REV. 813, 817 (2000).

adequately protect children from witnessing or experiencing a partner's violence can jeopardize an abused parent's own liberty or custodial rights.<sup>181</sup>

## B. Battered Women as Defendants

### 1. Prosecution

The extraordinary difficulties that battered women face even in an improved social and legal climate become more pronounced if she uses self-defense. In some respects, the perception that help is now available to her deepens her plight when she defends herself physically. Despite, or perhaps because of, public education concerning domestic violence, the reality that many battered women have greater recourse than in the past can turn the "why didn't she leave?" question in any particular case into an even more haunting refrain.

When battered women are prosecuted for assault or homicide against their batterers, their accounts of underlying events continue to be regarded with skepticism. Criminal defendants, in general, tend to confront disbelief of their claims. The charges against them render their mitigating or exonerating accounts of events inherently suspect. Even when these accounts are truthful, they may be disbelieved because they are self-serving.<sup>182</sup>

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<sup>181</sup> See, e.g., *People v. Stancil*, 606 N.E.2d 1201 (Ill. 1992) (upholding murder convictions of two women whose boyfriends fatally beat the women's children); *In re Glenn G.*, 154 Misc. 2d 677 (N.Y. Fam. Ct. 1992) (battered mother neglected children by inadequately protecting them from father's abuse); *State v. Williquette*, 385 N.W.2d 145 (Wis. 1986) (upholding mother's conviction for child abuse based on her failure to protect children from father's abuse). See also V. Pualani Enos, *Prosecuting Battered Mothers: State Law's Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996) (claim that battered women have failed to protect their children from the batterer has resulted in many women losing custody).

<sup>182</sup> See, e.g., *McMorrow*, *supra* note 84, at 226 ("One common perception that defendants face is that a criminal defendant seeking release has every reason to stretch the truth or even lie. Unfortunately, this skepticism parallels the societal skepticism that battered women faced...").

This skepticism is enhanced by the reality that many battered women cannot provide corroboration of their abuse. See, e.g., Richard Gelles, *THE VIOLENT HOME* 107 (1987); Greenwald & Manning, *supra* note 124, at 15 (indicating that fear of retaliation, poverty, ignorance, and shame, among other reasons, can prevent battered women

Once charges have been filed, the adversary nature of the criminal justice system exacerbates skepticism, such that those who are allied with law enforcement feel professionally impelled toward disbelief of a battered woman's accounts. This disbelief carries a particular bite, as it often takes the form of an expression of support for battered woman as a class, followed by an assertion that this defendant is not a member of that class.<sup>183</sup> The problem of intimate violence seems to have more credibility and visibility in the abstract than it does when particular human beings—imperfect as they are-- in a particular context—factually complex as it will be-- are said to embody the problem.

## 2. Oversimplification

The adversarial legal system tends to reject complexity and insist that all human conduct be distilled into simple explanations.<sup>184</sup> Explaining that battering relationships are typically characterized not just by physical violence but by other manifestations of coercive control requires a more sophisticated analysis of the long-term dynamics of the relationship rather than descriptions of violent episodes.<sup>185</sup> Suggesting that a battering relationship may also include genuine forms of connection may be threatening to the listener--whether a judge, a jury member

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from revealing their abuse). The new regime of mandatory reporting, arrest, and prosecution may be another reason for failure to report abuse, as the abused partner may not support these interventions and may fear loss of control over the consequences of reporting. For further elaboration of the latter point, see Mills, *supra* note 63.

<sup>183</sup> See Dowd, *supra* note 64, at 581 (“[T]he frontal assault on battered women as a whole has been replaced by the individual disqualification of certain women from the group.”). See also Goldfarb, *supra* note 76, at 610; McMorrow, *supra* note 84, at 226.

<sup>184</sup> *Id.* at 229 (“The legal system pushes for simplicity in all cases.”).

<sup>185</sup> Most commentators agree that coercive control, not episodic physical violence, is the most accurate description of a battering relationship. See, e.g., Stark, *supra* note 12, at 983; Fischer, Vidmar, & Ellis, *supra* note 59.

or anyone else—because it invites comparison to one’s own intimate relationships rather than facilitating the psychological distancing that makes sitting in judgment more comfortable.<sup>186</sup>

Women who take self-defensive measures during a lull in the abuse rather than during a confrontation with their abuser are especially vulnerable to the simple assertion that they acted in angry retaliation rather than in fear for their lives. Explaining how it can be reasonable to believe that you risk serious, imminent harm during a lull in the abuse requires considerable psychological and contextual knowledge.<sup>187</sup> It is far easier to ignore or dismiss these complexities, and the adversarial legal system, built around the human desire for simplicity, facilitates this reaction.

### 3. Gender Stereotyping

Despite significant social progress in coming to understand the problem of intimate violence, traditional notions of gender remain a powerful force in the assessment of any battered woman’s self-defense claims. Actual women—diverse, flawed, and complex—often fall short of the cultural ideal and are found less credible. If understanding her situation requires understanding the long and psychologically complex dynamic of a relationship, the adversarial system is a poor forum for conveying that truth. The consequence is that many battered women are disbelieved. In these circumstances, disbelief can have dire consequences, including incarceration, injury, and even death.<sup>188</sup>

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<sup>186</sup> See Schneider, *supra* note 14, at 66-67 (acknowledging that when battering is understood as lying on a continuum of uses of power that are characteristic of all intimate relationships, it threatens decisionmakers’ capacities to distance themselves from the problem).

<sup>187</sup> See M. J. Willoughby, *Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?* 38 KAN. L. REV. 169 (1989).

<sup>188</sup> See Goldfarb, *supra* note 76, at 610 (“The obstacles faced by any actual woman, replete with the flaws and complexities of real human beings, in convincing decisionmakers that her life and her actions fall within the pinched boundaries of battered woman syndrome are high if not unsurmountable.”).

The more the accused diverges from the internalized cultural understanding of the good battered woman, the greater her credibility problems. Perhaps not surprisingly, experience has shown that the features of the good battered woman stereotype are drawn from the traditional female stereotype to the extent that the less demure, docile, and deferential the battered woman is seen to be, the more credibility problems she has encountered.<sup>189</sup> Battered women's survival strategies, such as self-medication with drugs or alcohol, and previous instances of fighting back, may lead to a counterstory that she provoked intimate violence.<sup>190</sup> Women who are perceived to fall outside narrow and traditional gender role expectations of mainstream culture, whether by dint of personality (e.g. independent, assertive) or identity (e.g. lesbians, African-American women), face particular difficulties in having their claims to have acted out of fear for their lives seen and heard.<sup>191</sup>

#### 4. Impeaching Credibility

Battered women's credibility problems are exacerbated by the fact that the techniques routinely used by the legal system to assess credibility do not comport with psychological understandings of reactions to trauma. For example, a standard technique in the adversary system is to impeach a witness' credibility by showing that the witness made prior inconsistent statements about pertinent events, making it more likely that current statements are

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<sup>189</sup> See Dowd, *supra* note 64, at 581 (“‘Good’ battered women are passive, loyal housewives acting as loving companions to their abusers.”); Goldfarb, *supra* note 76, at 608 (“Not surprisingly, the good battered woman is nothing more than a good woman, defined in traditional Victorian terms.”).

<sup>190</sup> See, e.g., *People v. Ciervo*, 506 N.Y.S.2d 462, 464 (N.Y. App. Div. 1986) (state challenged defendant's claim of suffering from battered woman syndrome by alleging that defendant was an adulteress, a drug user, a neglectful mother, and a poor housekeeper, indicating that she had provoked the violence.) See also McMorrow, *supra* note 84, at 226 (“If she ever fought back, then they argued that she was engaged in mutual combat and was not a battered woman. If she resorted to drugs or alcohol to escape the violence, she was ‘druggie’, [sic] not a battered woman.”).

<sup>191</sup> See sources cited at note 76.

manufactured.<sup>192</sup> Psychologists, on the other hand, indicate that among the consequences of trauma are confusion, disorientation, and memory repression, such that soon after a violent event a woman may provide the police an account that during a recovery process, she comes to know as false or incomplete.<sup>193</sup>

A court's evidentiary system is organized around an understanding that contemporaneous accounts are more accurate than subsequent accounts. Therefore battered women may confront a paradox. The memory complications that can flow from the violence that some battered women suffer are regarded as undermining the reliability of current accounts of that violence. Yet with respect to the psychological reality of the situation, initial memory problems may actually support a finding that she suffered significant trauma, and subsequent accounts may be the most accurate versions of events.<sup>194</sup>

## 5. Expert Testimony

If a psychological expert's testimony on battered woman syndrome is admitted during such a case, the expert can address the impact of trauma on memory and try to mitigate the harm done by standard evidentiary practices. But the admissibility of expert testimony remains a double-edged sword in these cases. With its admission typically linked to the concept of

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<sup>192</sup> See EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 3d.ed. 73-78 (1984) (describing the use of prior inconsistent statements to impeach a witness).

<sup>193</sup> See Lenore E.A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 327-28 (describing memory difficulties as among the major symptom clusters associated with battered woman syndrome).

<sup>194</sup> See McMorro, *supra* note 84, at 224 (memory problems that battering causes can be used to undermine a battered woman's claims when they are actually corroborative).

“battered woman syndrome”, expert testimony can illuminate a battered woman’s situation only to the extent that the features of the situation are understood as aspects of the syndrome.<sup>195</sup>

As many commentators have observed, viewing a victim of abuse as suffering from a syndrome deflects attention from the abuser, and undermines an understanding that she conducted herself reasonably, albeit in desperate circumstances.<sup>196</sup> This syndrome evidence, conjuring up images that the abuse victim suffers from a pathology, can have an adverse impact on perceptions of her reliability. These adverse inferences can influence outcomes of legal proceedings and haunt other important efforts to achieve stability in her life as well.<sup>197</sup>

## 6. Inadequate Defense Services

Another challenge for battered women charged with crimes against batterers is that few locales have made significant progress in recent decades in improving the quality of indigent defense systems. In many jurisdictions, battered women charged with assault or homicide against their batterers still receive woefully deficient representation, particularly when they are represented by appointed counsel.<sup>198</sup>

Given the poor quality of representation for many who cannot afford to hire competent counsel, the progress of the domestic violence movement in enabling fairer trials for battered women remains hypothetical for a defendant whose counsel does not appreciate the nature and circumstances of the underlying events, the context of the defendant’s relationship, the need for

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<sup>195</sup> See Myrna S. Raeder, *The Better Way: The Role of Batterers’ Profiles and Expert “Social Framework” Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 151-52 (1997) (arguing that a better practice would be to permit experts to give testimony about the general contextual features of domestic violence rather than about a psychological syndrome).

<sup>196</sup> See, e.g., Coughlin, *supra* note 74; Mahoney, *supra* note 28.

<sup>197</sup> For example, these perceptions can undermine her efforts to achieve child custody. See *supra* notes 179-81 and accompanying text.

<sup>198</sup> See *supra* note 79 and accompanying text.

psychological expertise, or the prospects for raising self-defense issues during the course of the case. In these circumstances, the factual record that might support self-defense can remain underdeveloped and fair outcomes impeded. Until indigent defense systems provide reasonably competent counsel on a reliable basis, battered women who have assaulted or killed their batterers, a subset of indigent defendants, will not be guaranteed the benefit of the progress that has been made in obtaining fairer treatment in the legal system for battered women.

### 7. Post-Conviction Relief

Once a battered woman has been convicted of assault or homicide against her batterer, her chances for vindication through appeal, collateral attack, or executive clemency are low. Those who participated in obtaining the conviction often are institutionally invested in maintaining the original outcome and seek to preserve it. Decisionmakers with the power to overturn convictions or reduce sentences will naturally use this power quite sparingly.<sup>199</sup> For battered women, these phenomena have become even stronger, since our culture considers itself to have vastly improved its understanding and treatment of domestic violence. While this belief is partially true, it also generates limited interest in addressing the problems that remain.

Even for women who were convicted of crimes against their batterers before recent legal innovations, the clemency movement has achieved at best mixed success. Despite the approximately one hundred battered women across the nation who have received gubernatorial clemency, hundreds more have been denied. Many of these women have strong arguments for clemency, yet their clemency petitions did not find a receptive audience at the statehouse. As a result, they serve the remainder of their sentences as originally imposed.

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<sup>199</sup> See, e.g., Dalton & Schneider *supra* note 28, at 741 (reporting the results of a 1995 study finding that 63% of convictions and sentences of battered women were upheld on appeal.) See also Hallye Jordan, *Gov. Davis Revising 'No Parole' Policy as Public Opinion Relaxes*, SAN JOSE MERCURY NEWS, Oct. 28, 2000 (reporting statements by Governor Gray Davis that commutation is to be granted on "rare occasions").

## VI. Conclusion

Intimate violence is linked to inequalities in perceptions and allocations of power within relationships. While any relationship can feature power disparities, women remain especially vulnerable to male violence in heterosexual relationships in a world of continuing gender inequality. As long as gender inequality persists, the problem of intimate violence will remain intractable, although public attention to the problem can partially alleviate the extraordinary harm that intimate violence creates.<sup>200</sup>

The battered women's movement has changed the world, creating many more options than previously existed for women who suffer intimate violence. Indeed, the considerable successes of the recent past create an especially challenging context for sustaining the energy of the movement today. Divisions within the movement about appropriate future directions can also drain its energies, and a difficult economic outlook makes competition for shrinking social services funds especially contentious.

Hopefully, the many eyes that have been turned to the problem and the many voices addressing it will prove up to the task of mobilizing to face the challenges ahead. And hopefully, the multiplicity of perspectives that high interest in the subject has generated will bring strength rather than fragmentation. The promise of a future containing far less intimate violence is well worth the struggle.

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<sup>200</sup> See Schneider, *supra* note 14, at 27 (“[T]he culture of female subordination that supports and maintains abuse has undergone little change.”).