

# EFFECTIVE ASSISTANCE OF COUNSEL FOR BATTERED WOMEN DEFENDANTS: A NORMATIVE CONSTRUCT

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## I. INTRODUCTION

The *Gideon*<sup>1</sup> decision is a solid precedent, hailed from all corners of legal philosophy. The current Supreme Court, even while narrowing other rights of criminal defendants, has described the right to counsel as fundamental. There is just one trouble. In the real world, the promise of *Gideon* is not being kept. Poor men and women in large numbers go to trial in this country with lawyers who are so incompetent, drunk, inexperienced or uninterested that the defendant's right to counsel is a bad joke.<sup>2</sup>

These women had not had an opportunity in trials [to tell] . . . about the harsh and brutal facts that, in my judgment, led to them sometimes defending themselves in very extreme and regrettable ways.<sup>3</sup>

That so many battered women<sup>4</sup> defendants receive ineffective legal assistance ought to compel introspection and remedial action within the

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that when an indigent defendant accused of a crime cannot afford counsel, a lawyer will be appointed by the state).

<sup>2</sup> Anthony Lewis, *A Muted Trumpet*, N.Y. TIMES, Aug. 16, 1991, at A23.

<sup>3</sup> *Ohio Governor Defends Giving Clemency to Battered Women*, DALLAS MORNING NEWS, Dec. 27, 1990, at A6 (quoting departing Governor Richard Celeste of Ohio, who had recently freed twenty-five women imprisoned for killing or assaulting their batterers).

<sup>4</sup> The term "battered women" will be used interchangeably with "abuse victims" and "domestic violence victims," because females are overwhelmingly the victims of domestic violence at the hands of male partners. The feminine pronoun in no way denies that there are male victims or minimizes their abuse; rather, it recognizes that the vast majority of domestic violence victims are females. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-99, REP. NCJ-187635, at 3 (2001) [hereinafter BJS SPECIAL REPORT] ("Women were victimized in 85% of the 791,210 intimate partner violent crimes in 1999."), available at <http://www.ojp.gov>.

legal profession. A review of cases in which courts found the conduct of counsel unacceptable reveals an astonishing degree of incompetence, with catastrophic consequences for battered defendants. The problem is characterized by attorneys' failure to present defense theories linked to the abuse endured by battered women defendants and is further compounded by judges who refuse to apply the law.<sup>5</sup> A battered woman defendant's case outcome is not so much predicated on the specific facts of her situation as on whom she draws for judge and counsel, as well as her race and socioeconomic status.

Cursorily mentioned in feminist jurisprudence and ignored in professional responsibility scholarship, the constructs of race and class are also essential in measuring attorney competency. The legal community must make access to justice a reality for *all* battered defendants, including those who are low income, of color, or both. Anything less constitutes continued implicit collusion between the legal system and the abusers.<sup>6</sup>

Lawyers are obligated to provide their clients informed, competent representation,<sup>7</sup> yet the handling of battered defendants' cases too often fails to satisfy this standard. The goal of this Article is to inspire improved legal practice and scholarly inquiry with regard to battered women defendants, whether motivated by the desire to better serve clients, the threat of liability, or the embarrassment of ignorance. Domestic violence must be understood as a planned pattern of coercive control that may involve physical, sexual, or psychological abuse<sup>8</sup> rising to the level of torture as understood in human rights discourse.<sup>9</sup> An understanding of domestic violence and human rights paradigms shifts battered women's calls for justice away from victim-blaming pathologies toward a more accurate view of the systemic oppression of women evidenced in individ-

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usdoj.gov/bjs/abstract/ipva99.htm.

<sup>5</sup> See Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense:" Towards a New Understanding*, 19 FORDHAM URB. L.J. 567, 567 (1992) (acknowledging how little the author, a criminal defense lawyer, knew on the topic prior to representing a woman who had killed her abusive husband, and how the legal system's similar lack of knowledge impairs battered women's access to fair trials).

<sup>6</sup> The normative battered woman for whom law and policy appear to be aimed is white, non-immigrant, young, heterosexual, middle-class, physically able, mentally stable, and has access to legal assistance. It is, however, beyond the scope of this Article to address all manners of essentialism. Instead, this Article will largely focus on the issues of race and class in the context of representing battered defendants. See Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse on Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996) (noting, for example, that domestic violence discourse has largely focused on male batterers and female victims).

<sup>7</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

<sup>8</sup> See Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response From Battered Women*, 68 FLA. B.J., Oct. 1994, at 24.

<sup>9</sup> See, e.g., Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence As Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994).

ual relationships.<sup>10</sup> Domestic violence crimes are overwhelmingly perpetrated by men against women;<sup>11</sup> therefore, this Article focuses on that dynamic. Such an emphasis in no way minimizes the seriousness of women abusing men,<sup>12</sup> nor does it ignore that domestic violence occurs in same-sex relationships.<sup>13</sup> Given that all domestic batterers share some of the same excessive control and abusive behaviors, generalizations can be drawn.

Estimates reveal that eighty to eighty-five percent of women imprisoned in the United States attribute their incarceration to their association with a batterer.<sup>14</sup> The Department of Justice reports that six out of ten women incarcerated in state prisons are survivors of abuse, and more than a third have been abused by an intimate partner.<sup>15</sup> The violence perpetrated against women is typically severe, with at least half of the *reported* offenses including incidence of rape, armed attacks, punches with closed fists, kicks, strangulations, beatings, or credible threats.<sup>16</sup> Several scholars contend that domestic violence is the most underreported crime;<sup>17</sup>

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<sup>10</sup> See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

<sup>11</sup> See, e.g., BJS SPECIAL REPORT, *supra* note 4; DIANE CRAVEN, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 1 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvvc.pdf>.

<sup>12</sup> See Jeffrey L. Edleson, *Fact & Fantasy: Violent Women: Social Service Agencies Have a Responsibility to Know the Difference*, Minn. Ctr. Against Violence and Abuse, Electronic Clearinghouse (citing Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?*, 1 VIOLENCE & VICTIMS 47 (1986)), available at <http://www.mincava.umn.edu/papers/jeffdap.htm> (last modified Sept. 19, 2002).

<sup>13</sup> See generally Barbara Hart, *Lesbian Battering: An Examination*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); see also Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence*, 9 VIOLENCE & VICTIMS 95 (1994); Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335 (1995); Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 331 (1999); VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS (Claire M. Renzetti & Charles Harvey Miley eds., 1996); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

<sup>14</sup> See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 265 n.8 (2000) [hereinafter SCHNEIDER, FEMINIST LAWMAKING] (citing NAT'L CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, STATISTICS PACKET (3d ed. 1995) (stating that the Executive Director of the Women's Prison Association in New York estimates that eighty-five percent of the offenders with whom he has worked would not have been incarcerated were it not for their connection with abusive male offenders)).

<sup>15</sup> See LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN OFFENDERS 1, REP. NCJ-175688 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf>.

<sup>16</sup> BJS SPECIAL REPORT, *supra* note 4; see also LAWRENCE A. GREENFELD ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES 14, REP. NCJ-167237 (1998) [hereinafter GREENFELD ET AL., VIOLENCE BY INTIMATES], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 28, REP. NCJ-183781 (2000), available at <http://www.ncjrs.org/pdffiles/nij/183781.pdf>.

<sup>17</sup> See Lori Romeyn Sitowski, *Congress Giveth, Congress Taketh Away, Congress Fixeth*

as such, the revealed incidents do not accurately reflect the true magnitude of what battered women endure. In spite of the danger they face, some victims are unable to leave abusive relationships due to obstacles such as insufficient finances, limited job skills, threats of retaliation by the batterer, no room at shelters, prior adverse experience with the legal system, inability to speak English, illiteracy, medical or mental health problems, disabilities, narcotics or alcohol addiction, fear of deportation or arrest, low self-esteem, or not being "out" as lesbian or gay.<sup>18</sup> Contrary to popular belief, at least seventy-five percent of battered women engage in a range of resistance behaviors, from calling law enforcement to yelling or struggling against the abuser. In fact, more than one-third of victims report using force in self-defense on at least one occasion.<sup>19</sup>

Physical violence alone, however, is an insufficient lens through which to view abuse against women because it fails to capture the psychological and social control that is debilitating to victims. Batterers combine coercive tactics to create a totality of intimidating circumstances causing victims to feel they can neither escape nor safeguard themselves or their children.<sup>20</sup> Because so many battered clients find it difficult to disclose the true extent of their victimization—including the psychological abuse they endure—counsel have an obligation to patiently prod their clients about any history of abuse. When representing a battered defendant, counsel must ensure the jury understands the effects of the batterer's excessive control and dehumanizing behavior within the context of violence and coercion.<sup>21</sup>

While much of the reported case law involving battered women focuses on those who kill their partners, there is a substantial body of non-homicide cases, including those involving drug possession and sales, property and prostitution offenses, or failure to protect children.<sup>22</sup> It is impor-

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*Its Mistake? Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000*, 19 LAW & INEQ. 259, 263 (2001).

<sup>18</sup> See Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999) [hereinafter Buel, *Fifty Obstacles to Leaving*]; see also Robson, *supra* note 13 (noting the additional problem that the judicial system is homophobic and therefore does not adequately deal with battering in lesbian relationships).

<sup>19</sup> See GREENFELD ET AL., VIOLENCE BY INTIMATES, *supra* note 16, at 19.

<sup>20</sup> See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman's Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1024 (1999).

<sup>21</sup> *Id.*

<sup>22</sup> See Michelle S. Jacobs, *Prostitutes, Drug Users, and Thieves: The Invisible Women in the Campaign to End Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 459, 463 n.19 (1999); see also KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT (1994) (reviewing study of prosecution and sentencing data for women and men in a Connecticut court); LEON E. PETTIWAY, WORKIN' IT: WOMEN LIVING THROUGH DRUGS AND CRIME (1997) (studying women who are engaged in prostitution and drug dealing); BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN (1996) (studying African American battered women awaiting trial at Riker's Island, New York); MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 95 (1997) (noting that in 1994 the greatest number of women were arrested for larceny and drug offenses).

tant for defense lawyers to rethink their approaches to non-homicide cases, as these are often relegated to a lesser status but have similarly dire outcomes for the accused.<sup>23</sup> Just as domestic violence scholarship convincingly explains how an abuse victim must sometimes use violence in self-defense,<sup>24</sup> counsel must adapt this body of law to explain how a battered woman would be induced to commit other types of offenses. Defense attorney Kris Davis-Jones reports that in non-lethal cases, prosecutors appear more amenable to fair case dispositions when she has prepared a comprehensive summary of the facts, history of abuse, and mitigating circumstances surrounding the battered defendant's commission of an offense.<sup>25</sup> While this Article details ways to achieve effective representation for all battered defendants, counsel may nonetheless have to extrapolate from homicide cases to enhance their defenses in non-homicide matters.

Casebooks are replete with specific examples of attorney malfeasance in cases involving battered women. In representing Betty Lou Beets—a poor, barely literate, white woman—on a capital murder for remuneration charge, Texas attorney E. Ray Andrews obtained a contract for the media rights to her life story. He later refused to testify on her behalf regarding her husband's death benefits after the killing occurred.<sup>26</sup> Since Beets had been charged with killing her husband for monetary gain, Andrews's testimony could have made a dramatic difference in the outcome of her case. Had Andrews testified that his client had not been aware of the insurance monies at the time of her husband's death, her maximum sentence would have been life in prison. Instead, Beets was sentenced to death. In spite of pleas from around the world to spare her life, Beets was executed on February 24, 2000. By putting his own interests ahead of Beets's, Andrews deprived the jury of critical, potentially exculpatory information. Even more egregious, Andrews also failed to introduce *any* evidence at trial or during the sentencing phase of her impoverished background or the history of horrific physical, sexual, and emotional abuse Beets suffered as a child, as well as at the hands of her husbands.<sup>27</sup> Al-

<sup>23</sup> See discussion *infra* Part III.C for use of defense options, including duress.

<sup>24</sup> See generally RICHIE, *supra* note 22.

<sup>25</sup> Telephone Interview with Attorney Kris Davis-Jones, Austin, Texas Defense Attorney (Mar. 5, 2002) (on file with author).

<sup>26</sup> See *Beets v. Scott*, 65 F.3d 1258, 1260 (5th Cir. 1995). Note that lack of financial resources forced Beets to accept whatever conditions Andrews dictated; no other lawyer was available.

<sup>27</sup> Particularly in a capital case, the court must have access to a comprehensive view of the defendant's life experiences. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that in order to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors); see also *Application for Reprieve From Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life, In re Betty Lou Beets*, n.3 (Feb. 1, 2000) (before the Governor of the State of Texas and the Board of Pardons and Paroles) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (stating a "belief, long held by this society, that defendants who commit

though Andrews was subsequently disbarred, his disbarment was a result of a bribery conviction,<sup>28</sup> not his ineffective assistance of counsel to Beets.<sup>29</sup>

Judy Haney, a battered wife in Alabama, received the death penalty for killing her husband even though her attorney was sufficiently intoxicated during the trial to be held in jail overnight for contempt.<sup>30</sup> The trial began the day after authorities released her lawyer from jail.<sup>31</sup> At trial, counsel did not produce the hospital records corroborating Haney's and her daughter's testimony regarding the horrific degree of abuse they suffered at the hands of the deceased. Nonetheless, the Alabama Court of Criminal Appeals<sup>32</sup> and the Alabama Supreme Court<sup>33</sup> upheld the conviction and death sentence. The Alabama Supreme Court should have *sua sponte* halted the trial and appointed new counsel. Although in *Powell v. Alabama*,<sup>34</sup> *Gideon v. Wainwright*,<sup>35</sup> and *Strickland v. Washington*,<sup>36</sup> the United States Supreme Court held that a poor defendant must be afforded an attorney,<sup>37</sup> Alabama courts in *Haney* gutted those opinions by effectively declaring that counsel need not conform to disciplinary standards or model rules of professional conduct.<sup>38</sup>

Many within the legal community say publicly that they are stunned and dismayed at the degree of incompetence displayed in cases such as *Beets v. Scott*<sup>39</sup> and *Haney v. State*.<sup>40</sup> However, most acknowledge privately that such practices occur far more often than the citizenry imagines. No defendant should be given abysmal counsel, particularly in felony and capital cases. Certainly, when key evidence, such as mitigating circumstances of domestic violence against the defendant and the essen-

criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse") (on file with author).

<sup>28</sup> As Henderson County's elected District Attorney in 1994, Andrews was convicted of agreeing to dismiss homicide charges against a man charged with murdering his wife if he was paid \$500,000. See Bruce Tomaso, *Troubles Mounting for Ex-DA: Bribe Case, Crash, Alcohol Take Toll on E. Texan*, DALLAS MORNING NEWS, Aug. 29, 1994, at 1A.

<sup>29</sup> The contract for media rights was the basis of a Texas State Bar grievance claim, but the Bar declined to discipline Andrews for it. See *Beets*, 65 F.3d at 1279.

<sup>30</sup> *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991), *aff'd*, *Ex parte Haney*, 603 So. 2d 412, 418-19 (Ala. 1992).

<sup>31</sup> *Haney*, 603 So. 2d at 378.

<sup>32</sup> *Id.*

<sup>33</sup> *Ex parte Haney*, 603 So. 2d at 418-19.

<sup>34</sup> 287 U.S. 45 (1932).

<sup>35</sup> 372 U.S. 335 (1963).

<sup>36</sup> 466 U.S. 668 (1984).

<sup>37</sup> See discussion *infra* Part II.C regarding how this trilogy ought to impact effective assistance of counsel for battered defendants.

<sup>38</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (citing two cases in which lawyers slept through trials and appeared drunk in court, yet were found to be competent).

<sup>39</sup> 65 F.3d 1258 (5th Cir. 1995).

<sup>40</sup> 603 So. 2d 368 (Ala. Crim. App. 1991), *aff'd*, *Ex parte Haney*, 603 So. 2d 412 (Ala. 1992).

tial realities of race and class,<sup>41</sup> is not properly addressed, the battered defendant is unlikely to have a fair trial.

The need for remedial action does not rest solely at the doorstep of lawyers, however. Judges, too, are remiss in not engaging in necessary systemic change. Convincing courts that domestic violence is a serious crime turns out to be relatively straightforward; the difficulty comes in engendering meaningful reforms to serve litigants better.

Furthermore, a diverse cross-section of abused women turn to lawyers and courts for help, too often with poor results. To meet the standard for effective assistance of counsel when representing battered defendants, lawyers must strategically address issues of race and class, in addition to the more doctrinal issues discussed in Part III.

This Article offers a prescriptive reform framework for lawyers and judges handling these cases. Specifically, Part II examines the conundrum of race and class distinctions, and ways in which the *Powell*,<sup>42</sup> *Gideon*,<sup>43</sup> and *Strickland*<sup>44</sup> cases are relevant to the theoretical and practical proposals. Part III addresses the gap between theory and practice,<sup>45</sup> applying the lenses of race and class as pertinent issues. Due to particularly negative and rigid portrayals, battered women of color often suffer a disproportionate, adverse impact when Battered Woman's Syndrome (BWS) is applied. The gap between theory and practice necessitates focusing on myriad aspects of effective representation, and as such, defense options are analyzed. This Part concludes with a review of post-trial remedies, including appeal, parole, commutation, clemency, and pardon.

Part IV argues that the judiciary, organized bar, and individual lawyers contribute to the intransigence of abysmal representation for battered defendants when proffering excuses in lieu of remedial action. Part V proposes an increased role for law schools, bar examiners, advanced certification programs, and continuing legal education (CLE) seminars. Finally, Part VI posits that at least some outcomes associated with battered women on trial can be anticipated and prevented, while others may not be as ominous as initial consideration might indicate.

Throughout the Article, I incorporate practitioners' observations that I have accumulated over my twenty-five years of working with thousands of battered clients in six states. In the interest of client confidentiality, most of my arguments are generalized from their experiences.<sup>46</sup>

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<sup>41</sup> See *infra* Parts II.B.1–2 for full discussion of relevant race and class issues.

<sup>42</sup> 287 U.S. 45 (1932).

<sup>43</sup> 372 U.S. 335 (1963).

<sup>44</sup> 466 U.S. 668 (1984).

<sup>45</sup> This gap is derived, in part, from the fact that most legal scholars have not practiced law and that most practitioners do not delve into the realm of legal scholarship.

<sup>46</sup> I have been a battered woman's advocate in Colorado, Massachusetts, New Hampshire, New York, Texas, and Washington since 1977. My cumulative experiences are reflected throughout the Article [hereinafter Author's Experience].

## II. DISTINGUISHING BATTERED DEFENDANTS AS WORTHY OF SPECIAL CONSIDERATION

### A. *Justifications*

With many criminal defendants harmed by inept counsel, one might ask why the plight of battered women defendants deserves particular scrutiny. Reviewing battered women's cases provides concrete suggestions that will positively address a previously misunderstood and vulnerable population. Other categories of defendants certainly warrant review, but having worked directly with thousands of battered women for over twenty-five years, they have inspired this normative construct.

#### 1. *A Crime Victim Previously Betrayed by the Courts, Lawyers, and the Community*

One reason to afford battered defendants special consideration is that they are generally crime victims who previously have been failed by the justice system and their communities. A well-informed judiciary might obviate the need for particularized focus, but since many judges lack rudimentary knowledge of domestic violence issues, they are ill-equipped to recognize effective representation. There are, of course, a number of judges who not only ably handle domestic violence criminal and civil cases, but also take leadership roles by engendering coordinated responses in the communities they serve.<sup>47</sup> Given the potentially grim consequences of inadequate legal assistance to abuse victims and lawyers' monopoly on accessing safety-enhancing remedies in court, it is unconscionable to condone the dearth of standards for practice in this area. Justice Sandra Day O'Connor has commented that it may be necessary to mandate minimum standards of practice for lawyers, particularly in death penalty cases.<sup>48</sup> This dramatic assertion should serve to alert counsel that problematic practices are widespread.

Battered women who later engage in criminal conduct frequently had attempted to secure the aid of the legal system for protection but were denied adequate assistance for reasons ranging from overwhelmed courts and uneducated staff to batterer tenacity and racist practices.<sup>49</sup> Lawyers and scholars must recognize the continuum of agency and victimhood; doing nothing or taking sufficient steps to protect oneself are

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<sup>47</sup> For further information on how leading judges and model courts effectively deal with domestic violence matters, contact the National Council of Juvenile and Family Court Judges (NCJFCJ), Family Violence Department, by phone at 1-800-52-PEACE. The NCJFCJ's Web site is <http://www.ncjfcj.org> (last visited Mar. 19, 2003).

<sup>48</sup> See Anne Gearan, *Court Backs Convicted Man with Sleepy Lawyer*, TULSA WORLD, June 4, 2002, at A7.

<sup>49</sup> See RICHIE, *supra* note 22, at 113.



not two discrete categories into which battered women can be classified. Professor Elizabeth Schneider argues that battered women's agency must be reinterpreted, as its forms are variable and dependent on many social forces.<sup>50</sup> Indeed, the vast majority of victims make many courageous efforts to achieve safety in spite of extraordinary obstacles. A victim's ability to engage in help-seeking behavior is constrained by myriad factors, many of which are beyond her control.<sup>51</sup> Some are able to find and make use of the few self-help books available,<sup>52</sup> but for others illiteracy, language barriers, or lack of money and resources mean they can make little use of such guides.

Since the mid-1980s, researchers have documented that the battered women who use violence in self-defense are those most severely beaten, those whose children are targeted, and those whose batterers abuse drugs or alcohol.<sup>53</sup> Not surprisingly, the availability of community victim support services lessens the danger to all involved. In reviewing homicide data from 1980 to 1984, Dr. Angela Browne found that when battered women are afforded legal assistance, access to shelters, and other resources, they are less frequently forced to defend their lives by killing their abuser.<sup>54</sup> It has been documented that access to legal assistance is the single highest predictor of long-term reduction in domestic violence.<sup>55</sup> When arguing to judges and parole boards why a battered defendant should be released on bail or permitted early parole, attorneys should address the availability of these resources (or the lack thereof).

#### *a. Ineffective Counsel*

Attorney missteps may not always be as apparent as failing to use applicable law, but their effects are no less harmful to the client. A lawyer may be ineffective because she is disconnected from her client and does not know how to reframe the attorney-client relationship. The battered defendant can discern cues from her lawyer regarding her competence as a witness and the lawyer's judgment about the defendant's entrapment in the abuse. Domestic violence expert Dr. Evan Stark cautions lawyers to:

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<sup>50</sup> See SCHNEIDER, *FEMINIST LAWMAKING*, *supra* note 14, at 83.

<sup>51</sup> See generally Buel, *Fifty Obstacles to Leaving*, *supra* note 18.

<sup>52</sup> See, e.g., ANN JONES & SUSAN SCHECHTER, *WHEN LOVE GOES WRONG: WHAT TO DO WHEN YOU CAN'T DO ANYTHING RIGHT* (1993); GINNY NiCARTHY & SUE DAVIDSON, *YOU CAN BE FREE: AN EASY-TO-READ HANDBOOK FOR ABUSED WOMEN* (1997).

<sup>53</sup> See CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 35 (1987).

<sup>54</sup> See Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 *LAW & SOC'Y REV.* 75 (1989).

<sup>55</sup> *UA Researcher Cites Legal Aid, Age for Less Abuse of Women*, *COM. APPEAL* (Memphis, Tenn.), Nov. 30, 2002, at B5 (on file with author).

[R]emember that if she is defined only as a victim, albeit a victim deserving defense, the battered woman will act like a victim in court, responding defensively to her abuser and outwardly buying into her misrepresentation as a woman without choice[,] while inwardly seeking ways to survive it by employing the same defensive maneuvers in court she has used at home.<sup>56</sup>

However, in representing battered defendants, even experienced defense lawyers often fail to listen effectively and support the battered client throughout the legal process.

The social disparity in life circumstances between counsel and the battered defendant may make it difficult for an effective relationship to develop, thereby hampering representation.<sup>57</sup> Traditional theories of representation often relegate clients to the periphery of a case. A battered defendant who has often been denied even the right to speak by the abuser, needs her lawyer to accurately present her voice in court.<sup>58</sup> Counsel should encourage a battered client to find her voice and center case strategies upon it.<sup>59</sup> Representation of battered defendants might be radically transformed by altering the typical approach to litigation.

The phrase "legal services," with its connotations of attorney self-education and interest in the client, is misleading in many battered defendants' cases. Some lawyers find it uncomfortable to hear details of abuse because their clients have lived with terror, the likes of which the lawyers cannot imagine. Batterers subject victims to a degrading regimen of humiliation, shame, and loss of esteem, often demanding total obedi-

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<sup>56</sup> Stark, *supra* note 20, at 1011.

<sup>57</sup> See Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1094-97 (1995) (arguing that connection is a critical element in representation of battered women); see also Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 619-20 (1994) (suggesting that lawyers must seek to understand the client's view of their interactions in an empathetic way); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1272 (1993) (describing as "true friendship" the association between a low-income criminal client and counsel); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 515-19 (1999) (writing that rapport with a client is central to criminal defense lawyering); Abbe Smith & Ilene Seidman, *Lawyers for the Abused and Lawyers for the Accused: An Interfaith Marriage*, 47 LOY. L. REV. 415, 428 (examining the importance of an effective client relationship).

<sup>58</sup> See Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2132 (1991) (discussing the significance of client narratives in representing the indigent).

<sup>59</sup> See Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1613 (1989) (stating that the attorney's strategies should be focused on client voice); see also Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (characterizing client narrative as key to developing case theory).

ence.<sup>60</sup> These factors can help explain why battered women undertake violent actions against their assaultive partners. Thus, inquiries into the details of abuse are essential for developing a defense strategy for battered women. Moreover, where race, class, and gender issues intersect, counsel must be cognizant of these particularized influences shaping their clients' behavior.<sup>61</sup> Counsel must be prepared to educate the court and jury about these issues and their relevance to the defense.

Professor John Mitchell asserts that lawyers must elicit much more complete narratives from clients and encourage clients to actively participate in their own cases. As a new lawyer, Mitchell admits to viewing his client as a hindrance to the case:<sup>62</sup>

By casting my clients as powerless and dependent, with my legal story as the only one that counted, I set myself above them, enjoyed my superiority, and stole their voice—or at least made them self-edit that voice to give me what they knew I was seeking—and, in the process, to an extent I hurt them. I took their dignity, if only for the brief term of our interaction. That has changed, though undoubtedly imperfectly. I now seek and teach my students to seek the full person—a unique person, in part defined by culture, gender, race, sexual preference, and the political world, but ultimately unique. I do so, not just because I believe it is the right thing to do, but because it makes me (and my students) better lawyers. I know who I'm dealing with and can work in a relationship of mutual respect. And in truly hearing the client's story, the client and I (and/or students) can make a range of strategic decisions which otherwise would not be possible.<sup>63</sup>

Discerning client voice is not an easy task; it requires respecting clients' autonomy and dignity.<sup>64</sup> Lawyers who lack training in domestic violence dynamics or who are unable to empathize with the severely limited options battered defendants face are often quick to judge their clients. Sometimes a battered defendant is too physically and mentally exhausted to contemplate trial and wants to accept even an unfair prosecu-

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<sup>60</sup> See, e.g., SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982).

<sup>61</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1257 (1991).

<sup>62</sup> See John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to Do When His Two Favorite Theories Collide*, 6 *CLINICAL L. REV.* 85, 98–101 (1999).

<sup>63</sup> *Id.* at 100–01.

<sup>64</sup> See Smith & Seidman, *supra* note 57, at 429 (citing Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 605 (1985)).

tion offer.<sup>65</sup> In other cases, battered women have been able to explain to an advocate the humiliation and torture they endured at the hands of their batterers, but feel unable to take the stand to describe such traumatic incidents in a public courtroom. Lawyers should make a point to reinforce that their clients did not deserve to be abused and make every effort to assist them in obtaining counseling.

Communicating with a battered client is more difficult if language barriers exist. Counsel may need an interpreter to translate, but confidentiality can be compromised by the interpreter's presence.<sup>66</sup> Generally, translators are prohibited from revealing the contents of these discussions, but the law in this area varies by jurisdiction, necessitating that counsel review it prior to selecting an interpreter.<sup>67</sup> In some instances a family member, battered women's advocate, or office assistant may be able to assist with translation, but a professional interpreter will likely be needed for court.<sup>68</sup> Certified interpreters are considered more impartial and can protect witnesses' or parties' rights.<sup>69</sup> If the client needs to sign documents (such as a retainer agreement), every effort should be made to translate it into the client's native language, provided that she is literate.

Without adequate knowledge about the devastating impact of psychological abuse, counsel tend to minimize its importance in crafting defenses. If a lawyer downplays the significance of abuse, a battered client may feel silenced, to the detriment of case presentation. For example, Betty Lou Beets, convicted of killing her husband, described the mental torture her husband had inflicted on her to her court-appointed lawyer, but he indicated that only physical abuse was relevant.<sup>70</sup> Beets's husband would frequently force her to undress and then stand naked before him for hours while he told her how fat, unappealing, and repulsive she was. He would continue the barrage of humiliating ridicule and criticism for days

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<sup>65</sup> *Id.*; see also *infra* notes 164, 270, and 674 (in the case of Lisa Grimshaw, the prosecution offered her a fifteen-year sentence, although the man who actually killed her husband received an eight-to-ten-year sentence. As a result of her refusal to accept this offer, Grimshaw spent three and a half years in the Awaiting Trial Unit, then recognized as the most overcrowded prison facility in the country, at 560% of capacity.); *infra* notes 672 and 674 (in Meekah Scott's case, the prosecution said they would retry her unless she accepted a plea agreement of eight to ten years in prison. Her sentence was eventually negotiated down to the one year she had served while awaiting trial.).

<sup>66</sup> See Susan Bryant, *How to Bridge the Culture Gap*, 38 TRIAL 42 (2002).

<sup>67</sup> John Elliott Leighton, *A World of Words Comes to Court*, 38 TRIAL 20, 22 (2002).

<sup>68</sup> See *id.* at 20 (citing Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 241 (1996)).

<sup>69</sup> *Id.* at 21. For assistance in locating a professional translator, counsel can start with the American Translators Association Web site, <http://www.atanet.org> (last visited Mar. 19, 2003). For faster assistance, the AT&T language line offers translation in 150 languages, 1-800-752-0093.

<sup>70</sup> Statements of Betty Lou Beets to her appellate lawyer in the author's presence on Jan. 20, 2000 [hereinafter Statement of Betty Lou Beets]; see case description *supra* in text accompanying note 26 (on file with author).

on end. Coupled with a history of childhood and prior relationship violence, Beets felt the emotional abuse was the most painful and crippling for her.<sup>71</sup>

A conceptual breakthrough in what constitutes acceptable practice is essential. Presently, ethical obligations of lawyers do not demand focus on the harm of abuse; decisions are instead justified under the guise of “case strategy.” In *Humiston v. Alarcon*, the Ninth Circuit found that the defense attorney made a suitable strategic decision not to provide evidence of BWS because the appellant denied taking part in the murder for which she was charged.<sup>72</sup> Deferring to counsel’s tactical decisions, the court determined that the lawyer’s conduct was competent and upheld the jury’s conviction.<sup>73</sup> However, as case analysis will show, it is precisely this seemingly irrational behavior of abuse victims that BWS seeks to explain. Had counsel and the court been better informed regarding the beneficial uses of BWS testimony, a more equitable disposition may have resulted.

*b. Dual Arrest or Victim Arrest*

Usually the first to intervene in cases of domestic violence, law enforcement officers possess extraordinary power to frame the circumstances of the offense. Their reactions to domestic violence may be impacted by degree of training, statutory mandates, or attitudes about women,<sup>74</sup> perhaps based on a personal history of family violence.<sup>75</sup> These factors contribute to the trend of victims being arrested and charged with domestic violence offenses, either as sole defendants or dually arrested with their abusers.<sup>76</sup> Most scholars agree that domestic violence is not characterized by mutual battering—a fact documented in the National Violence Against Women Survey (NVAWS) conducted by the Centers for Disease Control and Prevention and the National Institute of Justice. Both the NVAWS and the National Crime Victimization Survey indicate that females are overwhelmingly the victims of abuse by intimate male part-

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<sup>71</sup> *Id.* Psychological abuse can also be the basis of a self-defense claim that allows counsel to introduce evidence of BWS to prove the client’s reasonable belief of impending harm. See K. Tiffany Parker, *Georgia Supreme Court Expands Battered Person Syndrome to Include Psychological Abuse*, 30 CUMB. L. REV. 545, 552–53 (2000). Yet, practitioners representing battered clients rarely rely on such a claim.

<sup>72</sup> No. 99-56413, 2000 U.S. App. LEXIS 16171, at \*2 (9th Cir. July 11, 2000).

<sup>73</sup> *See id.*

<sup>74</sup> *See* Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence*, 1 J. INTERPERSONAL VIOLENCE 147, 148–52 (1995).

<sup>75</sup> *See* Sandra M. Stith, *The Police Response to Domestic Violence: The Influence of Individual and Familial Factors*, 5 VIOLENCE & VICTIMS 32, 37–39 (1990).

<sup>76</sup> *See* Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence*, 7 VIOLENCE AGAINST WOMEN 1339, 1348–49 (2001); *see also* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 588 (1999).

ners.<sup>77</sup> Additional studies further indicate that the women arrested are frequently abuse victims ensnared in a violent cycle they have not instigated and from which they cannot safely escape.<sup>78</sup> Moreover, violence perpetrated by women is different than violence perpetrated by men, with distinctly dissimilar intentions, fear, levels of injury, and perception of options. When the asymmetrical nature of abusive relationships goes unnoticed by police, prosecutors, defense attorneys, and judges, these officials are also likely to ignore the distinctions between the victim's preemptive and defensive violence.<sup>79</sup>

Counsel for a woman charged with a violent crime must carefully assess her history and pattern of abuse. Dr. Jeffrey Edleson suggests there are three categories of violent women: the first group includes women who are forced to use violence in self-defense to avert serious harm by their partners.<sup>80</sup> The second category contains those women who have long been victimized, either as a child or by a violent partner. Such survivors may assault preemptively to avoid being harmed again. Third, there are women who instigate abuse without provocation or an initial assault by their partners.<sup>81</sup> Edleson cautions intervenors not to be manipulated by those purporting that men and women are battered equally, but instead to recognize that a small minority of women are the primary physical aggressors and need the same intervention programs as male batterers.<sup>82</sup> He further describes the myth that women are as violent as men as a politically motivated backlash designed to intimidate true victims.<sup>83</sup>

One isolated incident often does not accurately reflect who is the true victim and who is the abuser. Domestic violence is a *pattern* of abuse that reflects the perpetrator's belief that he is entitled to use violence if his partner is not sufficiently solicitous, obedient, loyal, or compliant. Even this simplified insight into the dynamics of battering can help lawyers and judges understand that mutual battering is extraordinarily rare: a

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<sup>77</sup> See Miller, *supra* note 76, at 1344.

<sup>78</sup> See D.R. Follingstad et al., *Sex Differences in Motivations and Effects of Dating Violence*, 40 FAM. REL. 51, 57 (1991); see also L. K. Hamberger et al., *The Intended Function of Domestic Violence is Different for Arrested Male and Female Perpetrators*, 10 FAM. VIOLENCE & SEXUAL ASSAULT BULL. 40, 44 (1994) [hereinafter Hamberger et al., *The Intended Function of Domestic Violence*]; L. K. Hamberger & T. Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE & VICTIMS 125, 137 (1994); L. L. Marshall & P. Rose, *Premarital Violence: The Impact on Family of Origin Violence, Stress, and Reciprocity*, 5 J. FAM. VIOLENCE 51, 64 (1990).

<sup>79</sup> See Hamberger et al., *The Intended Function of Domestic Violence*, *supra* note 78, at 40.

<sup>80</sup> See Edleson, *supra* note 12.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Professor Edleson suggests utilizing N. HAMLETT, WOMEN WHO ABUSE IN INTIMATE RELATIONSHIPS (Minneapolis, Minn. Domestic Abuse Project, 1998) to better assess women and their stories of abuse.

domestic violence relationship is typified by a persistent batterer and a designated victim. Because a survivor uses force in response to certain situations does not make her a batterer. It is the perpetrator who employs terroristic conduct—physical, psychological, sexual, financial, and individualized abuse—to solidify control of his partner that is the batterer.<sup>84</sup>

As will be discussed in greater detail in Part II.B.2.d, women are disadvantaged by bias inherent in the justice system, and women of color and poor women receive the most severe sentences.<sup>85</sup> Female defendants of color have been further disadvantaged by traditional applications of BWS,<sup>86</sup> because the models of male perpetrators were adapted for white women, thereby ignoring the complexities of racial difference.<sup>87</sup> The disproportionate arrest of poor women and those of color is closely correlated to the negative stereotypes characterizing them as more violent, out of control, hostile, and dangerous than white women. If counsel plans to use evidence of BWS to argue that a defendant of color used violence in self-defense, she will need to review the intended testimony to ensure it accurately reflects *this* client's experiences.

Prior to acting in self-defense against her abuser or prior to committing offenses, the battered woman is a classic crime victim to whom the state owes the same level of intervention it would accord the victim of stranger crimes. Current interpretations of the Fourteenth Amendment's Equal Protection Clause indicate that domestic violence victims have a right to the same police response accorded victims of stranger violence.<sup>88</sup> Yet, studies indicate the great majority of domestic violence cases are not treated seriously by the criminal justice system. One report documented that of every 100 domestic violence assaults, only fourteen victims call the police, resulting in only 1.5 arrests and 0.49 convictions.<sup>89</sup> Such patterns reflect some victims' ambivalence about requesting police and court assistance: if they feel that the system will not protect them and calling for help will only incite the batterer's wrath, victims may seek private

<sup>84</sup> See Erin H. House, *The Myth of Mutual Battering*, in LOUISIANA DEPARTMENT OF JUSTICE DOMESTIC VIOLENCE IN THE WORKPLACE CONFERENCE MANUAL 4 (Aug. 15, 2002) (on file with author).

<sup>85</sup> See Melissa Hooper, *When Domestic Violence Diversion is No Longer an Option: What to do With the Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 178 (1996).

<sup>86</sup> See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 95–97 (1984) (referring to Walker's Cycle of Violence theory).

<sup>87</sup> See Shelby A. D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 HOW. L.J. 297, 301 (1995); see also Sharon Angella Allard, *Rethinking Battered Woman's Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 194–207 (1991).

<sup>88</sup> See *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (finding that the Fourteenth Amendment's Equal Protection Clause is violated if the police provide less protection to domestic violence victims than they do victims of stranger violence).

<sup>89</sup> Linell A. Letendre, *Beating Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 WASH. L. REV. 973, 978 (2000) (citing DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 45, 233 (1995)).

recourse or none at all. Many victims desire no state interference on their behalf, while others lament the system's often minimal response. Should the victim be fortunate enough to find an informed prosecutor, it is still likely that the batterer will be sentenced to a batterer's intervention program instead of jail.<sup>90</sup> If the goal is to treat intimate and stranger assaults similarly, courts are failing, with dire consequences for the victims and their children,<sup>91</sup> rather than for the perpetrators.<sup>92</sup>

In the civil law arena there are similar, widespread practices sabotaging abuse prevention laws and increasing the danger to domestic violence victims and their children.<sup>93</sup> Battered women are ordered into marital counseling as part of divorce proceedings, even though there exists substantial research documenting the increased risk of harm with mediation and couple's counseling in cases involving domestic violence.<sup>94</sup>

In spite of laws now dictating the parameters of state intervention, battered women cannot be certain they will encounter a police officer, judge, advocate, or lawyer who meets the equal treatment standard. Abuse victims of color or who are poor can expect even worse handling of their cases,<sup>95</sup> as can gay and lesbian victims<sup>96</sup> and those who are mentally ill or substance-abusing.<sup>97</sup> While a few communities have engaged in court watches to document institutional practices,<sup>98</sup> many more such accountability initiatives are needed to compel greater adherence to statutory mandates.

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<sup>90</sup> See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998).

<sup>91</sup> See The Family Violence Project of the Nat'l Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 216-18 (1995) (reporting that despite legal reform, many courts remain uninformed and unresponsive to battered women).

<sup>92</sup> See, e.g., NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS (1998).

<sup>93</sup> See Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 827 (1997). See generally ANN JONES, NEXT TIME SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT (1994).

<sup>94</sup> See CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 415, 440 (2001); see also Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731-32 (1999).

<sup>95</sup> See SUPREME COURT OF TEX., TEX. OFFICE OF COURT ADMIN., STATE BAR OF TEX., PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS: A SUMMARY REPORT (1998), available at <http://www.courts.state.tx.us/publicinfo/publictrust/index.htm>; see also Leslye Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313 (1995) (noting the added obstacles faced by abused immigrants).

<sup>96</sup> See generally Letellier, *supra* note 14. See also Murphy, *supra* note 14; VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS, *supra* note 14.

<sup>97</sup> See Sarah M. Buel, *Family Violence, Ethical Practice With High-Risk Domestic Violence Victims*, TEX. PROSECUTOR, Mar.-Apr. 1999, at 34.

<sup>98</sup> See Sarah M. Buel, *Family Violence, Court Watches: Improving Services to Victims By Documenting Practices*, TEX. PROSECUTOR, July-Aug. 1999, at 16. The Battered Women's Justice Project (1-800-903-0111) has information and materials regarding court watches around the country.



2. *Recognizing the Pattern of Abuse as Creating Long-Term Danger and Trauma*

A second reason to expend additional efforts in advocating for battered defendants is that they have been subjected to what batterer expert Dr. David Adams calls “a planned pattern of coercive control.”<sup>99</sup> This prolonged pattern of abuse instigates the crisis for some victims: they are desperate for relief from the relentless terror, but find little or no help in the legal or broader community. If the batterer is arrested after an incident, it is only that one incident to which the courts attend. Such a myopic focus fails to convey a comprehensive understanding of the batterer’s dangerous conduct, making the victim’s fear appear exaggerated. It is critical that prosecutors present evidence of the batterer’s prior abuse against the victim, as well as past abuse of others.<sup>100</sup> Evidence that the batterer repeatedly assaulted the victim in the past is relevant to prove that the victim was in fear of the defendant<sup>101</sup> and to help the court understand the true breadth of the abuse.

Batterer treatment expert Dr. Donald Dutton states:

[In my observations] I began to learn that intimate abuse was not just about hits and punches. It was about psychologically and physically trying to control their victims’ use of time and space in order to isolate them from all social connection, both past and present. It was an all-out attempt to enslave them psychologically.<sup>102</sup>

Literature from other disciplines explaining Post-Traumatic Stress Disorder, “trauma-bonding,” and similar adaptive behaviors provides insight for lawyers and judges handling domestic violence cases.<sup>103</sup> Extreme harm borne by victims, coupled with the criminal justice system’s failure to intervene effectively and the reality of victims’ non-options, creates a climate of desperation conducive to victims’ commission of crimes. In *Commonwealth v. Stonehouse*,<sup>104</sup> counsel’s failure to request specific jury instructions taking into account the *cumulative effects* of the extreme physi-

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<sup>99</sup> David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, BOSTON B.J., June-July 1989, at 25.

<sup>100</sup> See *People v. Johnson*, 284 Cal. Rptr. 579 (Cal. App. 1991), *cert. denied*, 503 U.S. 963 (1992) (allowing evidence of past violence perpetrated against one victim to be introduced in the murder case of another victim).

<sup>101</sup> See, e.g., *Commonwealth v. Gordon*, 553 N.E.2d 915 (Mass. 1990).

<sup>102</sup> DONALD G. DUTTON & SUSAN K. GOLANT, *THE BATTERER: A PSYCHOLOGICAL PROFILE* 13 (1995).

<sup>103</sup> See Mills, *supra* note 76, at 570–82. However, such diagnoses must be approached cautiously; they can prove catastrophic for battered women seeking custody of their children and may be harmful to the victim’s self-esteem.

<sup>104</sup> 555 A.2d 772 (Pa. 1989).

cal and psychological abuse suffered by the defendant when deciding whether she was reasonable in her belief that mortal danger was imminent constituted ineffective assistance of counsel.<sup>105</sup> The court is to be credited for recognizing the deleterious impact of patterned abuse which characterizes domestic violence cases.

### 3. *The Unwillingness of Some Judges To Apply the Law*

A third justification for giving battered defendants special consideration is the pattern of judicial bias against them. Admittedly, a number of judges have managed to maintain the requisite neutrality while implementing innovations to better protect abuse victims, whether the victims are defendants, plaintiffs, or witnesses in cases.<sup>106</sup> However, as part of her groundbreaking study of battered defendants, Professor Holly Maguigan found that some judges' unwillingness to apply existing laws constitutes the greatest impediment to battered defendants' receiving a fair trial.<sup>107</sup> Ohio's former governor, Richard Celeste, cited similar findings as the basis for granting clemency to twenty-eight battered women incarcerated for killing their abusers in self-defense.<sup>108</sup> Refusing to protect abuse victims often begins when they apply for civil protective orders, including wrongful denial or derisive treatment. Victims who become state witnesses in criminal cases are often disbelieved in spite of substantial evidence of abuse or are treated rudely.<sup>109</sup> While judges' improper decisions may not rise to the level of misconduct, the results of those decisions may, nonetheless, greatly endanger victims.<sup>110</sup> Judges who comprehend the dynamics and costs of domestic abuse are more likely to make equitable decisions regarding testimony, evidence rules, and application of laws. Problematic judges disregard precedent, misuse evidentiary rules, and block admissible expert testimony,<sup>111</sup> among other troublesome practices. Judicial gatekeeping gone awry bodes ill for a legal system premised on equal access to justice and equal protection of the laws.

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<sup>105</sup> See *id.* at 782.

<sup>106</sup> See Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case For a Problem Solving Approach*, 27 W. ST. U. L. REV. 1 (1999-2000).

<sup>107</sup> See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 385 (1992); see also *infra* Parts III and IV.

<sup>108</sup> See Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Case of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 10-17 (1994).

<sup>109</sup> See Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063 (1995).

<sup>110</sup> See discussion *supra* Part II.A.1.

<sup>111</sup> See Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81 (2001).

A number of jurisdictions have instituted court watch programs in an effort to hold recalcitrant judges accountable.<sup>112</sup> The goal of these programs is embarrassingly minimal: to ensure that the law is applied fairly. When a judge—viewed as the ultimate arbiter and a victim’s last chance for safety—displays apathy, excuses the batterer’s behavior, or ignores the abuse-prevention laws’ intent, the victim’s despair is only intensified. For those victims who are poor, of color, or both, a judge’s abdication of ethical duties to implement the laws represents further betrayal by the legal system that often began with mistreatment by law enforcement.<sup>113</sup>

### B. *The Conundrum of Race and Class Distinctions*

In proffering a normative construct for effective representation of battered women defendants, it is necessary to assert the relevance of both race and class as determinative of effective dispositions. Professors Lani Guinier and Gerald Torres assert that race has far more impact than class in constructs of identity, hierarchy, degree of oppression, and political literacy.<sup>114</sup> Guinier and Torres begin by arguing that those of the same race share a sense of linked fate that does not usually exist for poor people as a class because social policy has openly stifled racial groups.<sup>115</sup> They then suggest that race affects identity in palpable ways that class does not, noting that because the poor do not share a sense of linked fate, they have no framework from which to gauge systemic failings.<sup>116</sup> In the context of domestic violence victims and, more specifically, battered defendants, this framework is faulty. Admittedly, shared race is usually an immediate and powerful bond, but shared neighborhoods and struggles for basic survival can link the poor, providing a basis for critiquing and acting on common problems.

Guinier and Torres note that a further difference is the calculated invisibility of class.<sup>117</sup> Yet, this is precisely the allegation with regard to race in previous discourse—that the platform of colorblindness is a bankrupt concept as it denies race, and therefore, the essential experience of people of color. Professor Beth Richie’s research focuses solely on African American battered women,<sup>118</sup> who shared similar paths to Riker’s

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<sup>112</sup> See Buel, *supra* note 98. Court watches have been instituted in, for example, Austin, Texas; Boston, Massachusetts; Honolulu, Hawaii; Louisville, Kentucky; Minneapolis, Minnesota; and Tulsa, Oklahoma.

<sup>113</sup> See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1042 (2000).

<sup>114</sup> See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 101 (2001).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 102.

<sup>117</sup> *Id.* at 103.

<sup>118</sup> See generally RICHIE, *supra* note 22.

Island Jail.<sup>119</sup> Richie posits that black abuse victims experience harm in distinctly different ways than white abuse victims.<sup>120</sup> She asserts that while white women tend to be marginalized within their families, African American battered women are expected to fulfill high expectations by other family members.<sup>121</sup> Black women associate safety with their loyalty to the batterer,<sup>122</sup> as opposed to white victims, who offer lack of resources or isolation as the reasons for staying with their abusers.<sup>123</sup> Richie found that African American female offenders who were not battered did not define themselves in terms of culturally based gender roles, fear of partner violence, or loyalty.<sup>124</sup> Such findings are not only critical for practitioners creating safety plans with battered clients and crafting defense strategies, but also serves as a means for feminist scholars to expand the breadth of discourse regarding agency, oppression, culpability, privacy, and epistemic fairness.

*1. Race, Ethnicity, and Culture*

*a. Over-Representation Among Female Offenders*

Another rationale for identifying battered defendants as needing distinctive legal consideration stems from the disproportionate representation of women of color charged with theft, drug dealing and using, prostitution, and failure to protect children.<sup>125</sup> Guinier and Torres posit that race is a political *and* social construction—racism is the acceptance of injustice and invisibility of those targeted by the majority community as well as by those being oppressed. Race is inextricably linked to power, which in turn sustains the racial hierarchy.<sup>126</sup> By disadvantaging women of color in the social and political realms, the state serves as an oppressor. By responding with even less enthusiasm than usual to women of color as abuse victims,<sup>127</sup> the state—here represented by police and courts—becomes an overt subjugator. Victims are caught in a no-win situation in

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<sup>119</sup> *Id.* at 101–02.

<sup>120</sup> *Id.* at 65, 72–76, 97–100.

<sup>121</sup> *Id.* at 35–39.

<sup>122</sup> *Id.* at 52.

<sup>123</sup> *Id.* at 51.

<sup>124</sup> *Id.* at 123.

<sup>125</sup> See Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 912 (1993) (reporting that from 1960 to 1980, seventy-five percent of the total rise in larceny arrests of women were due to a greater number of arrests of non-white women); see also Holly B. Fecher, *Three Stories of Prostitution in the West: Prostitute Groups, Law and Feminist "Truth,"* 4 COLUM. J. GENDER & L. 26, 35 n.30 (1994) (citing disparate prosecution rate of African American women).

<sup>126</sup> See GUINIER & TORRES, *supra* note 114, at 15.

<sup>127</sup> See Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1159, 1217–19 (1999) (discussing the roles that race, ethics, and lawyers play in the criminal justice system).

which they are very much on their own, unable to rely on outside sources for help.

*b. Under-Representation in Scholarship*

Professor James Ptacek's exhaustive research of social science journals found that just 4.7% of the articles concerning domestic violence refer to race. Of those that do, Ptacek notes that they usually mention only African Americans,<sup>128</sup> ignoring the rich array of other victims of color.<sup>129</sup> The database of psychology journal abstracts reveals that even fewer of those articles mention race—just 2.8%.<sup>130</sup> In the domestic violence context, the polemics instigated by gender and racial identification have polarized allied professionals for decades. Feminist legal theory locates violence against women within the construct of male oppression and theoretically allows victims to voice *all* the varied forms of abuse that permeate their lives.<sup>131</sup> However, critical race feminists have aptly criticized feminist theory as essentializing women's experiences as though race, culture, class, sexual orientation, and other life-defining factors are irrelevant. Women of color are often silenced by the discourse centered on white females. This results in the omission of their unique experiences and perspectives from traditional feminist jurisprudence and certainly from other analytical legal constructs.<sup>132</sup>

By obscuring the voices of battered women of color, feminism's promise to hear *all* women's narratives is betrayed.<sup>133</sup> This is not to say that there are not overarching themes among victims, such as fear, ambivalence, frustration with the legal system, and wanting the abuse to stop. It is to clarify, though, that women of color are forced to navigate a more treacherous path to obtain legal remedies, in part due to the cultural incompetence of the white, legal stakeholders, including their lawyers. When asking white defense lawyers how they address race with clients of color, almost all respond that they do not let race interfere with their cases.<sup>134</sup> Such attempts at colorblindness suggest that most white lawyers

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<sup>128</sup> See JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* 25 (1999).

<sup>129</sup> See James Zion & Elsie Zion, "Hozho Sokee"—*Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407 (1993); see also Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

<sup>130</sup> See PTACEK, *supra* note 128, at 29.

<sup>131</sup> See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 5 (1987).

<sup>132</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

<sup>133</sup> *Id.* at 601.

<sup>134</sup> An informal study that I have conducted over the past twenty years, in response to asking several hundred defense lawyers of their views on race and representation (on file with author).

do not identify race as important when the client is white, and they make a concerted effort to replicate this stance with clients of color, in part because of the generalized discomfort associated with addressing issues of race.

The colorblind approach fails because race is a significant factor in determining how whites interact with persons of color in personal and professional spheres. It is not only the behavior of individuals but also institutional racism which systematically disadvantages people of color in social life and in law. Given similar evidence of disparate arrest, prosecution, and sentencing of defendants of color,<sup>135</sup> attorneys and judges should allow communities of color to inform efforts in jurisdictions with problematic practices. For an attorney representing a client of color, this means maintaining a heightened awareness with all client interactions and case decisions. From safety planning and investigating the case to choosing expert witnesses and instructing the jury, counsel must ensure that she is not delivering less competent representation to clients of color.<sup>136</sup>

*c. Intersectionality of Race, Gender, and Domestic Violence*

The construct of gender is another aspect of the intersectionality paradigm of race and partner violence.<sup>137</sup> White attorneys sometimes complain that victims of color appear reluctant to call the police or avail themselves of criminal justice, social service, and shelter resources. Feminist scholars of color have explained that the politics of racial identity in America cause some victims of color to feel they must choose between their race and gender.<sup>138</sup> Not surprisingly, race wins because it has been the most powerful force in shaping a victim's individual and cultural identity, precisely because institutional racism prevents women of color from ranking their social priorities. For many victims of color, family and community must take precedence, as the legal system has proven itself unreliable.

Professor Linda Ammons further elucidates:

The loyalty trap affects the ability of black women to seek protection and effective counseling. For example, African-American women do not feel comfortable discussing their problems in integrated settings. The fear is that disclosure in some way may

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<sup>135</sup> See David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001) (finding that blacks, males, and offenders with low levels of education and income receive substantially longer sentences).

<sup>136</sup> See *infra* Part III.

<sup>137</sup> See generally Crenshaw, *supra* note 61.

<sup>138</sup> See Jim Smolow, *Justice: Race and the O.J. Case*, TIME, Aug. 1, 1994, at 46 (“[M]any black women feel caught between the pressure to stand loyally by a black man perceived to be under attack by the white establishment and the need to assert rights as women.”).

hurt the community. Therefore the [cultural] prohibition against airing dirty laundry becomes more important than healing. Emma Jordan Coleman describes the dilemma abused black women face as a “Hobbesian choice between claiming individual protection as a member of her gender and race or contributing to the collective stigma upon her race if she decides to report the . . . misdeeds of a black man to white authority figures . . . .”<sup>139</sup>

Professor Catharine MacKinnon misses the essence of this paradox in claiming that the real reason women of color identify first with race is because it allows them to align themselves with a group specifically including men and excluding white women.<sup>140</sup> It is not within MacKinnon’s experience, as a white law professor, to identify first with race, and therefore she opts not to acknowledge that women of color have been deprived of the luxury of choosing how to define their identities. MacKinnon writes that she resents critical race feminists’ assumption that white women are inherently privileged and have not suffered under oppressive male-dominated legal institutions.<sup>141</sup> Contrary to MacKinnon’s scholarship, critical race feminist scholars argue that feminist discourse, including that addressing violence against women, has almost entirely ignored race. This critical omission further marginalizes and subordinates battered women of color because critical aspects of their experience are not considered, respected, or supported.<sup>142</sup> Attorneys representing battered defendants must begin to view their cases through the lens of race. This involves asking necessary questions about their clients’ perceptions of racial impact throughout their lives and recognizing that institutional racism can engender hopelessness in battered women of color about their ability to extricate themselves from violent relationships.

*d. Service Providers’ Disconnect: Essentialism and Misinformation*

Given prior negative experiences with the criminal justice system, combined with a community ethos not to rely upon principally white, disconnected institutions, religious communities or extended families may be the most preferable resources for battered women of color. Turning to faith leaders, however, can also prove problematic if they, too, are uninformed about the dynamics of domestic violence and the limited range of

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<sup>139</sup> Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 *Wis. L. REV.* 1003, 1024–25.

<sup>140</sup> See Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 *YALE J.L. & FEMINISM* 13, 22 (1991).

<sup>141</sup> *Id.*

<sup>142</sup> See Crenshaw, *supra* note 61, at 1252–53.

options available to victims.<sup>143</sup> When white attorneys or advocates counsel women of color to call the police for help, they are ignoring the persistent pressures of race and culture that make these victims disinclined to invite law enforcement scrutiny into their private lives. Given the history of hostility and lack of intervention by police in many communities of color, it is not surprising that even desperate victims find it difficult to view the criminal justice system as a viable option for safety.<sup>144</sup> This reality necessitates that counsel ask a battered client whom she views as her support network and what community agencies she trusts.

Some domestic violence shelter staff members lament that victims of color do not use their services, yet often these agencies fail to hire diverse staff, insist that all guests be proficient in English,<sup>145</sup> refuse to accommodate "ethnic" foods, have literature depicting only white women, do not help find housing or employment, or generally do little to make non-white victims feel comfortable.<sup>146</sup> Importantly, there are shelters that are either designed to serve victims of color or that have ensured their staff is diverse.<sup>147</sup> However, further rifts occur between most shelters and battered women defendants, be they newly arrested or facing imminent release, under the misimpression that these are somehow "bad" battered women, unworthy of services.<sup>148</sup>

"Essentialism," which is the metaphysical theory that the essential properties of an object can be distinguished from those that are accidental to it, may seem to be only a remote concept to trial lawyers, one they can leave for scholars to ponder. However, the race and class dynamics inherent in many criminal cases—particularly those involving battered women—dictate that here theory must inform practice. With people of color and the poor disproportionately arrested, prosecuted, and sentenced more harshly,<sup>149</sup> lawyers should expand traditional notions of legal repre-

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<sup>143</sup> See Katherine Hancock Ragsdale, *The Role of Religious Institutions in Responding to the Domestic Violence Crisis*, 58 ALB. L. REV. 1149 (1995). For guidance in addressing issues of faith with domestic violence or sexual assault survivors, see the Center for the Prevention of Sexual and Domestic Violence's Web site, <http://www.cpsdv.org> (last visited Mar. 19, 2003).

<sup>144</sup> See Crenshaw, *supra* note 61, at 1257.

<sup>145</sup> See *id.* at 1262.

<sup>146</sup> See *id.*

<sup>147</sup> At the Casa Myrna Vasquez shelter in Boston, Massachusetts, all staff speak Spanish, and at the Asian Battered Women's Shelter in San Francisco, California, staff reflect a broad range of Asian cultures. For additional information on shelters that are designed to serve women of color or have a diverse staff, contact the National Coalition Against Domestic Violence's Web site, <http://www.ncadv.org> (last visited Mar. 19, 2003), or the National Domestic Violence Hotline at 1-800-799-SAFE.

<sup>148</sup> There are notable exceptions, including the SafePlace Shelter in Austin, Texas, whose director, Kelly White, has long been an ardent advocate of shelter involvement with battered women arrested and in prison. White has actively intervened in several cases, sometimes directly with the District Attorney's office in new arrests, and with various influential state actors on behalf of those already incarcerated. See Author's Experience, *supra* note 46.

<sup>149</sup> See generally Mustard, *supra* note 135.



sentation. Beyond simply lamenting these stark inequities, counsel must identify and challenge the facets of the legal system which engender the offending practices.<sup>150</sup> Abuse victims who are low income, of color, or both often believe they have failed by societal standards: they have achieved neither economic self-sufficiency nor independence from violent partners. They feel judged by legal professionals as a result of lawyers' negative body language and blaming questions that demonstrate disappointment, pity, frustration, contempt, and derision for the victim. Race and class factors are often disempowering for the abuse victim, both when seeking help from the courts as a crime victim and when appearing as a defendant. Poverty, particularly when coupled with race, adversely impacts health, life expectancy, and access to jobs and wealth, and determines whether prison or college will dictate future choices.<sup>151</sup> It is rare for poor defendants to obtain adequate representation. Public defenders and court-appointed counsel usually have unmanageably high caseloads and lack the resources, knowledge, and experience to properly handle complex cases,<sup>152</sup> let alone those made more complicated by the defendant's victimization.

*e. Jury Selection Challenges*

The entire jury selection process is rife with imbalanced treatment of diversity, negatively skewing the likelihood that litigants of color can access impartial juries. Counsel should be familiar with recent case law regarding the parameters of juries' racial compositions and should be prepared to challenge a venire not representative of their clients' ethnicities. In *Duren v. Missouri*,<sup>153</sup> the Supreme Court specified a three-prong test for determining when the Sixth Amendment's "fair cross section" mandate is breached. The defense must prove: first, that the excluded group constitutes a discrete sector; second, that the jury list fails to include representation of the group proportionate to its presence in the community; and third, that the group's exclusion is systematic.<sup>154</sup> Consistent with *Duren*, a Georgia judge recently ordered jury clerks to ensure that jury pools include Hispanics. In *State v. Smith*, Judge Kathlene Gosselin

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<sup>150</sup> As a prosecutor in Boston, I was taken aback to hear some lawyers offer convoluted "cultural" explanations for a batterer's violent behavior or a victim's subsequent emotional agitation. For example, a white defense attorney justified his client's assaults by saying, "Well, his wife is Puerto Rican and you know what fiery tempers they have, so she incites him." At the Dorchester District Court in Boston in 1993, a white attorney explained to me that all African American women are tough and fight back; therefore, domestic violence charges against his black client should be dismissed since the wife must have engaged in mutual combat (on file with author).

<sup>151</sup> See GUINIER & TORRES, *supra* note 114.

<sup>152</sup> See Bright, *supra* note 38, at 279.

<sup>153</sup> 439 U.S. 357 (1979).

<sup>154</sup> See *id.*

determined the county's procedure for assembling jury lists violated the defendant's Sixth Amendment right to an impartial jury by systematically discriminating against Hispanics.<sup>155</sup> Ruling that for purposes of jury selection Hispanics in Hall County comprise a "distinctive group," Judge Gosselin accepted a death penalty defendant's challenge to the jury list.<sup>156</sup>

Counsel might assume that *Duren* and *Smith* will result in more sympathetic juries. However, experts caution that the "Hispanic" designation encompasses a broad spectrum of classes and nationalities that defy generalization. Dissimilarities among Hispanics are distinctive in each jurisdiction.<sup>157</sup> Contrary to some mainstream stereotypes, the Hispanic community includes variations in education, wealth, and nationality. Upper income jurors may view lower income Hispanic defendants less favorably than they would higher income Hispanic defendants.<sup>158</sup> However, attorney Jesus Nerio, the former president of the Hispanic Bar Association, believes *Duren* is a significant victory. He interprets the ruling as requiring that juries must specifically include Hispanics in proportion to their presence in the community. He believes the credibility of the criminal justice system is enhanced in the eyes of minorities when members of their community are adequately represented on juries<sup>159</sup>—an argument a court might find persuasive on public policy grounds.

## 2. Class with Concomitant Challenges

### a. Poverty and Domestic Violence

Another reason to afford battered defendants special consideration is that they are often indigent. The more impoverished a woman is, the greater the risk for violence by an intimate partner. Not surprisingly, those receiving welfare experience considerably higher levels of abuse.<sup>160</sup> Certainly, middle and upper-income women are also battered, and they too face great difficulties in extricating themselves from their batterers.<sup>161</sup> Yet, indigent battered women often cannot make use of community resources that are contingent upon the access afforded by a car, a job with benefits, and affordable child and health care. In examining the nexus

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<sup>155</sup> *State v. Smith*, 571 S.E.2d 740, 742 (Ga. 2002).

<sup>156</sup> *See id.*

<sup>157</sup> *See* Richmond Eustis, *Georgia Judge Orders: Include Hispanic Citizens in Jury Pools*, NAT'L L.J., Nov. 19–26, 2001, at A12.

<sup>158</sup> *See id.* (citing Professor Doug Bachtel).

<sup>159</sup> *See id.*

<sup>160</sup> *See generally* ELEANOR LYON, WELFARE, POVERTY AND ABUSED WOMEN: NEW RESEARCH AND ITS IMPLICATIONS (Nat'l Res. Ctr. on Domestic Violence, Pa. Coalition Against Domestic Violence, Oct. 2000), available at [http://www.vawnet.org/vnl/library/general/BCS10\\_POV.htm](http://www.vawnet.org/vnl/library/general/BCS10_POV.htm); *see also* JODY RAPHAEL, SAVING BERNICE: BATTERED WOMEN, WELFARE, AND POVERTY (2000).

<sup>161</sup> *See* SUSAN WEITZMAN, "NOT TO PEOPLE LIKE US": DOMESTIC ABUSE IN UPSCALE MARRIAGES (2000).

between partner violence and poverty, feminists have long argued that abuse of women is ultimately a form of social control with far-reaching and deleterious effects.

For many battered clients seeking to flee abuse, immediate shelter and affordable housing issues must be addressed by counsel or an advocate, for this may be the reason victims subsequently return to their abusers or commit new offenses. If the client is substance-abusing or mentally ill, many shelters will not accept her, which is ironic given that so often the addiction or illness is a result of victimization.<sup>162</sup> Fortunately, a number of shelters are now adding longer-term transitional housing and even permanent apartment complexes to their programs in an effort to assist otherwise homeless victims.<sup>163</sup>

When the Massachusetts Parole Board granted Lisa Grimshaw<sup>164</sup> parole in 1992, it was on the condition that she secure a job and a place to live.<sup>165</sup> Having been sexually molested by her father as a child and lacking any family members or friends to whom she could turn for assistance, Grimshaw faced spending additional time in prison due solely to her poverty. I approached a local shelter, offering to provide the funds for them to hire Grimshaw as an advocate.<sup>166</sup> The shelter balked, citing concerns from the staff and the board of directors about Grimshaw's status as a parolee. I was stunned. I asked if I could address both groups, arguing that if I, as a prosecutor, was not worried about the political fall-out from involvement in her case, it was difficult for me to understand their reluctance to accept the funds and gain the assistance of an invested advocate. After much dialogue, the shelter agreed to the proposal, but they neither

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<sup>162</sup> Notable exceptions to this denial of services include the Domestic Violence Intervention Services Shelter in Tulsa, Oklahoma and the Elizabeth Stone House Shelter in Boston, Massachusetts.

<sup>163</sup> For example, in Austin, Texas, SafePlace Shelter has an eighteen-month transitional housing program and is in the process of building an apartment complex to provide permanent, low-cost housing. For more information, see the SafePlace Shelter's Web site, <http://www.austin-safeplace.org> (last visited Mar. 19, 2003).

<sup>164</sup> Lisa Grimshaw, a battered woman who served nine years of a fourteen-to-eighteen-year sentence, was one of the "Framingham 8." She was convicted of contract murder even though her co-defendants testified that they had simply offered to talk to her estranged husband, Tommy, in an effort to convince him to stop beating and stalking Grimshaw. The co-defendant who killed Tommy with a baseball bat, received a life sentence, and the co-defendant bystander received probation. See Doris Sue Wong, *Woman's Conviction Sustained by SJC*, BOSTON GLOBE, Apr. 24, 1992, at 38. Grimshaw's conviction was upheld by the Massachusetts Supreme Judicial Court in 1992. See *Commonwealth v. Grimshaw*, 590 N.E.2d 681 (1992). I began work on Grimshaw's case as a first-year law student in 1988.

<sup>165</sup> Inmates in the Massachusetts Correctional Facility for Women are limited in their ability to seek employment and housing—the facility is only equipped with pay phones, and, unless inmates have ready access to cash, they are limited to making collect phone calls. See Author's Experience, *supra* note 46.

<sup>166</sup> While in prison, Grimshaw established a program in which female offenders visited high schools to provide students with information about teen dating and domestic violence. She also counseled inmates, advising them of their rights as abuse victims and providing them with support and mentorship. Based on this experience, Grimshaw was far more competent than many advocates.

fully accepted Grimshaw nor accorded her due respect for the duration of her employment there.<sup>167</sup>

*b. Batterers Sabotaging Employment*

Abuse often decreases economic well-being through interference with work, education, and training. Moreover, abuse often increases dependence on welfare, sabotages birth control efforts, and causes or exacerbates substance abuse—all barriers to work.<sup>168</sup> Realizing that if his partner is employed she is more likely to escape from her abusive situation, a batterer often becomes relentless in his determination to get her fired through frequent phone calls, causing trouble at her workplace, beating her just before work, destroying her clothes, preventing her from sleeping, and generally interfering with her ability to be a competent employee.<sup>169</sup> However, the employer usually expects the victim to control the batterer's behavior because it is disruptive to the workplace, and, if the victim does not (or cannot), she is sometimes fired or forced to quit.<sup>170</sup> In *Green v. Bryant*, a battered woman was fired from her position as a physician's assistant after her ex-husband beat her with a pipe and raped her at gunpoint.<sup>171</sup> Astoundingly, a Pennsylvania district court dismissed the plaintiff's wrongful discharge claim on the grounds that there was no public harm implicated in the plaintiff's termination.<sup>172</sup> While most victims are unable to seek redress in court, studies indicate that such firings are not atypical: approximately one-third of battered women lose their jobs as a direct result of abuse, and as many as 57.8% do not want to go to work because of threats of future abuse.<sup>173</sup>

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<sup>167</sup> For example, although Grimshaw had a written contract stipulating that she would be paid no less than one thousand dollars per month, the shelter repeatedly paid her only several hundred dollars per month. Grimshaw was embarrassed to report this misconduct, but, even after she did, I had to call repeatedly in order to correct the practice.

<sup>168</sup> See RAPHAEL, *supra* note 160, at 22, 29–30, 46–48, 50; see also Buel, *Fifty Obstacles to Leaving*, *supra* note 18.

<sup>169</sup> See RAPHAEL, *supra* note 160, at 5, 29–38; see also Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 REV. LITIG. 365, 366–67 (1999).

<sup>170</sup> See Buel, *Fifty Obstacles to Leaving*, *supra* note 18, at 21; see also FAMILY VIOLENCE PREVENTION FUND, GET THE FACTS: DOMESTIC VIOLENCE AND THE WORKPLACE (citing EDK ASSOCS., THE MANY FACES OF DOMESTIC VIOLENCE AND ITS IMPACT ON THE WORKPLACE 2–4 (1997) (reporting that thirty-seven percent of victims said abuse impacted their work performance, with fifty-four percent saying the abuse caused them to miss work at least three times per month)), at <http://endabuse.org/programs/display.php3?DocID=70> (last visited Mar. 19, 2003).

<sup>171</sup> 887 F. Supp. 798, 800 (E.D. Pa. 1995). This victim not only lost her job, but all her medical benefits were retroactively terminated as well, leaving her with substantial medical bills directly attributed to this assault.

<sup>172</sup> See *id.* at 801.

<sup>173</sup> See HEIDI SACHS, WELFARE INFO. NETWORK, DOMESTIC VIOLENCE AS A BARRIER TO WOMEN'S ECONOMIC SELF-SUFFICIENCY, 3 FINANCE PROJECT ISSUE NOTES (Dec. 1999) (citing a 1999 study by the Institute for Wisconsin's Future, which found that thirty percent

Victims of color face the added challenge of racial discrimination based upon stereotypical assumptions regarding their propensity for violent relationships. Being fired can result in greater hardship for victims of color, because they may not be able to rely on members of their community if financial troubles occur.<sup>174</sup> A study of mostly African American and Hispanic victims of abuse in Chicago's Humboldt Park found that the long-term effects of domestic violence could also affect victims' ability to participate in the labor market over time.<sup>175</sup>

A batterer causing the victim's job loss can incite financial despair when the victim realizes that she cannot provide for herself or her children without the batterer's assistance.<sup>176</sup> Maintaining employment is also critical for victims trying to keep or obtain custody of their children, because judges often rule in favor of the parent most financially stable. The recommendations of child custody evaluators and psychologists reinforce this bias, even if the reason the batterer's income is higher is that he fails to pay child support.<sup>177</sup> Moreover, with each firing it becomes more difficult for victims to obtain new jobs. They are labeled as problematic employees while no effort is made to hold the abusers responsible.

In an effort to better protect victims, counsel should contact a battered client's employer to lobby for improved interventions, as this may save the client's job and aid the employer in avoiding liability for failing to respond properly.<sup>178</sup> For example, several jurisdictions now allow employers to obtain protective orders prohibiting the batterer from coming to the workplace and no trespass orders, resulting in arrest and misdemeanor charges for a violation.<sup>179</sup> Additionally, a few states have now

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of victims interviewed had been fired because of domestic violence situations), available at <http://www.welfareinfo.org/domesticviolence.htm>; CONNIE STANLEY, DOMESTIC VIOLENCE: AN OCCUPATIONAL IMPACT STUDY (Domestic Violence Intervention Servs., Inc., July 27, 1992) (showing that thirty percent of victims had lost their job or had other work problems associated with the abuse), at <http://www.wcmontco.org/pages/statistics.htm>.

<sup>174</sup> See Crenshaw, *supra* note 61, at 1246.

<sup>175</sup> See SUSAN LLOYD, INST. FOR POLICY RESEARCH NORTHWEST UNIV., DOMESTIC VIOLENCE AND WOMEN'S EMPLOYMENT (1997) (stating that "[H]uman capital characteristics (such as physical and psychological health) that influence employability and job performance, and wage income and past unemployment do appear to be significantly affected"), available at <http://www.nwu.edu/IPR/publications/nupr/nuprv03n1/lloyd.html>.

<sup>176</sup> See Buel, *Fifty Obstacles to Leaving*, *supra* note 18, at 20.

<sup>177</sup> See Marc Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, PROF. PSYCHOL., Apr. 1997, at 137, 140 (surveying over 200 psychologists from thirty-nine states and finding that twenty-six percent of the psychologists said they would give preference to the parent who is more financially stable), available at <http://www.deltabravo.net/custody/practice.htm>.

<sup>178</sup> See Perin, *supra* note 169. Employers have been held liable for negligence and other torts when a battered employee is not adequately protected from violence at work. Such liability may have the unintended consequence of employers preemptively firing a battered employee.

<sup>179</sup> See, e.g., CAL. PENAL CODE ANN. § 601(a)(2) (West 2003) (stating that a person is guilty of trespass if, within thirty days of making a threat to injure, he enters the threatened person's place of employment with the intent to carry out the threat).

passed legislation prohibiting employers from discriminating against or firing victims of domestic violence, specifying that battered women cannot be retaliated against for taking time off to obtain protective orders, attend trials, or otherwise handle legal matters arising from the crimes committed against them.<sup>180</sup> Even if counsel's state does not expressly protect victims in the workplace, questions regarding harassment at work should become a routine aspect of intake and safety planning.

In an effort to maintain financial dependency, some batterers steal the victim's money and property, harass her at work or school, damage her belongings, create enough trouble to threaten her housing, refuse to pay child support if she leaves, and file false reports with Child Protective Services, the police, or the Department of Welfare.<sup>181</sup> Thus, battered defendants are often dealing with a multiplicity of legal and personal problems, greatly exacerbated if they are impoverished and unable to maintain decent employment. Professor Lucie White explains:

Whenever I listen intently to poor women talk about their lives, I hear stories of violence: the violence of racism and class bias that they remember—and expect—from school; the violence of industrial hazards, brain-deadening routines, repressive discipline, and sexual harassment that they face in the few available jobs; and the violence inherent in the bargain when they seek to secure their children's futures through a man.<sup>182</sup>

*c. Omissions in Scholarship*

As he discovered about race, Ptacek's research of social science journals found that only four percent of the articles on battered women discuss class,<sup>183</sup> and that just 1.9% of psychology journal articles concerning domestic violence address socio-economic issues.<sup>184</sup> Legal discourse is also deficient in this arena, requiring counsel to be resourceful in crafting arguments that address the deleterious effects of poverty on her client. Counsel must be aware of the pervasiveness of abuse in poor women's lives<sup>185</sup> and the ways in which these experiences vary by

<sup>180</sup> See CAL. LAB. CODE § 230(c) (West 1989). Similarly, Maine now allows violent crime victims to take employment leave to prepare for or appear in court, receive medical treatment, or obtain necessary services in response to the domestic violence crisis. See ME. REV. STAT. ANN. tit. 26, § 850(1) (West 1999).

<sup>181</sup> See Author's Experience, *supra* note 46; see also Laurie S. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 59 (2001).

<sup>182</sup> Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 GEO. L.J. 1961, 1989 (1993).

<sup>183</sup> See PTACEK, *supra* note 128, at 29 (noting that just 2.8% of the articles addressed race).

<sup>184</sup> *Id.*

<sup>185</sup> See Angela Browne & Shari S. Bassuk, *Intimate Violence in the Lives of Homeless*

race/ethnicity/culture, immigrant status, welfare dependency, degree of community support, occupation, level of literacy, and access to services.

*d. Criminal Justice System Bias*

Counsel must also counter the ways in which the legal system ignores the correlation between violence and poverty<sup>186</sup> by bringing these facts to the court's attention in every stage of litigation. From their first contacts with the criminal justice system after being arrested, low-income battered women are disadvantaged. Margaret Byrne, director of the Illinois Clemency Project for Battered Women, summarizes the battered defendant's plight: "What they share is that each was severely mistreated, first by a husband or boyfriend, and then by the criminal justice system."<sup>187</sup> This occurs, in part, because of lawyer's failure to make cogent arguments on behalf of battered clients. At bail or bond hearings, lawyers representing battered defendants should argue mitigating financial circumstances, being careful not to admit guilt. In direct examination of the client, counsel should ask detailed questions regarding the economic hardships endured by the battered client to show why she returned to the abuser or how he prevented her from leaving. In Travis County, Texas, many defense attorneys lament that if female defendants post bond, they are summarily denied a court-appointed lawyer. It is assumed that if they can afford to pay the bond, they ought to also be able to access funds to secure counsel. This practice ignores the reality that many of these poor women have borrowed money from an array of relatives and friends who have no more to lend. Defense attorneys report that they do not see the same practice with male defendants.<sup>188</sup>

*e. Community Antipathy*

For the very reasons described above, the social and political implications of class distinctions, both within the race and ethnicity construct and without, cannot be ignored.<sup>189</sup> Racial, cultural, and ethnic groups are particularly heterogeneous in the United States, with socio-economic loca-

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*and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample*, 67 AM. J. ORTHOPSYCHIATRY 261, 271 (1997) (citing research documenting the extremely high rates of violent victimization experienced by poor women).

<sup>186</sup> See Coker, *supra* note 113, at 1015.

<sup>187</sup> See Kevin McDermott, *Group Seeks Clemency for Battered Women*, ST. LOUIS POST-DISPATCH, July 14, 1995, at 2B. The article discusses the experience of Camella Lewis, a woman who was convicted of first-degree murder for stabbing her boyfriend to death as he beat her. The jury, which was not permitted to hear evidence of Lewis's history of abuse, sentenced her to twenty-four years in prison.

<sup>188</sup> Multiple Interviews with Anonymous Defense Attorneys and Advocates, at Travis County Defense Attorneys Domestic Violence Training, in Austin, Tex. (Dec. 18, 2001) (on file with author).

<sup>189</sup> See Eustis, *supra* note 157.

tion often dictating perspectives on crime.<sup>190</sup> While some whites may distance themselves from people of color based solely on race, other whites may view financial status as the basis of acceptance. Upper-income blacks, Hispanics, and other people of color may dissociate themselves from the less privileged of their own ethnicity to emphasize how far they have progressed up the social ladder.<sup>191</sup> The more privileged people of color may also be seeking to solidify their new status by distancing themselves from those less privileged. But, the dissociation can flow in both directions, as the less privileged may resent those of their own culture who are now professionals and have "made it."<sup>192</sup> In the context of representing a battered defendant of color, counsel must not assume that jurors or judges of the same ethnicity will automatically trust or feel kinship with or allegiance to their client. Generally, the less the battered client's life has mirrored the traditional white, middle class, June Cleaver model, the less sympathy she will enjoy from privileged whites as well as from the privileged members of her own race.<sup>193</sup>

*f. Welfare and Child Support*

Class constitutes another essential prong in the intersectionality analysis,<sup>194</sup> since a majority of victims returning to their batterers do so because they lack the money to remain independent.<sup>195</sup> Hopes of welfare<sup>196</sup> assistance offer little comfort to victims, given that maximum benefits decreased in most states between July 1994 and January 2000.<sup>197</sup> By January 2000, almost half the states provided less than \$400 per month for a family of three, with fourteen of those under \$300 per month and none over \$1,000.<sup>198</sup> Yet, in 2000, the federal government defined a fam-

<sup>190</sup> See Joseph Erasto Jaramillo, *Toward Transformative Critical Race Theory: Creating Communication Across Class Divisions*, 2 *HISP. L.J.* 15, 29–30 (1996).

<sup>191</sup> *Id.* at 27.

<sup>192</sup> *Id.* at 30.

<sup>193</sup> See Moore, *supra* note 87, at 302.

<sup>194</sup> It is the premise of this Article that significant analysis of the legal system's interventions with victims must be shaped by the ways in which race, class, gender, and violence intersect in the litigants' lives. See Harris, *supra* note 132.

<sup>195</sup> See Crenshaw, *supra* note 61, at 1246 n.13 (citing a shelter staff member's report that eighty-five percent of their victims were forced to return to the abuser, primarily due to problems in obtaining housing and jobs).

<sup>196</sup> The official federal name for the common usage of "welfare" is Temporary Assistance to Needy Families (TANF).

<sup>197</sup> For background on state welfare systems and their sources of funding, see HOUSE COMM. ON WAYS AND MEANS, 106TH CONG., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), THE 2000 GREEN BOOK, § 7, 351, 383–84, tbl. 7-7 (17th ed., Oct. 6, 2000), available at <http://aspe.hhs.gov/2000gb/sec7.txt>.

<sup>198</sup> See *id.* The lowest are Alabama (\$164), Mississippi (\$170), Tennessee (\$185), Louisiana (\$190), Texas (\$201), Arkansas (\$204), South Carolina (\$204), Kentucky (\$262), North Carolina (\$272), Georgia (\$280), Indiana (\$288), Missouri (\$292), Oklahoma (\$292), and Idaho (\$293). The highest are Wisconsin (\$673) (community service), Vermont (\$708), Hawaii (\$712) (work exempt), and Alaska (\$923). See also Peter T. Kilborn, *Wel-*



ily of four as “poor” if their income was less than \$17,600 annually.<sup>199</sup> Because welfare may be the only financial safety net available, its insufficient benefits force many abuse victims to return to the batterers in order to feed their children. While the 1990s brought a surge in prosperity for some, the poor were largely bypassed. Wages for unskilled laborers did not keep pace with inflation, with women’s earnings still twenty-six to thirty percent lower than men’s.<sup>200</sup> Further exacerbating battered women’s precarious financial situation is the low incidence of abusers paying child support.<sup>201</sup> In addition to her batterer’s wrath, a victim faces a labyrinth of paper work, court costs, and multiple hearings that make procurement of child support an unattainable goal for many battered mothers.<sup>202</sup>

While not all battered women are indigent, most lack access to their financial resources precisely because the abusers have ensured that they alone maintain control. An additional problem for battered defendants is that in some jurisdictions, such as Travis County, Texas, almost anyone charged with an assault offense is required to attend a mandatory batterer’s intervention program pending adjudication. The programs generally charge an initial intake fee of approximately \$55, then \$15–\$20 per class for twelve to eighteen weeks. Missing even one class can result in bond revocation, which can be catastrophic for battered defendants with children. Alternatively, by demonstrating to the prosecutor that the defendant is indeed a battered woman, a few defense attorneys have been able to set up alternative arrangements in which the battered defendant attends counseling at a battered women’s program, which is usually free or far less expensive than the batterer’s intervention program. Those prosecutors and pre-trial officers who readily disparage victims for not leaving the abuser prior to the arrest view this as an opportunity to help them break a pattern of victimization.

*g. Substance Abuse, Poverty, and Domestic Violence*

The strong correlation between substance-abusing women and violent victimization has been established, whether the abuse has been perpetrated by boyfriends, husbands, partners, or family members, or experienced as adults or children.<sup>203</sup> Substance-abusing women also have higher

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*fare All Over the Map*, N.Y. TIMES, Dec. 8, 1996, § 4, at 3.

<sup>199</sup> See Peter T. Kilborn, *Census Shows Bigger Houses and Incomes, But Not For All*, N.Y. TIMES, May 15, 2002, at A15.

<sup>200</sup> *Id.*

<sup>201</sup> See generally Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 (2000). See also Buel, *supra* note 94.

<sup>202</sup> See, e.g., Karren Houppert, *Victimizing the Victims*, VILLAGE VOICE, June 5–9, 1999, available at <http://www.villagevoice.com/issues/9923/houppert.php>.

<sup>203</sup> See Margarete Parrish, *Substance Abuse, Families and the Courts*, 3 J. HEALTH CARE L. & POL’Y 191, 205 (1999); Margaret E. Goldberg, *Substance Abusing Women:*

rates of physical and mental illness, including hypertension, diabetes, and sexually transmitted diseases.<sup>204</sup> For low-income battered women charged with drug offenses, new sanctions can lead to further impoverishment, forcing their return to the batterers. As part of the 1996 Welfare Reform Act, anyone convicted of a felonious drug offense is prohibited from receiving food stamps and welfare indefinitely.<sup>205</sup> The policy implications do not bode well for battered women also coping with the challenges of addiction and recovery. Even if the drug offender is pregnant, sick, supporting a family, a first-time offender, a minor, or has been "cured," the law allows no provision for removing the ban. Substance abusers seeking treatment may be denied admission to residential programs if they cannot make financial or food stamps contributions. Thus, the law disproportionately impacts poor mothers and their children. Since the law took effect in 1996, the Sentencing Project estimates that 92,000 women have been sentenced for drug offenses, two-thirds of whom are mothers, raising a total of 135,000 children.<sup>206</sup>

It is also more difficult for convicted felons to obtain employment, and any economic downturns are likely to hit hardest those who are unskilled and least valued. Female drug offenders suffer from a lack of community support systems, which is only exacerbated by the likelihood of their being denied public housing as a result of their convictions. Furthermore, since many poor women seek work in caregiving positions, having a criminal record or even being accused of a crime—particularly assault—disproportionately impacts their ability to secure jobs.<sup>207</sup> They then must choose between homelessness<sup>208</sup> or returning to their batterers. Feeling hopeless with the lack of options, a battered woman may feel compelled to commit a crime—be it killing her abuser in self-defense or using unlawful means to provide for her children and herself.

### C. *Defining Competence under Powell, Gideon, and Strickland*

Even a cursory review of professional competency standards yields yet another reason that battered defendants' cases deserve additional scrutiny. In spite of the Sixth Amendment's mandate that criminal defendants be afforded assistance of counsel,<sup>209</sup> battered women are too often denied an effective defense. Through the trilogy of *Powell*,<sup>210</sup> *Gideon*,<sup>211</sup>

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*False Stereotypes and Real Needs*, 40 Soc. WORK 789, 791 (1996).

<sup>204</sup> See Kilborn, *supra* note 199, at A15.

<sup>205</sup> See Herman Schwartz, *Out of Jail and Out of Food*, N.Y. TIMES, Mar. 21, 2002, at A33.

<sup>206</sup> *Id.*

<sup>207</sup> Telephone Interview with Kris Davis-Jones, *supra* note 25.

<sup>208</sup> See Schwartz, *supra* note 205, at 37.

<sup>209</sup> U.S. CONST. amend. VI.

<sup>210</sup> 287 U.S. 45 (1932).

<sup>211</sup> 372 U.S. 335 (1963).

and *Strickland*,<sup>212</sup> the Supreme Court has provided two clear mandates: first, the right to counsel; and, second, that such counsel must be competent. Holding lawyers accountable for ineffective assistance proves quite difficult for defendants generally. Given the prevalent lack of knowledge regarding domestic violence issues by the appellate bar and bench, battered defendants' attorneys have little to no accountability.<sup>213</sup>

*Strickland* provides a two-prong test for determining whether the effective assistance of counsel standard has been met.<sup>214</sup> Bearing the burden of proof to reverse a conviction, the defendant must first establish that the lawyer's mistakes were serious enough to practically deny the Sixth Amendment right to counsel. The second prong requires the defendant to show that counsel's errors compromised the defense.<sup>215</sup> Declining to provide much specificity in its guidelines, the Court stated only that counsel should afford "reasonably effective assistance,"<sup>216</sup> based on "prevailing professional norms."<sup>217</sup> *Strickland* also cautioned that evenhanded review of a lawyer's conduct must avoid "the distorting effects of hindsight,"<sup>218</sup> thus protecting counsel from sanctions if the case strategy seemed sound at the time. Here, attorneys' unfamiliarity with domestic violence is highly problematic to the client because *Strickland* refuses to question critical decisions made by counsel without the benefit of essential information.

Aside from the Supreme Court's official affirmation of the right to effective counsel, two justices have expressed apprehension regarding inadequate representation in death penalty cases. In 2001, Justice O'Connor stated that it may be necessary to mandate minimum standards for lawyers.<sup>219</sup> Justice Ruth Bader Ginsburg also noted that of felons requesting reprieves, those who receive adequate representation at trial are not given the death penalty.<sup>220</sup>

In 1984, a Texas jury convicted Calvin Jerold Burdine of stabbing to death his gay partner, W. T. "Dub" Wise, although his lawyer slept through critical phases of the trial.<sup>221</sup> Subsequent to his murder conviction, Burdine raised an ineffective assistance of counsel claim. Despite finding that Burdine's lawyer had, in fact, slept during key phases of the trial on multiple occasions (as attested to by three jurors and the clerk of

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<sup>212</sup> 466 U.S. 668 (1984).

<sup>213</sup> See Schafran, *supra* note 109.

<sup>214</sup> 466 U.S. 668 (1984).

<sup>215</sup> See *id.* at 687.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 688.

<sup>218</sup> *Id.* at 680.

<sup>219</sup> See Victoria Ashley, *Death Penalty Redux: Justice Sandra Day O'Connor's Role on the Rehnquist Court and the Future of the Death Penalty in America*, 54 BAYLOR L. REV. 407, 408 (2002).

<sup>220</sup> See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 30 (2002).

<sup>221</sup> See Gearan, *supra* note 48.

the court), the Texas Court of Criminal Appeals refused to grant relief, holding that Burdine had not met his burden under *Strickland*.<sup>222</sup> Burdine fared better in federal habeas corpus proceedings when a federal district court found constructive denial of counsel for substantial periods of the trial and held that such circumstance created a presumption of prejudice as to outcome under *Strickland*.<sup>223</sup> A split panel of the Fifth Circuit reversed,<sup>224</sup> but on a rehearing en banc, the Fifth Circuit affirmed the district court and vacated the conviction as well as its own panel's prior decision. In a nine-five split, the Fifth Circuit held that Burdine was not seeking the benefit of a new rule that would be barred as retroactive, and that sleeping counsel is equivalent to no counsel for Sixth Amendment purposes. This decision may not be dispositive, however, as the state is free to retry Burdine.<sup>225</sup> It is notable that five dissenters on the Fifth Circuit were not prepared to hold that sleeping counsel is per se ineffective counsel at trial. Where, then, *do* they draw the line? Would these judges consider it ineffective assistance if attorneys representing them in criminal matters slept through key parts of their trials?

*Burdine* has implications for victims of domestic violence, for although this case was characterized as a robbery-murder,<sup>226</sup> the record mentions that Burdine and Wise had quarreled previously over Wise's control of Burdine's income. Burdine also claimed that Wise had wanted him to engage in prostitution, and he refused. Burdine further alleged that Wise "put a contract out" on him after throwing Burdine out of the house. Burdine also warned his accomplice in the robbery of Wise's propensity for violence.<sup>227</sup> There was conflicting testimony about the degree to which Burdine participated in the stabbing of Wise, and the legitimacy of Burdine's confession.<sup>228</sup> Obviously, a sleeping lawyer—asleep during the prosecutor's questioning of witnesses, at times—would have been unable to effectively address these inconsistencies.

It is worth mentioning that among the factors the Texas Court of Criminal Appeals noted as supporting the future dangerousness of Burdine was his prior conviction for sodomy.<sup>229</sup> Had he been awake, Burdine's counsel could have argued that sodomy laws have been rescinded in all but a few states<sup>230</sup> and that sodomy is not a crime causing danger to

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<sup>222</sup> See *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).

<sup>223</sup> See *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999).

<sup>224</sup> See *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000).

<sup>225</sup> See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert denied*, 122 S.Ct. 2347 (2002). The Supreme Court denied *certiorari* in June, 2002.

<sup>226</sup> See *id.* at 339. Burdine and another man were convicted of killing Wise while stealing money and property from the home Burdine had once shared with Wise.

<sup>227</sup> See *Burdine v. State*, 719 S.W.2d 309 (Tex. Crim. App. 1986).

<sup>228</sup> *Id.* at 314–15.

<sup>229</sup> See *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).

<sup>230</sup> See David Pasztor, *Texas Ban on Gay Sex Faces New Legal Fight*, AUSTIN AM.-STATESMAN, July 22, 2002, at 1 (noting that Kansas is the only other state besides Texas that specifically bans homosexual acts).

others, and thus that conviction should not be counted against Burdine in determining imposition of a death sentence.

### III. THEORY IN THE CONTEXT OF PRACTICE

This Part begins with a comprehensive review of those substantive areas of case preparation that will benefit most from melding theory and practice experience throughout the trial process. Although this Part focuses on homicide cases, the basic tenets of these cases are applicable in handling non-homicide matters as well. This Part identifies ways in which to initially rethink and recast blame, analyzes six defense options available during trial, and finally addresses a limited set of post-conviction remedies.

#### A. *The Gap Between Theory and Practice*

Attorneys and judges must listen to each victim's story, and while not excusing the committed offense, must fashion dispositions recognizing that domestic violence is situated within the context of inequality that impacts women's fundamental rights to safety and autonomy.<sup>231</sup> Integrating theories of domestic violence jurisprudence with practice should improve the quality of both. Yet, a review of battered defendants' cases indicates that many attorneys lack even rudimentary knowledge of domestic violence dynamics and law necessary to bring about change. Examining use of (or failure to use) BWS provides characteristic examples of this ignorance greatly harming abused clients.

While many of the reported domestic violence cases focus on battered women who have killed their abusers, many more are non-homicide cases involving crimes relating to narcotics, property, prostitution, and like offenses. However, since it may be difficult for counsel to access guidance specific to non-homicide cases, it is necessary to examine homicide cases that what would be most beneficial to each battered defendant's case.

Battered women have prevailed in claims of ineffective representation using the bases of liability described below. Beyond simply avoiding malpractice or appellate reversal, the intent of this Section is to afford prescriptive guidelines for counsel, with an eye toward creating minimum standards of practice for those representing battered defendants.<sup>232</sup>

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<sup>231</sup> See SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 115.

<sup>232</sup> The numbered subsections are placed in roughly chronological order as they would be addressed in case preparation.

1. *Battered Defendants Charged with Non-Domestic Violence Offenses*

Social science research indicates that women arrested for drug offenses, theft, and prostitution are overwhelmingly victimized by intimate partners, yet most feminist scholarship ignores this group of victims in favor of focusing on those who kill their abusers in self-defense.<sup>233</sup> While the self-defense cases present egregious circumstances warranting attention, they comprise a rather small percentage of the offenses for which women are charged.<sup>234</sup> Since domestic violence scholarship comprehensively explains the correlation between being victimized and using violence in self-defense,<sup>235</sup> it is reasonable to assume that battered women would be induced to commit other types of offenses as well.

The previously referenced link between classism and racism is evidenced by the disproportionate prosecution of Latina and African American women for the offenses of theft, drug dealing and using, prostitution, and failure to protect children.<sup>236</sup> Although street prostitutes represent between ten to twenty percent of the sex trade, they constitute ninety percent of the women incarcerated on prostitution charges and are primarily women of color.<sup>237</sup> While a large body of feminist scholarship exists regarding prostitution, only a few writers address the links between sex work and violence.<sup>238</sup>

Richie's previously referenced study of battered African American defendants at Riker's Island<sup>239</sup> identifies six theoretical pathways to battered women's involvement with the criminal justice system: being sexually exploited by violent partners;<sup>240</sup> defending themselves against violence;<sup>241</sup> being held hostage by violent partners;<sup>242</sup> symbolically retaliat-

<sup>233</sup> See Jacobs, *supra* note 22, at 461.

<sup>234</sup> See Stephanie R. Bush-Baskette, *The War on Drugs as a War Against Black Women*, in CRIME CONTROL & WOMEN 113, 116 (Susan L. Miller ed., 1998) (reporting national statistics indicating that "arrests for violent crimes were not prevalent enough to be included [in the top five crimes for which women were most frequently arrested]").

<sup>235</sup> See RICHIE, *supra* note 22, at 118-19.

<sup>236</sup> See Raeder, *supra* note 125, at 912; see also Fecher, *supra* note 125, at 35 n.30 (showing disparate prosecution rate of African American women), cited in Jacobs, *supra* note 22, at 464.

<sup>237</sup> See Ann M. Lucas, *Race, Class, Gender and Deviancy: The Criminalization of Prostitution*, 10 BERKELEY WOMEN'S L.J. 47, 49 (1995).

<sup>238</sup> See, e.g., Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47 (1997); see also Evelina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 HAMLINE J. PUB. L. & POL'Y 1 (1994); Margaret A. Baldwin, *Strategies of Connection, Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65 (1993); Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE L.J. & FEMINISM 47 (1992); Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33 (1993).

<sup>239</sup> See generally RICHIE, *supra* note 22.

<sup>240</sup> *Id.* at 114.

<sup>241</sup> *Id.* at 118.

<sup>242</sup> *Id.* at 105. Often these women were charged with failure to protect a child who was

ing against non-abusers for the violence perpetrated against them in the past;<sup>243</sup> living in poverty because of violent partners not supporting their families;<sup>244</sup> and being addicted to drugs.<sup>245</sup> Importantly, although the women were charged with crimes ranging from drug sales and robbery to prostitution and assault, each one could identify partner abuse as the primary force compelling them to commit unlawful offenses.<sup>246</sup>

Richie's findings are further substantiated by a recent, in-depth study of women being held in the Cook County Jail of Chicago that revealed inmates had been victims of child abuse, sexual assault, and domestic violence at rates two and three times the national average.<sup>247</sup> At the time of their arrest, the majority of the women were homeless, with just eight percent able to list a residence to which they could go upon their release.<sup>248</sup> Many of the women also had histories of substance abuse and mental illness, often associated with their past abuse having gone untreated.<sup>249</sup> Thirty-four percent of the women interviewed were sex workers, some to obtain food or shelter and others to satisfy their addictions.<sup>250</sup> Those involved in prostitution had a greater likelihood of being intimate violence survivors and were subjected to higher rates of detention.<sup>251</sup> Twenty-nine percent of the women had either been terminated from or denied public assistance within the twelve months preceding their arrests, with missing an appointment the most frequently cited reason for not being able to obtain government assistance.<sup>252</sup> One arrestee said, "If I was getting the benefits that I needed, I wouldn't have been in the situation to commit the crimes."<sup>253</sup>

Practitioners should present these correlations when arguing mitigating circumstances to the court on behalf of a battered client, helping a client break free of her batterer, and educating the legal community about effective interventions.

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killed by the batterer.

<sup>243</sup> *Id.* at 110.

<sup>244</sup> *Id.* at 120.

<sup>245</sup> *Id.* at 123.

<sup>246</sup> *Id.* at 127–31.

<sup>247</sup> See CHI. COALITION FOR THE HOMELESS, UNLOCKING OPTIONS FOR WOMEN: A SURVEY OF WOMEN IN COOK COUNTY JAIL (2001) [hereinafter COOK COUNTY JAIL STUDY], available at <http://www.chicagohomeless.org/factsfigures/jailstudy.pdf>. On October 31, 2001, the Chicago Coalition for the Homeless conducted comprehensive, one-on-one interviews with 235 of the 1117 women being held at the Cook County Jail.

<sup>248</sup> *Id.* at 6.

<sup>249</sup> *Id.* at 2.

<sup>250</sup> *Id.* at 14.

<sup>251</sup> *Id.* at 14–15.

<sup>252</sup> *Id.* at 13.

<sup>253</sup> *Id.* at 19.

## 2. *Attorney-Advocate*<sup>254</sup> *Partnerships*

Not a model frequently taught in law schools, a solid attorney-advocate partnership can transform the nature of client interactions and dramatically impact case dispositions.<sup>255</sup> Several public defender offices have created such partnerships,<sup>256</sup> sometimes with the assistance of social workers and counselors. Solo, small firm, and pro bono practitioners can contact their local shelters to locate the advocates within their communities who may be able to assist with complex or problematic cases.<sup>257</sup> As a survivor who is also an experienced, empathetic, and assertive advocate, Beth Ledoux taught me that in partnership, we could do far more for the terrified battered women with whom we worked than either of us could alone.<sup>258</sup> As a trial attorney, it is easy to become consumed with the minutiae of legal doctrine while ignoring the fact that legal strategy must be dictated by client-specific concerns and facts. Ledoux's gentle persistence could elicit from battered women detailed histories of abuse, depression, substance abuse, the impact of abuse on their children, current fears, job losses due to stalking, abuser harassment from jail, and prolific witness intimidation.<sup>259</sup>

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<sup>254</sup> Within the domestic violence community, and for my purposes in this Article, the term advocate refers to non-attorney staff of domestic violence shelters or programs whose job involves assisting victims. Some programs designate court or legal advocates who are specially trained and may be of most help to the lawyer. Social workers and counselors who serve the same purpose are included within the rubric of advocate. Although attorneys are also considered advocates, they will not be referred to as such herein.

<sup>255</sup> See Sarah M. Buel, *The Critical Role of Advocates in Family Violence Cases for Both Prosecutors and Victims*, TEX. PROSECUTOR, Nov.-Dec. 1998, at 28. While geared toward prosecutors, this Article highlights many of the advantages of close partnerships with advocates for any attorney working with abuse victims. The success of this collaboration is contingent on (1) an experienced, empathetic, and assertive advocate on whom counsel can rely, and (2) a lawyer who can cede a degree of control and trust to the advocate, then truly listen to the advocate's read on the battered client's state of mind, concerns, and needs. *Id.*

<sup>256</sup> For example, the Bronx Defenders and the Neighborhood Defender Service of Harlem provide social workers to assist counsel with troubled clients.

<sup>257</sup> If counsel is unsure whom to contact in a local area, the National Domestic Violence Hotline can provide information for victim and offender programs in the United States and military installations around the world. Their number is 1-800-799-SAFE, with English and Spanish speaking advocates available.

<sup>258</sup> Though a domestic violence advocate may have formidable knowledge regarding typical abuse issues, she may be unfamiliar with prison and appellate matters. However, in my experience, most advocates are eager to learn, and in such cases, counsel should share copies of relevant regulations, laws, cases, and other materials on which the lawyer will rely.

<sup>259</sup> Ledoux's patience and deep concern were obvious and genuine. Abuse victims who distrusted the court system were only willing to take part if Ledoux advocated for them. She made clear to victims that their safety and healing were our primary concerns, repeatedly explained the entire court process, and, perhaps more importantly, discussed both short-term and long-term safety planning with them. Ledoux reminded me to return victims' calls, sat in on interviews to provide a familiar face for the victim, called me the night before trial to explain a new insight for dealing with a mentally ill victim, convinced alcoholic victims to stay sober for trial, ordered opposing counsel to be respectful of vic-



As a juvenile court prosecutor, I worked closely with another effective advocate, Pam Ellis.<sup>260</sup> Not surprisingly, a substantial majority of our cases involved family violence, though most often the charged offenses were burglary, drug sales or possession, stolen cars, property destruction, and assaults on teachers, girlfriends, and parents. First, Ellis and I would meet with the arrested juvenile and his or her attorney. After explaining that we were not going to discuss the present case, I would say to the youth, "I'm an adult in your community who loves and cares about you. Tell me how I can help." We would discuss safety planning for home, school, and on the street, then ask the youth his or her life aspirations and create a chronological list for the juvenile to complete in order to achieve the goals. Subsequently, either Ellis or I would meet with a parent or guardian if one had appeared in court.<sup>261</sup>

It may not initially be apparent that battered defendants are within one's caseload, as the criminal justice system focuses primarily on the offenses, and therefore screening for abuse amongst defendants is not common. However, far more effective interventions can be provided when dually addressing the youth's criminal behavior *and* his or her victimization. The impact of partnership on youth, their families, and the court was immensely promising. Through our experiences, it became clear that the majority of youth who assault their mothers and dating partners were abused as they grew up and, not surprisingly, believe it is permissible to use violence to achieve a desired end. Thus, many youth in the criminal justice system are both victims and perpetrators who may carry such behavioral patterns into adulthood if they do not receive early effective interventions.<sup>262</sup>

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tims, convinced clerks to give us important records and expedite our cases, raced to pick up tardy witnesses just prior to trial, and sat with victims throughout the trial. This enabled me to focus on trying the case. Ledoux was a victim advocate first in the Norfolk County (Massachusetts) District Attorney's Office and then, from 1989 through 1995, in the Quincy District Court Probation Department (Massachusetts).

<sup>260</sup> Pam Ellis was also the founder and director of the Student Alliance Against Racism and Violence and is now a practicing attorney in Boston. As a young African American and Native American female professional, Ellis was a strong role model who had little patience with apathetic bureaucrats. She was more than willing to confront parents and youth if they behaved unprofessionally in their relationship with her, or if they were not forthcoming with the truth. She tirelessly arranged novel treatment plans best suited to each defendant, fought for foster care beds, forced schools to fund special education, tutoring and other needed services, found youth and parents jobs, convinced mental health practitioners to provide counseling even for those with no money or insurance, brought defendants books based on their interests, involved them in community projects, and insisted that youths think beyond their immediate gratification, pain, or selfishness.

<sup>261</sup> Defense attorneys and the arrested youth were quite suspicious at first, understandably questioning our motives and methods. However, both came to see that absent consideration of the youth's dangerous home or street life, we could not reasonably expect to end the unlawful conduct.

<sup>262</sup> See Sarah M. Buel, *Why Juvenile Courts Should Address Family Violence: Promising Practices to Improve Intervention Outcomes*, 53 JUV. & FAM. COURT J. 1, 1 (2002).

3. *Safety Planning for Clients Out on Bail, Released, or Incarcerated*

Battered defendants may be at risk of further harm, irrespective of whether they are in custody. If the client is charged with assault or another non-fatal crime against her abuser, she may face danger from him, as well as from his family and friends.<sup>263</sup> Similarly, abused clients released while awaiting trial or post-trial may need to move to a new home to remove themselves from the negative environment engendered by the batterer. Yet, parole or probation officers may be unaware of the abuse dynamics, leaving the victim's lawyer with the responsibility of ensuring that a safe release plan is in effect.

Counsel will want to inquire about the incidence of separation violence. A common fallacy is that once the victim leaves the perpetrator, the abuse will cease. Empirical data reveal, however, that this assumption is erroneous.<sup>264</sup> Not only can fleeing fail to stop the criminal behavior, it may incite an escalation of the violence, sometimes even leading to murder of the battered partner.<sup>265</sup> It is thus irresponsible and unethical to advise a battered client to leave, absent the preparation of a safety plan.<sup>266</sup> To do so places the victim in the untenable position of having to placate a volatile batterer, while simultaneously trying to secure legal remedies and achieve financial independence.

In preparing an individualized safety plan, it is important for counsel to carefully inquire of the battered client the degree to which she has been subjected to sexual abuse in addition to the physical battery. Recent

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<sup>263</sup> In one case, the batterer's sister stalked our client, even after a protective order was obtained to prevent all family members from further harassing her. In another case, several of the batterer's friends took turns repeatedly showing up at the client's home and threatening to kill her if she was not convicted at trial. Most of the battered women in prison with whom I have worked related being terrorized by the batterer, his family, or his friends. See Author's Experience, *supra* note 46.

<sup>264</sup> See BJS SPECIAL REPORT, *supra* note 4, at 5 (finding that separated females are victimized more often than married, divorced, widowed, or never-married women).

<sup>265</sup> See CONSTANCE A. BEAN, *WOMEN MURDERED BY THE MEN THEY LOVED* (1992); see also Carolyn Rebecca Block & Antigone Christakos, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME & DELINQ. 496, 526 (1995); ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1986); Barbara Hart, *Separation Violence*, in CONFRONTING DOMESTIC VIOLENCE: EFFECTIVE POLICE RESPONSE 1 (1990); LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* (1986); Aysan Sev'er, *Recent or Imminent Separation and Intimate Violence Against Women*, 3 VIOLENCE AGAINST WOMEN 567 (1997); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spousal Killings?*, 30 CRIMINOLOGY 189, 215 (1992).

<sup>266</sup> A safety plan is a well-organized action plan to assist the victim in staying alive that addresses the varied circumstances of the victim. A threefold safety plan brochure is available for download from the Web site of the American Bar Association's Commission on Domestic Violence. ABA COMM'N ON DOMESTIC VIOLENCE, *SAFETY TIPS FOR YOU AND YOUR FAMILY*, at <http://www.abanet.org/domviol/domviolence.pdf> (last visited Mar. 19, 2003). The safety plans are intentionally *not* copyrighted to encourage their replication and distribution. See Sarah M. Buel, *Safety Planning Begins With You*, TEX. PROSECUTOR, Sept. 1996, at 21.

studies have documented that sexually sadistic men are more likely to inflict severe physical abuse, sometimes even murdering their partners.<sup>267</sup> Additionally, studies indicate that batterers who are sexually sadistic toward adult partners are also far more likely to perpetrate incest against their own children. Similar to the “morally indiscriminate” child molester, the sexually sadistic offender exploits any vulnerable, available victim.<sup>268</sup> These findings indicate that when counsel determines that her client has been victimized by a sexual sadist, she should explore the possibility that child sexual abuse is also present. When applicable, such testimony regarding the extreme nature of the abuse and the presence of multiple victims would lend credibility to the battered defendant’s reasonable belief that violence was necessary to protect herself or her children.

Although some would assert that counsel should simply act on her client’s wishes without comment, a lawyer’s mandate for competent representation includes providing the client with sufficient information to make informed choices. Likewise, if substance abuse, mental illness, confusion, loss of memory, or any other condition renders a client unable to testify, counsel must seek corroborative evidence, and, if necessary, a continuance. In representing abused defendants charged with substance abuse, property, prostitution, and similar crimes, lawyers may find clients unwilling to implicate the batterer as the drug dealer, pimp, or fence even though doing so may constitute mitigating circumstances. Providing this information would likely so endanger the victim that she is unwilling to cooperate in her own defense. Alternatively, she may still be in love with the batterer and suffer from such low self-esteem that she cannot imagine life without him. In these situations, and in variations that counsel will no doubt encounter in representing battered women, it can be difficult to ascertain battered victims’ true voices, but safety planning must nevertheless be emphasized.

Part of competent representation includes adequately warning a victim of impending danger from her batterer. In working with scores of domestic violence victims whose partners had attempted to murder them, the recurrent question they asked was, “Why didn’t someone warn me how dangerous he could be?” Most victims do not want the warnings obscured in veiled, polite euphemisms about how much their decision to return to their batterer is respected. While counsel should not tell the victim what course of action to take, full disclosure of likely recidivism

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<sup>267</sup> See Janet Warren & Robert R. Hazelwood, *Relational Patterns Associated with Sexual Sadism: A Study of 20 Wives and Girlfriends*, 17 J. FAM. VIOLENCE 75, 80 (2002) (stating that sadistic men are likely to inflict many forms of severe physical abuse, including murdering people other than their partners, sometimes with the help of their partners), available at <http://www.kluweronline.com/issn/0885-7482/contents>; see also Park Elliot Dietz et al., *The Sexually Sadistic Criminal and His Offenses*, 18 BULL. AM. ACAD. PSYCHIATRY L. 163 (1990).

<sup>268</sup> See Warren & Hazelwood, *supra* note 267, at 87–88.

is essential. Lawyers who do not actively listen or offer judgmental lectures to victims only obfuscate the vital warnings their clients need. Too often the abuse progresses from injuries to homicide, with an average of three women murdered by an intimate partner every day in the United States.<sup>269</sup> Given such risk, legal and allied professionals have an ethical responsibility to treat victims with compassion *and* honesty. Failing to afford victims full discussions of options, including the ramifications of each, preempts their dignity of choice. While warnings may not forestall further harm, at least counsel has not abetted the batterer through silence or disingenuous platitudes.

Counsel may be unaware that incarcerated clients also need a safety plan while in jail or prison. Some battered women report feeling safer in prison because their batterers cannot access them,<sup>270</sup> but other inmates and corrections staff can pose a significant danger.<sup>271</sup> Many incarcerated battered women report sexual abuse by guards and prison staff, who threaten to file allegations of wrongdoing against women in order to coerce their compliance. Because many of the women are mothers and violations of disciplinary rules can result in termination of their children's visitation, the battered inmates feel they have no choice but to silently

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<sup>269</sup> BJS SPECIAL REPORT, *supra* note 4, at 3 (reporting that in 1999, 1,218 women were killed by intimate partners); *see also* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1998: UNIFORM CRIME REPORTS 5 (1999), available at [http://www.fbi.gov/ucr/Cius\\_98/98crime/98cius07.pdf](http://www.fbi.gov/ucr/Cius_98/98crime/98cius07.pdf); GREENFELD ET AL., VIOLENCE BY INTIMATES, *supra* note 16, at 4. Not only are men less likely to be killed by intimate partners, but men are generally more likely to receive lenient sentences than are females in similar circumstances. *See* Nancy Gibbs, 'Til Death Do Us Part, TIME, Jan. 18, 1993, at 38 (according to Attorney Michael Dowd, director of Pace University's Battered Women's Justice Center, females who killed a partner averaged fifteen to twenty-year sentences, while men who killed a partner averaged two to six years).

<sup>270</sup> *See generally* Interview with Lisa Grimshaw, in DEFENDING OUR LIVES (Cambridge Documentary Films 1992) (stating that although she spent three and a half years awaiting trial in a cramped cell with six other inmates, at least she was not worried about her ex-husband trying to kill her). This Oscar-winning documentary film chronicles the lives of four battered women in prison for killing their abusers in self-defense. The film is available through Cambridge Documentary Films's Web site, [www.cambridgedocumentaryfilms.org](http://www.cambridgedocumentaryfilms.org) (last visited Mar. 5, 2003), or by phone, at 1-617-484-3993.

<sup>271</sup> *See* HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996)

(Our findings indicate that being a woman prisoner in U.S. state prisons can be a terrifying experience. If you are sexually abused, you cannot escape from your abuser. Grievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, administratively or criminally. Few people outside the prison walls know what is going on or care if they do know. Fewer still do anything to address the problem.)

available at <http://hrw.org/reports/1996/Us1.htm>; *see also* Ginger Adams Otis, *Female Prisoners Sue State for Guard's Sex Abuse*, WOMEN'SNEWS, Mar. 17, 2003, at <http://www.feminist.com/news/news173.html>; *see also* Martin A. Geer, *Protection of Female Prisoners: Dissolving Standards of Decency*, 2 MARGINS 175, 176-77 (2002).

submit to the sexual demands. Additionally, some inmates and corrections staff are physically abusive with impunity.<sup>272</sup> To their credit, several corrections facilities have made a concerted effort to combat abuse of inmates. In my experience this has been the exception, however, so counsel must ensure that battered clients have a safety plan in effect while incarcerated.

#### 4. Investigating and Documenting the Abuse

Another frequent failing is counsel's insufficient investigation into and scrutiny of the history and documentation of abuse.<sup>273</sup> The *Strickland* Court ruled that for ineffective assistance claims, particular consideration must be afforded to assertions that counsel did not investigate information provided by the defendant.<sup>274</sup> Schneider notes that confusion and loss of memory often afflict a battered woman who has killed her partner. It may be difficult to obtain sufficient information from the client alone, necessitating that counsel seek coordinating evidence from additional sources.<sup>275</sup>

Exculpatory evidence may be accessible from police and medical reports, tapes of 911 calls, telephone answering machine tapes, and employment records, among others. The defense attorney is ethically obligated to bring such information to the attention of the court. As most police reports do not include the history of abuse of the battered defendant, it is counsel's responsibility to compile as complete a list as possible of the crimes the defendant has endured. It may be too difficult for the abused client to cite the chronology of abuse in one sitting. Counsel can ask the client to start by listing the first, last, and worst incidents of abuse, then provide a notebook and ask her to jot down notes of every incident she can recall, noting in detail her injuries and pain, any help she may have sought, how she felt, any witnesses, how the abuse impacted her life, and anything else she thinks might be helpful.<sup>276</sup>

It is my experience that some defense lawyers direct their investigators to tell witnesses they are "from the court," a ploy meant to mislead witnesses into disclosures. Misrepresenting the identity and purpose of the investigator's inquiry violates state disciplinary codes for the lawyer handling the case.<sup>277</sup> Since it can be critical to obtain corroborating testi-

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<sup>272</sup> *Id.*

<sup>273</sup> *See, e.g.,* *People v. Rollock*, 577 N.Y.S.2d 90, 91 (App. Div. 1991).

<sup>274</sup> *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

<sup>275</sup> *See DALTON & SCHNEIDER, supra* note 94, at 797.

<sup>276</sup> In my twenty-five years of working with battered women, I have found this patience rewarded; the client is able to recall more critical information over time. *See* Author's Experience, *supra* note 46.

<sup>277</sup> *See, e.g., In re Ositis*, 40 P.3d 500, 503 (Or. 2002) (noting that a misrepresentation is material if it involves information that would have significantly influenced the decision making process had the decision maker known it, and holding that attorneys can be held

mony from hostile witnesses, counsel must seek creative methods for obtaining cooperation. If the battered client has killed her abuser, the abuser's family is usually quite antagonistic toward her, refusing to acknowledge any wrongdoing on the part of their relative. However, there may be records of crimes the batterer has committed against family members or others, about which the relatives will testify. Once subpoenaed, counsel can ask the court to declare these individuals hostile witnesses and proceed with leading questions regarding the facts to which they can attest.

As each case presents its own individualized pattern of abuse, counsel must not presume that a batterer will fit a preconceived notion of behavior, but must be prepared to obtain from the victim and present to the court a complete history of abuse. In *State v. Donahue*, the court ruled that evidence of abuse occurring three years prior to the instant offense, although involving two different victims, was not too remote to be admitted.<sup>278</sup> To aid in the prosecution of batterers, California permits evidence of the batterer's commission of other acts of domestic violence to be admitted in a criminal action in which he is currently accused of a domestic violence offense.<sup>279</sup> These legal reforms indicate recognition that the batterer's pattern of abuse is relevant to show state of mind, premeditation, plan, and absence of mistake or accident, consistent with Federal Rule of Evidence 404(b).<sup>280</sup>

Documenting a complete history of abuse will help judges and juries understand defendant's state of mind at the time of the offenses. Among these crimes are assault,<sup>281</sup> aggravated assault,<sup>282</sup> assault and battery with

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responsible if they violate the rules through the acts of another).

<sup>278</sup> 549 A.2d 121 (Pa. 1988); see also *State v. Aniker*, 536 P.2d 1355 (Kan. 1975) (allowing testimony regarding abuse committed by the defendant against his wife that occurred prior to the homicide for which he was being tried, ruling it was relevant and admissible on the issues of identity, intent, and motive).

<sup>279</sup> CAL. EVID. CODE § 1109 (West 1998).

<sup>280</sup> Federal Rule of Evidence 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b) (2001).

<sup>281</sup> Texas law defines assault as follows: "A person commits an offense [of assault] if the person: intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon 1994 & Supp. 2003).

<sup>282</sup> In Texas, aggravated assault is defined as an assault that "(1) causes serious bodily injury to another, including the person's spouse; or (2) uses . . . a deadly weapon during the commission of the assault." *Id.* § 22.02; see also *Allen v. State*, 736 S.W.2d 225 (Tex.

a dangerous weapon, attempted murder, strangulation, murder,<sup>283</sup> malicious destruction of property, trespass, breaking and entering, obstruction of justice, witness tampering, witness intimidation, violation of protective order, kidnapping or unlawful restraint,<sup>284</sup> threats,<sup>285</sup> terroristic threats, stalking, sexual assault,<sup>286</sup> indecency with a child,<sup>287</sup> fraud, and criminal non-support.<sup>288</sup> The battered client frequently will not identify criminal behavior as such or may need to be reminded that acts such as destruction of property, tampering with her mail, stalking her at work, and threatening to kill her for seeking help, constitute crimes, given that the abuser will have committed the crimes with impunity for so long. Rarely will battered clients volunteer information about sexual abuse, even if counsel asks questions regarding harm. As such, it is necessary to ask specific questions, such as, “Has your partner ever made you do anything that made you feel uncomfortable?” and “Has your partner ever made you have sex when you didn’t want to?”<sup>289</sup>

As discussed previously, counsel must carefully document the historical pattern of abuse between the battered client and her abuser. The initial impression may mistakenly indicate that the client is either the

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App. 1987) (allowing evidence of broken finger and black eye to sufficiently show serious bodily injury where complaining witness incurred medical expenses and testified to dysfunction of finger several months after assault); *Bailey v. State*, 38 S.W.3d 157 (Tex. Crim. App. 2001) (holding that a piece of wood used to assault was a deadly weapon despite defendant’s intent not to cause serious bodily injury, since in the manner of its use or intended use it was “capable” of causing death or serious bodily injury); *see also DeLeon v. State*, 865 S.W.2d 139, 142 (Tex. App. 1993) (stating “mere presence of a deadly weapon” can constitute “use” under this section where it instills fear and thereby threatens another with bodily injury”); *St. Clair v. State*, 26 S.W.3d 89 (Tex. App. 2000) (holding that an automobile can be a deadly weapon).

<sup>283</sup> Texas defines murder as follows: “A person commits [murder] if he: intentionally or knowingly causes the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b) (Vernon 1994).

<sup>284</sup> Texas defines unlawful restraint as follows: “‘Restraining’ means to restrict a person’s movements without consent, so as to interfere substantially with the person’s liberty, by moving the person from one place to another or by confining the person.” *Id.* § 20.01(1). Kidnapping is defined as “intentionally or knowingly abduct[ing] another person.” *Id.* at § 20.03(a); *see also Brooks v. State*, 559 S.W.2d 312 (Tex. Crim. App. 1979) (stating kidnapping may be committed in either one of two ways: restraining another with the intent to prevent the other’s liberation by hiding or holding the victim where she likely will not be found, or restraining another to prevent her freedom by using or threatening to use deadly force). Note that under Texas Penal Code section 20.04, aggravated kidnapping can be charged if sexual abuse or bodily injury is inflicted upon the victim, or the perpetrator terrorizes the victim or a third person. TEX. PENAL CODE ANN. § 20.04(2)–(4) (Vernon 1994 & Supp. 2003).

<sup>285</sup> TEX. PENAL CODE ANN. § 22.01(a)(2) (Vernon 1994 & Supp. 2003) (defining assault to include “intentionally or knowingly threaten[ing] another with imminent bodily injury, including the person’s spouse.”).

<sup>286</sup> *Id.* § 22.01.

<sup>287</sup> *Id.* § 21.11.

<sup>288</sup> This list is by no means exhaustive and the title of each offense may vary by state.

<sup>289</sup> Telephone Interview with Attorney Kris Davis-Jones, *supra* note 25; Author’s Experience, *supra* note 46.

batterer or mutually violent.<sup>290</sup> Counsel will need to investigate batterer conduct, as batterers often quite convincingly portray themselves as the victims while minimizing, denying, and lying about the abuse they committed.<sup>291</sup> The true victim may appear hysterical, angry, aggressive, passive, docile, or ambivalent, and may possibly blame herself for the abuse after hearing the offender attribute the harm to her failings. Counsel must be prepared to explain the client's behavior because it can surface in trial and undermine the case.

In order to determine which party is the principle aggressor, counsel must discover the context in which the crime occurred, the intent of the conduct, and the effect of the abuse. In examining context, counsel should ask specific questions regarding the dynamics of abuse in the relationship: "Was the violence in response to a partner's abusive behavior?" If the battered client hit her abuser when he was trying to push her out of a moving car, the court ought to view the case in light of those circumstances. To assess the intent of a client's actions, counsel must gauge whether her violent act was in self-defense or whether it was designed to regain control to protect herself. The battered client may have thrown a frozen roast at the abuser after he threatened to shoot her. Considering the effect of the conduct, counsel will want to ask, "After the abuse, which party reports feeling fear, lower self-esteem, and self-blame?" The battered client may have confided in a co-worker or family member, "After my husband bought that gun and started threatening me, I really started to get scared. I think he really means to kill me."<sup>292</sup>

Other questions that help identify the principle aggressor are: "Does your partner try to control you?"; "Has your partner ever hit, slapped, punched, strangled, or threatened you?"; "Have you ever felt afraid of your partner?"; "Do you do anything to control your partner?"; "Have you ever hit, slapped, punched, strangled, or threatened your partner?"; "Has your partner ever said or shown he or she was afraid of you?"; "Have you ever been violent toward your partner in self-defense?"; and "Has your partner ever been violent to you in self-defense?" For each response, ask the client to explain her answers in detail.<sup>293</sup>

The client may suffer renewed trauma from recalling the totality of the abuse or a particularly disturbing incident. Thus, counsel should diplomatically encourage her to join a support group or seek individual therapy, depending on the client's preference.<sup>294</sup> Keeping local shelter bro-

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<sup>290</sup> See *supra* Part III.A.4.

<sup>291</sup> See Adams, *supra* note 99, at 23-24; see also DUTTON & GOLANT, *supra* note 102.

<sup>292</sup> See Karen J. Wilson, *Considerations When Trying to Determine the Primary Aggressor*, in LOUISIANA DEPARTMENT OF JUSTICE DOMESTIC VIOLENCE IN THE WORKPLACE CONFERENCE MANUAL 7 (Aug. 15, 2002) (on file with author).

<sup>293</sup> See *id.* at 8.

<sup>294</sup> In the Domestic Violence Clinic at the University of Texas School of Law, students role play how to tactfully advise the battered client that counseling may be quite beneficial. Counsel may say something like, "Many battered women have told us that it is tremen-



chures, safety plans,<sup>295</sup> and resource literature in the law office and courthouse (especially in the bathrooms) is wise, as the client can take materials to review at home. If it is not safe for her to have the materials on her person,<sup>296</sup> she can be advised to call the police or local shelter to access the information.

Courts and the media often distinguish between “good” and “bad” battered women. Those who are married, passive, and religious are the “real” battered women, as opposed to those who are angry, have fought back, or have a criminal record, and are thus considered undeserving of remedial assistance.<sup>297</sup> In creating a case strategy, counsel may need to address these biases and determine how to counter their deleterious influence on the judge and jury. Studies document that the highest predictor that a woman will be charged with a felony is her involvement with a violent man; the likelihood increases if her partner also sells or uses drugs.<sup>298</sup> The abuser may force his partner into unlawful sex work<sup>299</sup> or coerce her into conspiring in crimes, such as theft.<sup>300</sup> Such case facts should be utilized in the case strategy, not simply argued as mitigating circumstances in sentencing.

##### *5. Educating the Court as to the Significance of Partner Abuse in the Instant Case*

Counsel must become proficient at addressing the relevance of domestic violence to the individual case, in part to establish the reasonableness of the client’s fear. Absent an understanding of the toxic environment in which battered women have had to survive, the judge and jury cannot fairly evaluate these cases. Emphasis on the abused defendant’s omnipresent fear enriches their understanding of domestic violence and explains why the victim felt compelled to commit a crime in response to the abuse. In addition to gaining an understanding of the abuse victim’s state of mind at the time of the criminal activity, counsel must learn as much as possible about her childhood and life experience, as well as her psychological profile.<sup>301</sup> Again, attorneys should garner the familial,

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dously helpful for them to be in a support group or have a chance to talk with someone privately about all the terrible abuse they have suffered. I can give you the phone numbers for a few places you can check out.”

<sup>295</sup> See *supra* note 266 for a description of a safety plan.

<sup>296</sup> Many batterers routinely search their victim’s purse, coat pockets, and bureau drawers, thus necessitating alternate means of information access.

<sup>297</sup> See RICHIE, *supra* note 22, at 119.

<sup>298</sup> See DALY, *supra* note 22, at 58.

<sup>299</sup> See RICHIE, *supra* note 22, at 114–16.

<sup>300</sup> *Id.* at 120–23.

<sup>301</sup> See Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection*, 4 BUFF. CRIM. L. REV. 891, 895 (2001) [hereinafter Ammons, *Dealing With the Nastiness*] (citing Maura O’Keefe, *Posttraumatic Stress Disorder Among Incarcerated Battered*

work, and criminal history of the batterer, including his reputation,<sup>302</sup> abuse not reported to authorities, and the degree to which he exercised control over the victim.

The challenge here is not simply to present evidence of the physical battery inflicted on the defendant, but also to describe the coping mechanisms employed by the victim to protect herself over time, the reasons she was unable to leave, and her efforts to achieve safety. If the decision maker cannot empathize with the defendant, even in small measure, there is little likelihood of the evidence being evaluated fairly.

In addition to presenting the history of physical abuse, counsel must also help the jury understand the often-crippling impact of psychological abuse. Therapist Patricia Evans states that virtually all domestic violence victims suffer verbal abuse prior to and accompanying physical abuse.<sup>303</sup> In her in-depth interviews of forty-five battered women who had killed their abusers in self-defense, Dr. Lenore Walker found that all of them had endured "psychological torture," which involves: sleep and food deprivation causing exhaustion; name-calling and humiliation; forced intake of alcohol and drugs; social isolation; obsessive behavior denying her own power and thoughts; threats to the victim, her friends, relatives, and children; and brief respites to foster the hope of abuse cessation.<sup>304</sup> As most battered women define only physical assaults as abuse, it is their lawyer's responsibility to ask about psychological torture and convey to the jury its devastating impact.

While educating the court, it will also be necessary to deconstruct race and class. Counsel must question the client carefully in order to learn how to view the events through the lens of her race, culture, religion, sexual orientation, socio-economic status, and full persona. Battered defendants, particularly those who are low-income or of color, may never have had a chance to tell their stories or to identify the fact that their partners' behaviors constitute abuse. While a broad spectrum of scholars agree that our court system's institutional racism produces the disparate incarceration of minorities,<sup>305</sup> it is far more challenging to convey to the decision maker how this fact has impacted both the client's life and the

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*Women: A Comparison of Battered Women Who Killed Their Abusers and Those Incarcerated for Other Offenses*, 11 J. TRAUMATIC STRESS 71, 80 (1998) (finding "that a high percentage of incarcerated battered women experienced severe spousal abuse and are currently experiencing significant symptomatology").

<sup>302</sup> *Id.*

<sup>303</sup> See PATRICIA EVANS, *THE VERBALLY ABUSIVE RELATIONSHIP: HOW TO RECOGNIZE IT AND HOW TO RESPOND* 13 (1992).

<sup>304</sup> See WALKER, *supra* note 86, at 27-28.

<sup>305</sup> See Ronald Roach, *From the Classroom to the Courtroom: Scholars Assess Race and Class in the American Criminal Justice System*, BLACK ISSUES HIGHER EDUC., Jan. 17, 2002, at 26, available at [http://www.findarticles.com/cf\\_0/m0DXK/24\\_18/82770920/p1/article.jhtml?term=%22From+the+Classroom+to+the+Courtroom%22](http://www.findarticles.com/cf_0/m0DXK/24_18/82770920/p1/article.jhtml?term=%22From+the+Classroom+to+the+Courtroom%22).

path of the instant case. Deconstructing race and class politics for the average juror involves finding common ground with the battered defendant.

When interviewing a client and presenting evidence to the court, counsel should be aware that, aside from speech, body language can be variously construed depending on one's culture. Nodding while another is talking, making eye contact, and touching the person to whom you are speaking or her child are but a few examples that have opposite connotations in different cultures.<sup>306</sup> It may not be easy for practitioners to ferret out their stereotypical beliefs about a litigant of another culture or to distinguish between individual versus collective culture.<sup>307</sup> Accurately discerning client voice can also be obscured by the client's sense that she is bringing shame on her larger community, and this conflicts with her individual need to disclose the true extent of the abuse she has suffered. Remaining nonjudgmental is essential in order to establish a trusting relationship with a client quite different from oneself.

#### 6. *Providing Adequate Voir Dire*

When representing a battered defendant, counsel must screen the jury for bias against abuse victims, particularly those acting in self-defense. The purpose of *voir dire* is to rid the venire of those jurors unable to apply the law impartially in the instant case. *Voir dire* is an opportunity to educate the jury about the dynamics of abuse and to detect attitudes and stereotypes that may harm the defendant. San Diego City Attorney Casey Gwinn has drafted a ten-page list of *voir dire* questions specifically designed for domestic violence cases.<sup>308</sup> There is no reason why defense counsel should not utilize such a list, adapting the questions for each battered defendant's case. As a prosecutor conducting *voir dire* in domestic violence cases, I was astonished how often jurors would admit their biases if asked directly how they felt. I routinely asked, "How many of you think that if a husband hits his wife, she must have deserved it?" I expected that perhaps eldermembers of the venire might respond in the affirmative, yet, time and again, without even hearing the facts of the case, venire members of all ages answered "yes." Further probing with those jurors almost always revealed deep-seated biases, including blaming battered women for abuse and being unable to hold the offender as accountable as they would have in a stranger assault.<sup>309</sup>

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<sup>306</sup> See Bryant, *supra* note 66, at 43.

<sup>307</sup> *Id.* at 44.

<sup>308</sup> See Casey Gwinn, *Voir Dire Questions in Domestic Violence Cases*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS DOMESTIC VIOLENCE CONFERENCE MANUAL (Oct. 1991) (on file with author).

<sup>309</sup> Based on jury trials I conducted as an Assistant District Attorney in Norfolk and Middlesex Counties, Massachusetts, between 1990 and 1996.

If the battered defendant is a person of color or low-income, counsel should also ask specific questions relating to jurors' possible misconceptions and biases concerning race and socio-economic status. It is an error to assume that jurors who share the same race, ethnicity, or socio-economic status as the battered client will necessarily sympathize with her. In one case, an African American woman told me that the Haitian battered woman defendant should have stayed in her own country and not brought her problems to the United States. On another occasion, a Chinese man stated that he would not reward a Chinese battered woman for disclosing family problems to the public and bringing shame on him and his community. A low-income Irish woman said essentially that all men are violent sometimes and that she saw potential jury duty as a waste of time on behalf of an Irish battered woman who just needed to accept abuse as an unchangeable reality with poor men.<sup>310</sup> These examples illustrate the import of counsel being careful to identify cultural biases among jurors and not assume their biases from her own stereotypes about how potential jurors will react to the plight of her client.

Since it may be important for jurors to understand why the victim did not leave her abuser after the first assault, counsel must be prepared to question jurors on all relevant aspects of this phenomenon.<sup>311</sup> Questions can include: "How many of you are aware that a family of three in Texas receives just \$208 per month on welfare?"; "How many of you are aware that the number one reason battered women return to their abusers is a lack of money?"; "How many of you think that a battered woman with few job skills might feel forced to return to her batterer?"; "How many of you think that a mother and two children can survive on one minimum wage job?"; "How many of you know that with a minimum wage job you would take home about \$200 per week, gross?"; and "How many of you are aware that childcare for a four-year-old in our area averages about \$90 per week?" It may be beyond the ken of the average juror to comprehend the economic realities some victims face. Thus, such detailed questions should be permitted by the court as they address biases that jurors may hold regarding how easy it is for victims to leave violent relationships.

I consulted on a case in which a Chicano law enforcement officer murdered his wife after years of battering her.<sup>312</sup> His defense was that in Mexico she was a compliant and good wife, but that when she got to Texas she became "tart-tongued," wanted to go to school, and wore short skirts. Although the prosecutors assumed that the all-Hispanic jury would

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<sup>310</sup> Based on my experience conducting *voir dire* in domestic violence cases in Norfolk and Middlesex Counties, Massachusetts from 1990 through 1996.

<sup>311</sup> See Buel, *Fifty Obstacles to Leaving*, *supra* note 18 (discussing possible reasons upon which counsel can base *voir dire* questions).

<sup>312</sup> Author's Experience, *supra* note 46. In 2000, a Texas prosecutor (who asks to remain anonymous) asked for assistance with this case.

certainly find such a defense ludicrous, the defendant was acquitted. Fortunately, the case was overturned on appeal for technical errors, and the killer was convicted after the second trial. This case taught my fellow prosecutors and me to routinely ask questions such as, “How many of you think that an Hispanic woman should obey her husband’s wishes about what she can wear and whether she can work outside the home?” or “How many of you think that Hispanic men are just more violent than other men and their wives should understand?” Counsel should make these questions case specific, depending on the race, culture, or ethnicity of the litigants.

Similarly, if counsel is representing a gay or lesbian battered client, it will be necessary to ask questions specific to potential jurors’ homophobia. In *Burdine*, a case which involved a gay male charged with a non-domestic violence offense,<sup>313</sup> defense counsel not only failed to inquire about possible juror bias against gay men, but also did not introduce any evidence regarding how the partner abuse impacted Burdine.<sup>314</sup>

Just as it is necessary to address possible juror homophobia, counsel must also identify potential bias against female substance-abusers. Counsel may ask, “How many of you admire Betty Ford for acknowledging that she had a drinking problem and doing something about it?” In my experience, many jurors will respond affirmatively, prompting follow-up questions, such as, “How many of you are aware that it took Mrs. Ford some time to acknowledge she had a problem and then get help?”; “How many of you think that if a woman is getting beaten up by her partner, she might drink to dull the pain?”; and “How many of you think that if a woman gets drunk, she deserves to get beaten up?” Surprisingly, a few of the venire will concede such biases, allowing counsel to remove them from the pool and increase the likelihood of a fair trial.

The *Duren*<sup>315</sup> ruling and accompanying commentary highlight the importance of lawyers being familiar with the demographics of their communities, particularly as they relate to litigants’ access to fair trials. For domestic violence litigants of color, jury composition can determine not only actual case outcomes, but also the litigants’ perception of the process, impacting their willingness to obey the court’s orders. Since it is unlikely that attorneys will become familiar with critical race feminism,<sup>316</sup> this Article attempts to translate theory into suggested practice in a manner conducive to attorney’s adoption.

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<sup>313</sup> See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

<sup>314</sup> See *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).

<sup>315</sup> *Duren v. Mo.*, 439 U.S. 357 (1979).

<sup>316</sup> See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *CRITICAL RACE FEMINISM: A READER* 11 (Adrien K. Wing ed., 1997). Additionally, for battered women of color, the intersection of race and gender reflects most courts’ blatant and historic disregard of their experience, needs, and safety. To the extent that courts consider race, remedies have often been crafted with men of color in mind and therefore ignore the voices of women of color. When courts address sexism, white women’s voices

7. *Presenting Relevant Evidence, Including Key Witnesses, to the Fact-Finder*

Another leading complaint of battered defendants is that attorneys do not produce evidence—including expert testimony, medical records, and defendant's own testimony—demonstrating the domestic violence suffered or explaining the responses of defendants.<sup>317</sup> In *State v. Zimmerman*, the battered defendant was repeatedly beaten by her husband prior to her shooting him to death.<sup>318</sup> At trial, the defense attorney initially used BWS as the foundation of a self-defense strategy. However, counsel later decided that the psychologist, the battered defendant, and another witness should not testify. Tennessee's Appellate Court ruled that the altering of trial strategy after describing the self-defense and BWS core in the opening statement destroyed the defendant's credibility with the jury. The court determined that the cumulative effect of not using the psychologist's testimony and persuading the defendant not to testify constituted ineffective assistance of counsel. Applying the *Strickland* standard, the court found that but for her counsel's deficient conduct, the outcome of the case would have been different.<sup>319</sup> When self-defense is argued, psychologists' and defendants' testimonies become essential.<sup>320</sup> Some appellate courts have found for the battered client in attorney effectiveness hearings when counsel did not call key witnesses, including the defendant herself,<sup>321</sup> to explain the impact of the abuse, the defendant's state of mind, the severity of the abuse, and the defendant's help-seeking behaviors.

In some states, judges retain discretion as to whether to admit evidence of prior abuse against battered defendants.<sup>322</sup> Other jurisdictions, however, have codified the right to present expert testimony concerning

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have named the issues and crafted reform demands based largely on their limited perspective. Thus, the omission of patriarchy dialogue within anti-racist discourse and the silence regarding race within feminist literature leaves battered women of color struggling for safety while attempting to reconcile competing identities. See Crenshaw, *supra* note 61, at 1252.

<sup>317</sup> See *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. Ct. 1993); see also *People v. Day*, 2 Cal. Rptr. 2d 916 (Ct. App. 1992); *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989); *Martin v. State*, 501 So. 2d 1313 (Fla. Dist. Ct. App. 1986).

<sup>318</sup> 823 S.W.2d 220, 221–23 (Tenn. Crim. App. 1991). The battered defendant had previously attempted to obtain a protective order, but the hearing was postponed for a week when her husband failed to appear. The battering husband had also tape recorded the fight on the evening of the shooting, inadvertently documenting that he had started the fight and beaten the defendant before she shot him. During the fight, the battering husband also threatened to kidnap their two-year-old son. Zimmerman was convicted and sentenced to fifteen years in prison.

<sup>319</sup> 466 U.S. 668 (1984).

<sup>320</sup> See *Zimmerman*, 823 S.W.2d at 225.

<sup>321</sup> See *Miller*, 634 A.2d at 619; see also *Day*, 2 Cal. Rptr. 2d at 925; *Zimmerman*, 823 S.W.2d at 227; *Stonehouse*, 555 A.2d at 784–85; *Martin*, 501 So. 2d at 1315.

<sup>322</sup> See Jill Chanan, *Volunteers Organize Clemency Efforts for Battered Women*, CHI. LAW., Dec. 1993, at 6.

the impact of the abuse on a battered defendant's mental state when she pleads self-defense.<sup>323</sup> One drawback is that such legislation is not retroactive and thereby disadvantages those incarcerated before these statutes were enacted. In appellate, parole, or clemency hearings, counsel can argue that her client's case should be afforded additional scrutiny because this law was enacted too late for the client to benefit from its promulgation.<sup>324</sup> Although the statutes may limit their purview to murder cases involving self-defense or defense of others, this evidence is relevant in other cases involving battered defendants, whether they are charged with domestic violence or other offenses.<sup>325</sup>

Counsel should also bring to the court's attention the bias or animus of any state witnesses against the defendant. *Delaware v. Van Arsdall* clarifies that the opportunity for the defendant to prove a witness' negative motivations is a "proper and important function of the constitutionally protected right of cross-examination."<sup>326</sup> Most states also provide that the court is to afford great deference to a defendant attempting to prove that an opposing witness is motivated by bias or an inappropriate purpose.<sup>327</sup> Often in domestic violence cases, the batterer or his family and friends are allowed to testify with impunity regarding the battered defendant's current or past behavior. In this instance, it is not even necessary to have a full understanding of the power and control dynamics of domestic violence to realize that the batterer's animus must be revealed to the court.

A number of jurisdictions, either by statute<sup>328</sup> or case law,<sup>329</sup> now specifically allow evidence of the deceased's past abuse of the defendant, in order to assess the veracity and rationality of the battered defendant's behavior. In presenting evidence as to the battered client's state of mind, it is critical that the jury hears the history of abuse and understands its impact on *this* defendant. Although prior abuse does not excuse the defendant's criminal conduct, it is relevant as the basis of her reasonable belief in imminent harm.<sup>330</sup> Thus, whether the battered defendant has

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<sup>323</sup> See, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.36(b)(2) (Vernon 1979 & Supp. 2003).

<sup>324</sup> See Ammons, *supra* note 108, at 52.

<sup>325</sup> See AMY C. WRIGHT, WOMEN'S ADVOCACY PROJECT, DEFENDING BATTERED WOMEN: A MANUAL FOR CRIMINAL DEFENSE LAWYERS ch. 2 (2000) (citing Texas courts admitting history of abuse and expert testimony in cases involving defense of others and insanity pleas) (on file with author).

<sup>326</sup> 475 U.S. 673, 679 (1986) (citing *Davis v. Alaska*, 415 U.S. 308, 316–17 (1974)).

<sup>327</sup> See, e.g., *Hurd v. State*, 725 S.W.2d 249, 252 (Tex. Crim. App. 1987).

<sup>328</sup> See, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.36(b)(1) (Vernon 1979 & Supp. 2003) (detailing evidence that can be used in prosecutions for murder).

<sup>329</sup> See, e.g., *Commonwealth v. Fontes*, 488 N.E.2d 760, 762–63 (Mass. App. Ct. 1986); see also *State v. Leidholm*, 334 N.W.2d 811, 817–18 (N.D. 1983); *State v. Dunning*, 506 P.2d 321, 322 (Wash. Ct. App. 1973).

<sup>330</sup> See *People v. Aris*, 264 Cal. Rptr. 167, 179–80 (Ct. App. 1989) (finding expert testimony of battered woman's subjective perception of harm decidedly relevant when claiming self-defense); see also *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984) (allowing self-

killed her abuser in self-defense or committed crimes under duress, evidence of past abuse will assist the jury in appreciating the degree of harm suffered.

So important is past abuse to the defense strategy that counsel should present this evidence to construct four major themes.<sup>331</sup> First, not having endured abuse, the jury may be suspicious of the battered defendant's claim that her heightened fear of immediate harm was reasonable given the abuser's cues. In explaining the dynamics of prior violence, the defendant can sensitize the jury to warning signs from the batterer indicating an increasing level of danger and lethality.<sup>332</sup> Almost every abuse victim with whom I have worked describes the phenomenon of being able to read the batterer's slightest nuances that indicate impending assaults. A typical example is what battered women describe as "the look"—a stern glance given by the abuser to convey that the victim must comply with his wishes or face renewed violence. To the uninformed juror, such conduct may appear innocuous, necessitating that either the defendant or an expert explain the significance of batterer cues.

A battered woman married to a police officer once described to me that if, upon his arrival home, her husband put his service revolver in the hall closet, she could relax a little; but, if he placed it on the coffee table, he was likely to assault her. Placing the gun within easy reach signaled that she would be wise not to resist his demands or beatings.<sup>333</sup> Because abuse victims are most likely to be murdered when the batterer increases his sexual and physical assaults, his threats of such assaults, his use of drugs or alcohol, his threats of suicide, or his threats of murder,<sup>334</sup> jurors must understand the distinction between routine levels of abuse and the defendant's perception that danger levels have dramatically risen.

A second aspect of prior abuse on which to focus is the way in which *this* defendant perceived the danger to be imminent based upon the batterer's behavior. Particularly in those difficult cases where the battered defendant killed her abuser while he slept or when the danger would not appear immediate to an outsider, the jurors need to view the crime through the lens of a terrified woman who perceived no other option. Knowing from past experience that fighting to free herself will only exacerbate the assault, the battered woman may logically pursue different

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defense claim predicated on a history of severe abuse).

<sup>331</sup> See Beth Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 614–16 (1994).

<sup>332</sup> See *Commonwealth v. Stonehouse*, 555 A.2d 772, 784 (Pa. 1989) (allowing expert witness to explain the battered defendant's perception of the last incident as being more life-threatening than those preceding it).

<sup>333</sup> As told to me when I was a prosecutor in the Suffolk County District Attorney's Office in Boston, Massachusetts, in December of 1992 (on file with author).

<sup>334</sup> See Barbara Hart, *Predicting Lethality of Batterers*, in PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE TRAINING MANUAL 15 (1992) (on file with author).



means to defend herself—one that has some likelihood of success.<sup>335</sup> Similarly, in cases involving duress, counsel may need to explain the battered defendant's compliance with the abuser's orders to commit crimes, even if the batterer did not have a weapon in his possession at that time. It must be demonstrated to the jury that it is the battered defendant's perception that the violence can commence at *any* time that creates the sense of imminent danger. Indeed, many abusers intentionally randomize their assaults to condition the victims into fear-based compliance.<sup>336</sup>

Third, the history of abuse is material to establishing that the degree of force employed by the battered defendant was reasonable given the abuser's actions. Jurors often want to know why the abuse victim did not simply leave the relationship instead of resorting to killing the batterer or assisting him in the commission of crimes. The jury will need to hear what, if any, help-seeking actions this defendant attempted (such as calling the police or a shelter) and why these attempts failed. For example, batterers will frequently convince the victim not to pursue criminal charges or to leave the shelter with promises of reform, only to threaten her with death should she attempt to flee again. The defendant may not have gone to a shelter because she learned that they were full or did not allow male children over the age of twelve. She may not speak English or know of the available community resources, or she may lack the job skills necessary to support her children. Batterers display an unusual degree of tenacity in stalking their victims and forcing their return, making real the threat, "I will find you wherever you go and punish you worse for leaving."<sup>337</sup> Given evidence of her batterer's far-reaching power, a battered defendant may reasonably perceive that a high degree of force, such as use of a weapon, is necessary to stop the abuse.

Lastly, introducing the chronology of previous abuse can bolster the battered defendant's credibility by allowing her to explain perceived inconsistencies. If the defendant worked outside of the home, jurors often view her as more able to escape. They fail to understand that the batterer often controls the finances or will not hesitate to harass the battered partner at work, ensuring she is fired. Jurors also frequently admit to forming judgments based upon appearances and stereotypical concepts about battered women. Such biases mean the battered defendant must walk a fine line in her testimony so as not to appear angry or strong, particularly

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<sup>335</sup> See CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW* 69 (1989) (describing that battered women are helpless to protect themselves from the violence and may be forced to seize an opportunity that is highly likely to stop the abuse).

<sup>336</sup> See JACOBSON & GOTTMAN, *supra* note 92, at 62–63 (reporting that their studies could not accurately predict when the batterer would become violent, and that the batterer's unpredictability and uncontrollability greatly contributed to the victim's heightened fear).

<sup>337</sup> Author's Experience, *supra* note 46; see Buel, *Fifty Obstacles to Leaving*, *supra* note 18, at 19–20, 24.

if she is a woman of color.<sup>338</sup> Even if jurors do not acquit the battered defendant based upon the past abuse, the evidence may persuade them to find her culpable of a lesser charge or to give a more lenient sentence.<sup>339</sup> Counsel should present evidence of past physical as well as psychological abuse, perhaps using an expert witness to explain why the battered client was unable to flee such severe harm.

Batterer treatment experts caution that abusers typically over-report their partners' violence, while greatly minimizing their own.<sup>340</sup> Conversely, women may honestly reveal their violence, but without justifying their actions. This phenomenon implicates the credibility of each party's statements and should be addressed by counsel in trial. Since no substantive paper trail may exist documenting the abuse against the battered client, it may be necessary to augment minimal documentation with witnesses who can corroborate the severity of the harm. It is my experience that the batterer's family vehemently denies that any abuse occurred, though, of course, they were not with the couple at all times. Particularly when the batterer has been killed by the abused partner, it is imperative to ensure the court hears an accurate assessment of the violence endured by the defendant. The battered client may have minimized her abuse or blamed it on her clumsiness when seeking medical treatment. If she is able to explain the reasons for her denial or minimization, the defendant should do so. If it is determined that an expert can more effectively convey the typicality of this behavior, such assistance should be sought.

#### 8. Utilizing Expert Witnesses

Expert testimony can be a significant boon in both civil and criminal domestic violence cases.<sup>341</sup> Some battered women's advocates fear that a survivor may feel disempowered by watching an expert explain what has occurred, and the jury may view the defendant as less credible because she is not testifying herself.<sup>342</sup> There is also concern that attorneys will rely too heavily on experts to the detriment of case investigation and the procurement of critical evidence.<sup>343</sup> However, if properly presented, an expert can augment the survivor's testimony and enhance her credibility.

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<sup>338</sup> See Moore, *supra* note 87, at 302–03.

<sup>339</sup> In Texas, the jury sentences criminal defendants.

<sup>340</sup> See LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 11, 71–73, 195 (2002).

<sup>341</sup> See, e.g., Stark, *supra* note 20, at 974–75; see also Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993) (providing a thorough summary of expert methodologies).

<sup>342</sup> See Nancy Lemon et al., *Expert Witnesses in Domestic Violence Trials: Policy Pros and Cons for Prosecutors*, in NATIONAL TRAINING CENTER FOR DOMESTIC AND SEXUAL VIOLENCE EXPERT WITNESSES CONFERENCE MANUAL 17 (June 2001) (on file with author).

<sup>343</sup> *Id.*

Counsel should consider utilizing an expert to explain the battered defendant's behavior, state of mind, and other relevant matters that are beyond the understanding of most jurors. When the battered defendant is poor, of color, or both, counsel must also evaluate the benefits of enlisting an expert to describe relevant cultural beliefs, perceptions, practices, and obstacles inherent to the defendant's life experience. Courts have found lawyers ineffective for failing to use experts in domestic violence proceedings.<sup>344</sup>

*a. Predicate Issues of Framework and Doctrine*

Attorneys must be aware of the procedural framework for the use of experts, as well as the substantive legal doctrine. In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court discarded the general acceptance standard for admissibility of expert testimony, and replaced it with a validation test.<sup>345</sup> Justice Blackmun's majority decision specified that the trial judge should apply the procedures set forth in the Federal Rule of Evidence 104(a)–(b) for establishing foundational facts.<sup>346</sup> In the context of litigating domestic violence cases, Rule 104(a) is particularly relevant—it addresses questions regarding whether a lay witness has sufficient personal knowledge of the information about which she plans to testify. Since many of the expert and lay witnesses involved in domestic violence litigation will not provide scientific testimony, counsel should attend to Rule 104(a)–(b).

Rule 104(a) governs resolution of questionable predicate facts, such as whether the abuser or victim's discussion with the attorney was confidential. *Bourjaily v. United States*<sup>347</sup> provides that the judge should, after hearing each side's foundational testimony, evaluate its credibility and then make findings of fact. As gatekeeper, the trial judge assesses whether the expert's testimony rests on sound methodology. However, there is a dearth of case law and evidentiary treatises regarding the degree to which trial judges should use the reliability of foundational testimony in making 104(a) decisions.<sup>348</sup> In *Hall v. Baxter Healthcare*, an Oregon federal district court decided that in a *Daubert* hearing the proponent's expert witness could not be cross-examined for the purpose of attacking the witness's credibility.<sup>349</sup> Yet, in the same year the Third Circuit, deciding *In re Unisys Savings Plan Litigation*, ruled that the trial

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<sup>344</sup> See, e.g., *Commonwealth v. Stonehouse*, 555 A.2d 777, 781–83. But see *Neelley v. State*, 642 So. 2d 494 (Ala. Crim. App. 1993), cert. denied, 480 U.S. 929 (1995) (holding that not presenting a domestic violence expert witness was not sufficient basis for charge of ineffective assistance of counsel).

<sup>345</sup> 509 U.S. 579, 580 (1993).

<sup>346</sup> See Edward J. Imwinkelreid, *Litigating Credibility*, NAT'L L.J., July 2001, at A12.

<sup>347</sup> 483 U.S. 171, 181 (1987).

<sup>348</sup> See Imwinkelreid, *supra* note 346, at A12.

<sup>349</sup> 947 F. Supp. 1387, 1396 n.24 (D. Or. 1996).

court had correctly excluded the offered scientific testimony.<sup>350</sup> The exclusion was based on the expert's impeachment and upon the court finding that the foundational testimony was inconsistent with prior deposition testimony. The vehement dissent of Chief Judge Edward Becker, one of the foremost evidentiary judicial authorities, asserted that the majority had "confuse[d] the reliability of an expert witness—a matter for the jury—with the reliability of his or her methodology—a matter initially for the trial judge . . . ."<sup>351</sup>

In 2000, the Third Circuit again addressed the issue in *Elcock v. Kmart Corp.*<sup>352</sup> Writing for a unanimous panel, Judge Becker noted that the trial judge improperly evaluated evidence in a *Daubert* hearing. The proffered testimony alleged that the expert witness had committed criminal offenses involving false statements and dishonesty.<sup>353</sup> Judge Becker clarified the decision by stating:

We do not hold . . . that a district court can *never* consider an expert witness's credibility in assessing the reliability of that expert's methodology under Rule 702. Such a general prohibition would be foreclosed by the language of Rule 104(a) . . . . [C]onsider a case in which an expert witness, during a *Daubert* hearing, claims to have looked at the key data . . . while the opponent offers testimony suggesting that the expert had not in fact conducted such an examination. Under such a scenario, a district would necessarily have to address and resolve the credibility issue raised by the conflicting testimony . . . .<sup>354</sup>

Cautioning against drawing bright lines, Judge Becker held that the issue must be resolved on a case-by-case basis. Rather than trying to restrict the scope of 104(a) with rigid rules, the trial judge will need a general standard, allowing flexibility in its application.<sup>355</sup>

If there exists a genuine credibility dispute, the expert's integrity becomes an issue when the witness first provides testimony. Suppose that the battered defendant is an undocumented immigrant of color and that the proponent's domestic violence expert testifies that her opinions are based on ten years of working in an emergency shelter, primarily with white, middle-income abuse victims. The opponent then offers her own expert testimony that abuse dynamics differ significantly when victims are undocumented immigrants of color, based on nine years of counseling such victims. Here, the judge would need to determine to what degree

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<sup>350</sup> 173 F.3d 145, 155–58 (3d Cir. 1999).

<sup>351</sup> *Id.* at 161.

<sup>352</sup> 233 F.3d 734 (3d Cir. 2000).

<sup>353</sup> *See id.* at 750.

<sup>354</sup> *Id.* at 751 n.8.

<sup>355</sup> *See Imwinkelried, supra* note 346, at A12.

the opponent's foundational testimony challenges the assumption that the proponent's expert used sound methodology to arrive at her conclusions.<sup>356</sup> Thus, the first expert would have to argue that her conclusions are based on the premise that there exist sufficient similarities among all victims to allow her testimony to be useful. The second expert, on the other hand, would likely respond that generalizing about victims is not helpful to the court, thereby creating a presumption that the first expert's testimony would not be admissible.

In a *Daubert* hearing, the judge should admit credibility evidence only when it has substantial probative value in a dispute. Certainly, a witness's prior inconsistent statements should be admitted even when they are not wholly contrary to the witness's trial testimony.<sup>357</sup> To be admissible, the prior statements must only "bend in a different direction."<sup>358</sup>

*b. Issues for the Expert To Address*

A sizeable majority of the states admit expert testimony to explain why the battered defendant did not leave the abusive relationship.<sup>359</sup> The admissibility of evidence concerning BWS is based on the agreement within the relevant scientific community that serious abuse alters assessments of danger and its propinquity in ways that are not easily understood and may even be counterintuitive.<sup>360</sup> Expert testimony can help the jury make an informed assessment of whether the defendant acted under a reasonable fear of danger given the impact of the prior abuse,<sup>361</sup> and how an abuse victim perceives danger. In one of the earliest cases allowing evidence of BWS, *State v. Allery*, the court admitted an expert's testimony on BWS to help the jury assess whether the battered defendant shot her husband based on her belief that he presented imminent danger, considering her previous experiences of abuse by him.<sup>362</sup> In *State v. Ciskie*, the court applied the concepts of BWS and subsequently admitted expert testimony to assist jurors in understanding why a rape victim might not report the crime to police.<sup>363</sup> A further expansion occurred in *State v. Janes* when the court allowed an expert to testify about the ef-

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<sup>356</sup> *Id.* (applying Imwinkelreid's concept to a domestic violence situation).

<sup>357</sup> *Id.* (citing *United States v. Cody*, 114 F.3d 772, 776-77 (8th Cir. 1997)).

<sup>358</sup> *Id.* (citing JOHN J. McNAUGHT & HAROLD FLANNERY, MASSACHUSETTS EVIDENCE: A COURTROOM REFERENCE 13-15 (1988)).

<sup>359</sup> See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 85 (1996).

<sup>360</sup> See *State v. Riker*, 869 P.2d 43, 47 (Wash. 1994); see also *State v. Janes*, 850 P.2d 495, 502 (Wash. 1993) (discussing the applicability of BWS analysis to battered children); *State v. Ciskie*, 751 P.2d 1165, 1170-71 (Wash. 1988); *State v. Allery*, 682 P.2d 312, 315-16 (Wash. 1984).

<sup>361</sup> See *Allery*, 682 P.2d at 316.

<sup>362</sup> *Id.*

<sup>363</sup> See *Ciskie*, 751 P.2d at 1173.

fects of battering in order to help the jury decide whether a child defendant responded in self-defense when he shot his stepfather.<sup>364</sup>

An expert may interview the battered client to offer her opinion as to whether the defendant suffers from BWS or to provide a generalized description of typical domestic violence relationships, their dynamics, and each party's behavior. In a battered defendant's case, the expert will likely need to correlate the escalating violence with the abused person's inability to identify and use resources.<sup>365</sup> In the alternative, an expert can explain why existing options were unavailable to a specific victim—perhaps because she lacked transportation, job skills, and childcare, or did not speak English, drive, or was not permitted to leave the home.<sup>366</sup> In forensic cases, expert testimony may describe abuse victims' sequelae, the general nature of domestic violence, the rationale for what seems to be illogical behavior, and the ways in which this client is not a "typical" abuse victim.<sup>367</sup>

An expert might also explain the frequency, severity, and nature of the abuse suffered by the battered defendant to the jury. In some cases, the client is able to convey this information with the necessary level of clarity and detail. However, some survivors are too traumatized, depressed, angry, catatonic, inarticulate, or ashamed to present the facts sufficiently. They may have trouble remembering the horrific events or be grief-stricken from killing a partner they loved. The survivor's reactions to the abuse often meet some or all of the criteria for Post-Traumatic Stress Disorder (PTSD).<sup>368</sup> It thus may be necessary to supplement the survivor's testimony with that of an expert.

An expert can make clear how, as with other trauma victims, there exists no one model of how domestic violence survivors respond to abuse. The abuse victim's survival strategies are dependent upon the pattern and nature of the violence, her childhood and life traumas, accessible resources and support networks, and other variables that are often outside her control.<sup>369</sup> An expert can also describe the survivor's prior help-seeking behaviors to change the jury's focus from wondering why she didn't leave her abuser to lauding her for the strategies she did try.<sup>370</sup> A proficient expert can convey and explain the contextual influences shaping the survivor's psychological responses to the abuse and her coping strategies. Contextual factors include a battered defendant's race, eth-

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<sup>364</sup> See *Janes*, 850 P.2d at 502–03.

<sup>365</sup> See JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 51–73 (1992); see also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

<sup>366</sup> See Buel, *Fifty Obstacles to Leaving*, *supra* note 18, at 24, 26.

<sup>367</sup> See Dutton, *supra* note 365, at 1195.

<sup>368</sup> *Id.* at 1198 (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247 (Am. Psychiatric Ass'n. Ed., 3d rev. ed. 1987)).

<sup>369</sup> *Id.* at 1231–40.

<sup>370</sup> *Id.* at 1227.

nicity, culture, class, sexual orientation, age, fear for her children, availability of economic and emotional support, faith or religious beliefs, mental or physical disabilities, substance abuse or criminal record, emotional or financial dependence on her partner, history of physical or sexual abuse, and fear of the abuser.<sup>371</sup>

While optimism is usually considered a strength, battered women are often castigated for being unrealistically hopeful that the abuse will end, for giving the offender yet another chance to show that “this time he means it.” Expert testimony may be necessary to explain that the defendant’s failure to leave the relationship is not indicative of minimal violence, but rather of her optimism, albeit misplaced or naive. The survivor’s faith may also factor into her hopefulness: if she just prays hard enough, the abuse will end. She may have been counseled by her faith leaders that she should not leave the marriage but must find a way to make it work. The survivor’s problematic social and psychological sequelae are easily misunderstood if not viewed from her vantage point of crisis. Such patterns may include remaining with the batterer, being physically aggressive with him, and refusing to take part in his prosecution. Absent a reasoned explanation offered by an expert, these behaviors may impinge on the survivor’s credibility.<sup>372</sup>

Expert testimony may also be necessary to help the jury understand ways in which the defendant’s race, ethnicity, religion, and culture have affected her decisions and behavior. However, counsel must be careful to establish that the testimony is not tainted with stereotypes and cultural bias, making it more prejudicial than probative (and therefore inadmissible) under Federal Rule of Evidence (FRE) 403.<sup>373</sup> In *Jinro v. Secure Investments, Inc.*, the Ninth Circuit found that the trial court had erroneously admitted ethnically biased testimony indicating that corruption is rampant in the Korean business community.<sup>374</sup> Citing the *Daubert*<sup>375</sup> and *Kumho Tire Co. v. Carmichael*<sup>376</sup> decisions, the court ruled that the testimony violated FRE 702 by virtue of its unreliability.<sup>377</sup> Even had the tes-

<sup>371</sup> *Id.* at 1232.

<sup>372</sup> See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT 13, REP. NCJ-160972 (May 1996), available at <http://www.ncjrs.org/pdffiles/batter.pdf>.

<sup>373</sup> This Federal Rule of Evidence reads: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403 (2001). Most states’ rules of evidence either copy the FRE or closely mirror them. See, e.g., TEX. R. EVID. (sharing the precise wording of FRE 403).

<sup>374</sup> 266 F.3d 993, 1006–09 (9th Cir. 2001).

<sup>375</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>376</sup> 526 U.S. 137 (1999).

<sup>377</sup> Federal Rule of Evidence 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact

timony been determined reliable, the court emphatically stated that FRE 403 would have precluded it: “[The expert’s] sweeping generalizations, derived from his limited experience and knowledge—plainly a skewed sample—were unreliable, and should not have been dignified as expert opinion.”<sup>378</sup> The court was careful to note that this decision should not be misinterpreted to preclude testimony regarding culture, race, or ethnicity generally: “Testimony about cultural traits or behavior, for instance, is not *inherently* prejudicial . . . [though] the risk of racial or ethnic stereotyping is substantial, appealing to bias, guilt by association and even xenophobia.”<sup>379</sup> Particularly in the aftermath of the September 11, 2001, attacks, heightened scrutiny of cultural matters may force lawyers to address juror’s potential biases.<sup>380</sup>

*c. Choosing an Expert*

Deciding whom to utilize as an expert must be done on a case-by-case basis. Whether a credentialed professional (usually a Ph.D. psychologist or M.D. psychiatrist), law enforcement officer, nurse, experienced domestic violence advocate, minister, or other professional will be the most effective expert is highly case specific. Often, the doctorate level professionals cost far more than the survivor can afford or than the court will allow for an indigent defendant. As a result, counsel must carefully select other professionals in the community who have the requisite expertise for a specific case. Whom the attorney chooses should also depend on what testimony is needed for the specific case. I have often qualified certain law enforcement officers as experts to describe the typicality of victims returning to their batterers, to repudiate offender behavior, and to voice a deep desire for offenders to obtain treatment.<sup>381</sup>

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to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702 (2001).

<sup>378</sup> *Jinro*, 266 F.3d at 1006.

<sup>379</sup> *Id.* at 1009.

<sup>380</sup> See Henry R. Chalmers, *When Is Expert Testimony on Cultural Generalizations Admissible?*, LITIG. NEWS, Jan. 2002, at 1.

<sup>381</sup> In my experience it has also worked well to qualify priests, rabbis, ministers, nurses, and social workers as experts on the behavior of domestic violence victims, especially with regard to why victims may remain with the abusers.



### 9. *Objecting to Prosecution Errors*

Defense counsel is obligated to object to prosecutorial misconduct and must seek evidence of battered defendants' prior victimization that may be in the prosecutor's files.<sup>382</sup> When defense lawyers do not make timely objections to improper prosecutor conduct, they not only jeopardize a fair disposition in the present case, but also fail to preserve the record of the error for appeal. In *State v. Wyatt*, a battered woman's conviction was reversed due to the trial court's confusing jury instructions and incorrect citation of the law, and the prosecutor's improper behavior.<sup>383</sup> Trial counsel failed to raise timely objections when the prosecutor inappropriately entered evidence of the battered defendant's character, made inflammatory remarks in her closing arguments,<sup>384</sup> and referred to information not in evidence.<sup>385</sup> The defendant's lawyer also neglected to object to the court's erroneous and puzzling jury instructions, in addition to the judge's ruling disallowing a qualified expert from explaining critical facets of the battered person defense as they applied in this case.<sup>386</sup> While in *Wyatt* the appellate court eventually reversed the battered defendant's conviction based upon prosecutorial misconduct, often battered defendants lack access to appellate counsel and thus serve undeserved prison sentences in spite of the failings of their trial counsel.

### 10. *Legal Advice Reflecting Ethical Standards of Competent Representation*

Deficient advice is the most common complaint in malpractice cases brought by battered defendants, often concerning who should testify or whether to accept a plea agreement.<sup>387</sup> In problematic cases, counsel frequently advises the client to accept a plea agreement or insist on a trial, when the client's best interest is not the determining factor in deciding case strategy. Reasons for counsel's behavior may include laziness, lack of preparedness, insufficient monetary compensation, or unwillingness to pursue a credible defense. As part of this issue, abused clients may believe that their attorneys did not provide competent advice regarding who

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<sup>382</sup> See SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 278 n.108. Defense counsel is obligated to object to prosecutorial misconduct and must seek exculpatory evidence of the defendant's abuse history.

<sup>383</sup> 482 S.E.2d 147 (W. Va. 1996).

<sup>384</sup> See *id.* at 161.

<sup>385</sup> *Id.* at 155.

<sup>386</sup> *Id.* at 157.

<sup>387</sup> See, e.g., *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991) (regarding failure to call witnesses); see also *Larson v. State*, 766 P.2d 261 (Nev. 1988) (involving advice to reject plea agreements); *State v. Gfeller*, No. 87-59-III, 1987 WL 14328 (Tenn. Crim. App. July 24, 1987) (regarding advice that defendant not testify).

should testify and when.<sup>388</sup> Veteran defense attorney Mark Larsen affirms that the client's best interest should always control trial strategy. This does not mean that defense counsel is obligated to follow the defendant's wishes, he says, but he stresses that the client should never be pressured to take a plea or go to trial.<sup>389</sup>

In some cases, courts have not reversed the conviction, although they have chastised counsel for improper conduct. In *Brooks v. State*, the Alabama Court of Criminal Appeals affirmed the conviction of a battered woman who killed her husband, even though her counsel did not object to the trial court's erroneous rulings regarding manslaughter and BWS.<sup>390</sup> As a result, the issues were not preserved for appeal, precluding further review and redress for the trial court's errors.<sup>391</sup> Erroneous opening statements can also condemn a case, without warranting a reversal. A frequent category of complaint *not* substantiated by the courts has been that involving counsel's failure to use evidence of abuse at trial.<sup>392</sup> However, a lawyer's standard of practice should not be determined solely by quantity of appellate reversals, but rather by whether the degree of competent representation given approximates that which would be given if the case involved a member of her own family.

### 11. *Proper Jury Instructions*

Jury instructions can dramatically impact case outcomes, yet many trial lawyers do not ensure that key issues for battered defendants are addressed in these instructions. In self-defense cases, it is critical that jury instructions are couched in terms of subjective reasonableness. The relevant inquiry is whether the jury believes that *this* battered defendant perceived imminent harm and, therefore, her resort to self-defense must be viewed as rational. A recent study found that substantially more acquittals resulted when mock juries were given a subjective reasonableness charge in a battered woman self-defense case.<sup>393</sup> With non-self-defense cases, it is also important for counsel to use jury instructions that will help the jurors understand how *this* battered defendant perceived a dearth of options when committing the offense.

Sometimes counsel's lack of familiarity with domestic violence issues results in her failure to object to improper language in jury instructions. In *Brooks*, the battered defendant's lawyer did not object to the

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<sup>388</sup> See *Zimmerman*, 823 S.W.2d at 220; see also *Gfeller*, 1987 WL 14328, at \*3.

<sup>389</sup> Telephone Interview with Attorney Mark Larsen, Director, New Hampshire Public Defender Program (Nov. 1, 2002) (on file with author).

<sup>390</sup> 630 So. 2d 160 (Ala. Crim. App. 1993).

<sup>391</sup> See *id.* at 163.

<sup>392</sup> But cf. *Zimmerman*, 823 S.W.2d at 220.

<sup>393</sup> Cheryl A. Terrance et al., *Effects of Judicial Instructions and Case Characteristics in a Mock Jury Trial of Battered Women Who Kill*, 24 L. & HUM. BEHAV. 207 (2000).

judge's instruction that BWS did not constitute legal provocation sufficient to reduce murder to manslaughter and, as a result, failed to preserve the issue for appeal.<sup>394</sup>

## 12. Addressing Substance Abuse Issues

Safety planning and case strategy for battered defendants must address any substance abuse of the batterer. Intimate partner studies estimate that, at the time of committing their crimes, approximately forty-five percent of batterers were under the influence of alcohol,<sup>395</sup> while another found that ninety-two percent of victims reported that their batterers used drugs or alcohol on the day of the offense.<sup>396</sup> Furthermore, men who drink heavily are more likely to commit violent crimes than those who do not.<sup>397</sup> Thus, if the battered client reunites with a substance-abusing partner, she is at greater risk not only of being physically harmed by him but also of being re-arrested and blamed for any conflict, whether or not *she* is chemically dependent. Because the victim is at greater risk for serious injury if the batterer is chemically dependent, all safety planning must include screening for such behavior. Screening should occur by counsel as early as possible in order to develop short- and long-term safety planning.

Pre-release and sentencing conditions should also include provisions addressing any substance abuse matters, given that drunkenness dramatically increases recidivism. The judge can order that the batterer be prohibited from using drugs or alcohol,<sup>398</sup> whether the offender is an adult or juvenile. The judge will also want to seriously consider ordering the substance-abusing batterer into treatment, as participation in such programs decreases the risk of renewed violence by thirty to forty percent.<sup>399</sup> Recent studies indicate that even one episode of inebriation during the first three months after sentencing makes the batterer three and a half times

<sup>394</sup> See *Brooks*, 630 So. 2d at 162.

<sup>395</sup> Raul Caetano, et al., *Alcohol-Related Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States*, 25 ALCOHOL RES. & HEALTH 58 (2001), (citing J. Roizen, *Issues in the Epidemiology of Alcohol and Violence*, in ALCOHOL AND INTERPERSONAL VIOLENCE: FOSTERING MULTIDISCIPLINARY PERSPECTIVES 36 (S. E. Martin ed., 1993) ("An overview of studies of IPV estimated that men were drinking when the violence occurred in about 45 percent of the cases").

<sup>396</sup> See Daniel Brookoff et al., *Characteristics of Participants in Domestic Violence: Assessment at the Scene of Domestic Assault*, 277 JAMA 1369, 1371 (1997).

<sup>397</sup> See, e.g., Kathleen A. Oriel & Michael F. Fleming, *Screening Men for Partner Violence in a Primary Care Setting: A New Strategy for Detecting Domestic Violence*, 46 J. FAM. PRAC. 493, 495 (1998).

<sup>398</sup> Most states' statutes include general language similar to the Texas language, where a judge may order the abuser to "perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence." TEX. FAM. CODE ANN. § 85.022(a)(3) (Vernon 2001).

<sup>399</sup> See Alison Snow Jones & Edward W. Gondolf, *Time-Varying Risk Factors for Reassault Among Batterer Program Participants*, 16 J. FAM. VIOLENCE 345, 355 (2001).

more likely to assault his partner again.<sup>400</sup> When compared with abusers who seldom drank alcohol, those who drank on a daily basis were sixteen times more likely to batter their victims again.<sup>401</sup> Interestingly, researchers found that employment status of the offenders did not have an impact on their likelihood of recidivism.<sup>402</sup> Thus, even with pending charges or a conviction, the battered client should consider obtaining a protective order to decrease the likelihood of the abuser harming her.

Chemically dependent *victims* are also at greater risk for further harm, whether they are abusing prescription, over-the-counter, or street drugs.<sup>403</sup> Substance-abusing victims are often forced to return to the batterer, since many shelters will not accept alcoholics or addicts.<sup>404</sup> One study found a higher rate of substance abuse among battered women than non-battered women,<sup>405</sup> but noted that the vast majority of victims did not abuse drugs or alcohol.<sup>406</sup> Most users may, however, have become chemically dependent in response to domestic violence.<sup>407</sup> When the intervenors are unresponsive, hostile, judgmental, or otherwise unwilling to assist the victim, the victim's hopelessness can precipitate self-medication. White and Native American women show higher rates of alcoholism than African American or Hispanic women.<sup>408</sup> Those victims who are poor, of color, or both, face the greatest challenges in accessing drug treatment, particularly if they become chemically dependent as a result of domestic violence.<sup>409</sup> Even battered women who are not addicted to alcohol but have been drinking when the abuse occurs are less likely to encounter sympathetic police or courts.<sup>410</sup>

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<sup>400</sup> See *id.* at 353.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> See Jeanne McCauley et al., *The "Battering Syndrome": Prevalence and Clinical Characteristics of Domestic Violence in Primary Care Internal Medicine Practices*, 123 ANNALS INTERNAL MED. 737, 741 (1995).

<sup>404</sup> See Parrish, *supra* note 203, at 205. However, Tulsa's Domestic Violence Intervention Services is a model shelter in its provision of services to chemically dependent abuse victims. For more information, they can be reached at 1-918-585-3170.

<sup>405</sup> See McCauley, *supra* note 403, at 742; see also Glenda Kaufman Kantor & Murray A. Straus, *Substance Abuse as a Precipitant of Wife Abuse Victimizations*, 15 AM. J. DRUG & ALCOHOL ABUSE 173, 179 (1989) (finding that a higher percentage of female victims abused substances; however, this result was not statistically significant when a regression analysis was performed, possibly due to the low overall level of abuse).

<sup>406</sup> See Kaufman Kantor & Straus, *supra* note 405, at 179.

<sup>407</sup> See Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must be Aware to be Effective*, 264 JAMA 940, 943 (1990).

<sup>408</sup> See Goldberg, *supra* note 203, at 791.

<sup>409</sup> See RICHIE, *supra* note 22, at 123-27.

<sup>410</sup> See Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POL'Y 88, 94 (1999); see also Deborah Capasso Richardson & Jennifer L. Campbell, *Alcohol and Wife Abuse: The Effect of Alcohol on Attributions of Blame for Wife Abuse*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 51, 55 (1980).

Depression or mental illness, in combination with chemical dependency, significantly increases the likelihood of the user battering his partner. When the abuser is an alcoholic and has either antisocial personality disorder or recurrent depression, researchers have found an eighty to ninety-three percent rate of violence.<sup>411</sup> For the batterer who grew up in a violent home, alcohol abuse raises the chances of repeating the violence.<sup>412</sup> Another study reports that severe psychopathology increases the probability of repeat assault twofold.<sup>413</sup>

### 13. Addressing Mental Health Issues

Battered women are over-represented among those suffering from depression, and, not surprisingly, those incarcerated report even higher levels of mental illnesses.<sup>414</sup> Numerous studies have documented that protracted stress can permanently harm neurons in the hippocampus, a part of the brain concerned with memory. However, recent research has also shown that antidepressants may reverse the stress-induced damage to the cells by stimulating growth of hippocampal nerves.<sup>415</sup> It is important for lawyers to relate this information not only to judges and juries, but also to their battered clients who may be helped by seeing a therapist or taking antidepressant medication.

Many legal professionals complain that battered women seem to enter into successive abusive relationships, as though the phenomenon indicates a preference on the part of the victims. Rather, several decades of research indicates that victims in multiple violent relationships show elevated rates of self-defeating personality disorders, depression, and PTSD, among other mental illnesses.<sup>416</sup> Furthermore, victims suffering from PTSD may, over time, experience character changes, possibly leading to chronic psychopathologies.<sup>417</sup> Since childhood abuse—both sexual and physi-

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<sup>411</sup> See DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 28 (1995).

<sup>412</sup> See Oriel, *supra* note 397, at 496.

<sup>413</sup> See Jones & Gondolf, *supra* note 399, at 355.

<sup>414</sup> See Angela Browne, *Violence Against Women By Male Partners: Prevalence, Outcomes, and Policy Implications*, 48 AM. PSYCHOLOGIST 1077 (1993); see generally M. C. Astin et al., *Posttraumatic Stress Disorder Among Battered Women: Risk and Resiliency Factors*, 8 VIOLENCE & VICTIMS 17 (1993).

<sup>415</sup> See Erica Goode, *Antidepressants Lift Clouds, But Lose "Miracle Drug" Label*, N.Y. TIMES, June 30, 2002, at A1.

<sup>416</sup> See Frederick L. Coolidge & Laura W. Anderson, *Personality Profiles of Women in Multiple Abusive Relationships*, 17 J. FAM. VIOLENCE 117, 129 (2002) (explaining that behavior may rise to the level of a personality disorder by virtue of the "symptoms pervasive, enduring, and disrupting consequences").

<sup>417</sup> *Id.* at 118, 124. The authors define psychopathologies as either Axis I or II. Axis I pathologies include generalized anxiety, depression, post-traumatic stress and maladjustment, while Axis II describes behavior that is antisocial, avoidant, borderline, dependent, depressive, histrionic, narcissistic, obsessive-compulsive, paranoid, passive-aggressive, sadistic, schizoid, schizotypal, and self-defeating. *Id.*

cal—increases the risk of PTSD,<sup>418</sup> attorneys representing battered defendants will want to inquire about prior victimization over the client's lifespan. As might be expected, the length and severity of the abuse directly correlate to the degree of depression and mental illness. Those battered women with chronic and severe personality disorders are more likely to have been raised in violent families and tend to stay with a batterer longer.<sup>419</sup>

Counsel must carefully deconstruct a mentally ill client's psychopathology for the jury to ensure that she is not blamed for her victimization and further stigmatized for being labeled as both battered and mentally ill. Given that one of the most comprehensive studies ever conducted on depression found that 9.5% of Americans fit the diagnostic criteria for the mood disorder,<sup>420</sup> counsel must emphasize that mental disorders are illnesses, not character deficiencies or weaknesses.<sup>421</sup>

If the battered client has a mental illness, counsel should ask questions during *voir dire* such as, "How many of you know someone who suffers from depression?" or "How many of you think that if a battered person were depressed, it would be even harder to escape the relationship?" Questions should be refined based upon the facts of the present case, with emphasis on both educating the jury about mental illness and engendering compassion for the battered defendant.

Even in the absence of corroboration, it is helpful for the victim to testify about childhood and adult victimization and its impact on her behavior. Experts believe that in some instances mental illnesses may cause engagement in serially abusive relationships, while in others, the victim adopts protective responses in order to survive.<sup>422</sup> The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* does not address causation as part of its diagnostic criteria,<sup>423</sup> so counsel will want to ensure that the court does not improperly focus on etiological issues or blame. Instead, counsel should focus on tailoring the victim's therapeutic interventions to address any chronic mental illnesses that may interfere with the client living violence-free in the future.<sup>424</sup> Moreover, the incarcerated mentally ill victim needs mental health services not only to begin the healing process and prepare for eventual release, but also to cope with the abusive conditions of confinement. Such a client may need a period of counseling in order to testify effectively

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<sup>418</sup> *Id.* at 120.

<sup>419</sup> *Id.* at 119.

<sup>420</sup> See Goode, *supra* note 415, at A1.

<sup>421</sup> *Id.*

<sup>422</sup> See Coolidge & Anderson, *supra* note 416, at 129.

<sup>423</sup> See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

<sup>424</sup> See Coolidge & Anderson, *supra* note 416, at 129. The battered woman's recovery may be sabotaged by self-defeating symptoms that result in her returning to the abuser (if she is not incarcerated for harming him) or finding herself in another violent relationship.

about her victimization and her coping strategies. As described in Part III.A.8, it may be necessary for an expert to explain the client's behavior in the context of substance abuse, mental illness, and domestic violence.

#### 14. *Avoiding Conflicts of Interest*

Lawyers should not need to be reminded that it is unethical to place their own interests above those of their clients.<sup>425</sup> However, Andrews's extraordinary misconduct in *Beets*<sup>426</sup> illustrates the need for discussion of this topic. In *Beets*, Andrews contracted to represent Beets, a grandmother, in exchange for the media rights to her life story.<sup>427</sup> A clear conflict of interest was created; Andrews would reap the greatest financial gain if Beets were executed. Beets was convicted of capital murder for remuneration and executed, with no action taken against Andrews for his obvious conflict of interest and unethical practices.<sup>428</sup>

"[O]ther courts, scholars and organizations of the bar [ ] have uniformly denounced the execution of literary and media rights fee arrangements between attorneys and their clients during the pendency of a representation"<sup>429</sup> precisely because of "the extraordinarily high probability that a media rights contract between counsel and client will create a conflict of interest."<sup>430</sup> The Texas Bar Rules and Code of Professional Responsibility prohibit media rights contracts and specify that such violations cannot be cured by client consent.<sup>431</sup> Legal scholars have found such media contracts particularly reprehensible when they exist in lieu of, or as part of, a fee or as a condition of employment,<sup>432</sup> as in *Beets*. Although the Fifth Circuit ultimately agreed that Andrews had committed ethical violations in his media rights and witness/advocate conflicts, astonishingly it declined to find that his misconduct constituted ineffective assistance of counsel.<sup>433</sup>

<sup>425</sup> See *Larson v. State*, 766 P.2d 261 (Nev. 1988).

<sup>426</sup> See *supra* text accompanying notes 26-29.

<sup>427</sup> 767 S.W.2d 711 (Tex. Crim. App. 1987).

<sup>428</sup> See *Beets v. Scott*, 65 F.3d 1258, 1299 (5th Cir. 1995).

<sup>429</sup> *Id.* at 1273; see also *People v. Corona*, 145 Cal. Rptr. 894, 915-17 (Ct. App. 1978) (holding that media rights created an actual conflict); *Buenoano v. Singletary*, 963 F.2d 1433, 1438-39 (11th Cir. 1992) (remanding to determine if fee arrangement with a book and movie contract constituted an actual conflict and adverse effect).

<sup>430</sup> *Beets*, 65 F.3d at 1285.

<sup>431</sup> See *id.* at 1286; see also TEX. GOV'T CODE ANN. tit. 2, subject G app. A, art. X, § 9, Rule 1.08 (Vernon 2003); Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 133-34 (1990).

<sup>432</sup> See JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 12.12 (2d ed. 1996 & Supp. 2002) (quoting ABA Standards, The Defense Function Standard 4-3.4, Commentary); see also *id.* at 414 n.19.

<sup>433</sup> See *Beets*, 65 F.3d at 1279. Similarly, in *Neelley v. State*, an Alabama appellate court ruled that the defense attorney's publicity contract with his battered client did not rise to the level of ineffective assistance of counsel. See 642 So. 2d 494 (Ala. Crim. App. 1993), *cert. denied*, 514 U.S. 1005 (1995). In contrast, a California appeals court found

Lawyers should also be aware that it is an assumed conflict of interest to represent both parents in a termination of parental rights case. In *State v. Tammy S.*, a battered mother had her parental rights terminated for failing to separate from her abusive boyfriend (the children's father).<sup>434</sup> Ruling that the same standard exists for effective assistance of counsel in termination cases as in criminal matters, a New Mexico appellate court found that it was not possible to represent competently both a battered parent and her abuser.<sup>435</sup>

For the Sixth Amendment right to an attorney to have any real meaning, it must stand for the right to conflict-free counsel. In cases where the attorney does have a conflict of interest, the burden must be on the state to prove beyond a reasonable doubt that the client was not adversely affected. Shifting the burden should persuade prosecutors and judges to examine potential conflicts more carefully, as is done in other cases of possible governmental constitutional violations through "harmless error" analysis.<sup>436</sup>

#### *B. Particular Challenges in Failure To Protect Children Cases*

When addressing domestic violence, both case law and legal scholarship have focused primarily on homicide cases, much to the detriment of battered women charged with failing to shield their children from an abuser's harm. As a result, many defense attorneys handle such cases without raising mitigating circumstances or properly focusing the blame on the abuser. Until recently, feminist jurisprudence has been largely silent on child protection issues. Even now, only a few scholars are studying the correlation between domestic violence and child abuse.<sup>437</sup> A deep schism permeates attitudes among advocates and the public regarding whether battered mothers sufficiently protect their children from their partners' abuse. Schneider notes that, regardless of the obstacles, society assumes mothers will be able to shield their children from all harm and criminally

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fifteen years earlier that a media rights contract constituted a conflict, when "trial counsel assumed a position virtually adverse to his client and, totally unsupported by strategic or tactical considerations, took deliberate steps to thwart the development of viable defenses." *People v. Corona*, 145 Cal. Rptr. 894, 916 (Ct. App. 1978).

<sup>434</sup> 974 P.2d 158 (N.M. Ct. App. 1998).

<sup>435</sup> *See id.*

<sup>436</sup> *See generally* Craig M. Bradley, *The Right to Unconflicted Counsel*, TRIAL, June 2002, at 62.

<sup>437</sup> *See, e.g.*, V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress as a Defense For Battered Women Who "Fail to Protect."* 85 CAL. L. REV. 993 (1997); Leslie E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287 (1998).



penalizes those who cannot<sup>438</sup>—a difficult task for women who are unable even to protect themselves.

Stressing that context must be considered before condemning battered mothers, Professor Bernadine Dohrn cites the formidable obstacles of financial dependence and fear of violent retaliation. She explains, “Fathers, step-fathers and ‘boyfriends,’ as well as larger social institutions, are absent during the legal and moral adjudication of mothers.”<sup>439</sup> Unfortunately, the understanding evidenced by Schneider and Dohrn is not widely shared; even those who might be sympathetic toward a battered woman who kills in self-defense have little compassion for one charged with failing to protect her child.<sup>440</sup> Mothers are expected to be able to protect themselves, yet they are also expected to forfeit their lives to protect their children.<sup>441</sup>

A battered woman may face removal of her children and ultimately the termination of her parental rights if she cannot stop her abuser’s violence. Many states include in their definitions of child abuse “one whose parent knowingly allows another person to commit the abuse.”<sup>442</sup> Pursuant to this standard, a battered woman’s parental rights may be terminated if she fails to stop the abuse,<sup>443</sup> regardless of her ability to do so. Child protection staff and prosecutors have wide-ranging discretion in such cases, as evidenced by the broad wording of the District of Columbia’s statute that defines an abused child as: “a child whose parent, guardian, or custodian inflicts or fails to make reasonable efforts to prevent the infliction of physical or mental injury upon the child.”<sup>444</sup>

Gender and class bias are prevalent in cases involving mothers charged with failing to protect their children. Although she methodically drowned her five small children, Andrea Yates did not receive the death penalty. The media and the public focused on her status as a white, middle-class, suburban mother, overwhelmed by successive births, home schooling, and mental illness. There can be little doubt that if Andrea

<sup>438</sup> See SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 157.

<sup>439</sup> Bernadine Dohrn, *Bad Mothers, Good Mothers and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 3 (1995).

<sup>440</sup> See Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability For Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579 (1998).

<sup>441</sup> See *id.* at 652 (providing example of a probation officer arguing for the death penalty for a mother with no criminal record who said that “in my opinion, it is atrocious for a mother not to risk her life—everything, to save her child . . .”). Note that this view is not based in black letter law.

<sup>442</sup> See Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, in WOMEN’S HEALTH, POLITICS AND POWER: ESSAYS ON SEX/GENDER, MEDICINE AND PUBLIC HEALTH 307, 312 (Elizabeth Fee & Nancy Krieger eds., 1994) [hereinafter WOMEN’S HEALTH, POLITICS AND POWER] (citing New York and Connecticut as examples).

<sup>443</sup> See Marie Ashe & Naomi Cahn, *Child Abuse: A Problem for Feminist Theory*, in WOMEN’S HEALTH, POLITICS AND POWER, *supra* note 442, at 181–84.

<sup>444</sup> Stark, *supra* note 20, at 1008 n.167 (citing D.C. CODE ANN. § 16-2301 (23) (Supp. 1994)).

Yates had been a substance-abusing woman of color or a welfare mother, there would have been little concern for the causes of her murderous rampage.<sup>445</sup> Race bias further isolates battered women of color whose abusers threaten to file complaints against them with Child Protective Services (CPS)<sup>446</sup> or who live in jurisdictions in which police routinely notify CPS when responding to domestic violence calls in which children are present at the scene.<sup>447</sup>

Typical of the practice in many jurisdictions, New York City's Administration for Children and Families (ACS) routinely charged battered mothers with engaging in domestic violence and subsequently removed their children without the requisite court orders.<sup>448</sup> In *Nicholson v. Williams*, Senior District Court Judge Jack Weinstein found that poor battered women threatened with losing their children faced a Kafkaesque situation, in part because of the "sham" system of court-appointed counsel.<sup>449</sup> He stressed that the many years of "pitiless double abuse of these mothers" violated their constitutional rights.<sup>450</sup> Judge Weinstein's scathing opinion stated that these practices were rooted in "benign indifference, bureaucratic inefficiency and outmoded institutional biases."<sup>451</sup> *Nicholson* implicates class, race, and gender, as the majority of the *Nicholson* plaintiffs and eighty-five percent of New York City's foster children are Hispanics, African Americans, or immigrants.<sup>452</sup> Although domestic violence occurs across all socio-economic strata, *Nicholson* suggests that child protective agencies rarely intervene with white or affluent families.<sup>453</sup>

Judge Weinstein's landmark decision also found that ACS often charged battered mothers with neglect solely on the basis of their victimization, neither helped mothers flee abuse nor held the batterers re-

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<sup>445</sup> See Bob Herbert, *Deciding Who Will Live, Who Will Die is Never Fair*, N.Y. TIMES, Mar. 18, 2002, at A25.

<sup>446</sup> Child Protective Services (CPS) refers to the state agency charged with investigation and service provision to children who are abused or neglected and their families. Variations on this term abound; for example, Massachusetts calls its child protection agency the Department of Social Services. I will use the generic CPS to encompass all such agencies herein.

<sup>447</sup> See, e.g., Coker, *supra* note 113, at 1047 (noting that some police departments mandate that child protective services are notified of each domestic violence call in which children are found at the crime scene).

<sup>448</sup> See William Glaberson, *Judge Rebukes City Officials for Removing Children From Homes of Battered Women*, N.Y. TIMES, Mar. 5, 2002, at B3 (describing *In re Nicholson*, in which Sanctuary for Families filed a class action suit on behalf of all similarly situated battered mothers).

<sup>449</sup> 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

<sup>450</sup> See *id.* at 163.

<sup>451</sup> *Id.*

<sup>452</sup> See Chris Lombardi, *Justice For Battered Women: Victims of Domestic Violence Defend Their Right to Keep Their Children*, NATION, July 15, 2002, at 25 (describing the two-month trial of *Nicholson* that included forty-four witnesses, including *Nicholson* and nine other mothers in similar situations, and numerous experts).

<sup>453</sup> *Id.*

sponsible, often placed children in foster care without just cause, did not properly train its staff about domestic violence, and encouraged such improper conduct in its written policies. Citing violations of the Fourth, Ninth, Thirteenth, and Fourteenth Amendments, Judge Weinstein denounced ACS for its blatant disregard of plaintiffs' due process rights.<sup>454</sup>

Not only did Judge Weinstein's lengthy decision award Nicholson \$150,000, with similar amounts for the other plaintiffs, it also ordered ACS to dramatically revamp its practices. ACS was ordered to stop taking children from battered mothers whose only "offense" was being victimized,<sup>455</sup> and to coordinate with domestic violence advocates to craft improvements in their handling of such cases.<sup>456</sup> Judge Weinstein specified that ACS should make reasonable efforts to increase the safety of battered mothers and their children by removing abusers, providing shelter for victims, and assisting victims in obtaining protective orders and prosecuting batterers.<sup>457</sup> He further mandated that ACS staff members receive training in domestic violence and that removal of children be the option of last resort, utilized only after ACS made good-faith efforts to safeguard the mother. To facilitate adequate representation for the battered mothers, he also ordered the State to raise its hourly rate for court-appointed family court lawyers, doubling their compensation to \$90 per hour.<sup>458</sup>

It is hoped that the implications of *Nicholson* will engender systemic reforms nationally, as no court has previously condemned such dangerous practices or ordered such specific reforms to be undertaken by defendant agencies. Remarkably, Judge Weinstein also identified model programs to

<sup>454</sup> *Id.* Judge Weinstein stated that the plaintiff's Thirteenth Amendment rights were violated when they were denied control of their children and stigmatized.

<sup>455</sup> *In re Nicholson*, 181 F. Supp. 2d 182 (E.D.N.Y. 2000). The court held:

preliminary injunction would issue prohibiting ASC from separating a mother, not otherwise unfit, from her children on basis that, as a victim of domestic violence, she was considered to have "engaged in" domestic violence, and (2) compensation for attorneys appointed to represent mothers threatened with separation from their children was to be increased in order to allow for adequate representation of the mothers.

*Id.* at 182.

<sup>456</sup> See Lombardi, *supra* note 452. Judge Weinstein cited ACS's 1993 pilot "Zone C Project," in which child abuse cases were screened for domestic violence, and then domestic violence advocate and ACS caseworker teams were created to intervene with the family. As a result, removals of children dropped significantly. Similarly, in 1999, a "Zone A Project" was implemented, adding the collaboration of the police and increasing the batterer's arrests to fifty percent. At the same time, forty-two percent of the victims were able to obtain orders of protection. Not surprising, these improvements produced large decreases in child removals, down to just three percent of the cases. In spite of such success, the Project was discontinued. See *Nicholson*, 203 F. Supp.2d at 206-08, 210.

<sup>457</sup> See *In re Nicholson*, 181 F. Supp.2d at 190. Additionally, Judge Weinstein ordered that ACS create a simply written pamphlet, in English and Spanish, explaining the rights of battered women and their children in such circumstances. *Id.*

<sup>458</sup> *Id.* at 192.

which ACS could turn for guidance, such as the Dade County Dependency Court Intervention Project,<sup>459</sup> while emphasizing that the protection of battered mothers is most often the best way to protect the children.<sup>460</sup> Battered women's advocates are particularly optimistic given that Judge Weinstein's orders are not merely dicta but have the force of law as holdings. Although ACS has appealed the case to the Second Circuit, Judge Weinstein has already granted them one extension to begin implementing his reforms.<sup>461</sup>

Perhaps most difficult are cases in which a battered mother will not separate from the person harming her or her children. Counsel cannot represent both parties in the case, whether it is a termination of parental rights or a criminal matter.<sup>462</sup> In some cases, even after the court and a child protective agency advise the battered mother that her rights will be permanently terminated if she does not separate from the abuser, she may still be unable or unwilling to do so.<sup>463</sup> Sometimes a domestic violence shelter advocate can provide free, ongoing counseling and safety planning, with the ultimate goal that the victim will leave her abuser. The dilemma is that if, in the mean time, the children are placed in danger, counsel may be forced to report the former client to a child protective agency.<sup>464</sup>

Arguing traditional BWS would be counterproductive in such cases, as it fails to challenge the gender bias inherent in Walker's characterization of the "cycle" of domestic violence. CPS can justify their actions assuming children are at risk, because once battered, the mother is likely to remain in "the cycle" with either this or another abuser.<sup>465</sup> In *In re Betty J.W.*, J.B.W. had beaten and attempted to sexually molest his daughter.<sup>466</sup> Mary W., the mother, reported the abuse to a child protective agency a few days later because she was unable to escape from her abusive husband prior to that time. In another instance in which she tried to protect

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<sup>459</sup> See Lombardi, *supra* note 452. Judge Cindy Lederman has established this model program in spite of Miami's challenges of extraordinarily high caseloads, rich diversity among litigants, overtaxed social services, undocumented and immigrant families, and extremely low income of its litigants.

<sup>460</sup> *Id.* This principle includes the premise that a battered mother will be afforded a myriad of needed services, ranging from childcare to job training, and law enforcement to education.

<sup>461</sup> *Id.* In denying a second extension, Judge Weinstein found "no indication . . . that anything has been done except with respect to talk about" reforms.

<sup>462</sup> See, e.g., *State v. Tammy S.*, 974 P.2d 158 (N.M. App. 1998).

<sup>463</sup> *Id.*

<sup>464</sup> This option is not offered without reserve and great trepidation. However, in many states counsel is a mandatory reporter of suspected child abuse and may, in addition, feel a moral compulsion to do all that is possible to protect the children. The argument follows the theme of allowing the battered mother to make whatever decisions for herself that she deems appropriate, but that, at some point, the state may need to intervene if the children's safety is jeopardized.

<sup>465</sup> See Stark, *supra* note 20, at 1008-09.

<sup>466</sup> *In re Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988).

her daughter, Mary was threatened with a knife and beaten.<sup>467</sup> Despite her efforts, the trial court ruled “that Mary W. failed to protect her children by failing to keep J.B.W. away and by not separating from him,” and cited Walker’s theory in describing Mary’s inability to leave J.B.W.<sup>468</sup> On the basis of this assumption, the children were placed in foster care. Fortunately, the case was overturned on appeal by the West Virginia Supreme Court and the children were returned to their mother’s custody.<sup>469</sup>

Counsel must also decide if expert testimony would assist the court in understanding the behavior of the battered mother charged with failing to protect her child. In *People v. Daoust*, a domestic violence expert testified that when a victim faces persistent danger of violence, she typically lies to appease the batterer.<sup>470</sup> The defendant boyfriend, Daoust, severely abused Teresa Hoppe’s daughter while baby-sitting. When Hoppe suggested taking the child to the hospital to treat the injuries, Daoust threatened that he would “take care” of her and “finish with” the daughter.<sup>471</sup> When Hoppe finally brought her daughter to a hospital, the staff found brain injury, serious bruising, and hot water burns. Initially, Hoppe told the police that she had disciplined her daughter and claimed not to have a boyfriend, but later acknowledged that she had accepted the blame because of her grave fear of Daoust.<sup>472</sup>

Because Hoppe reported that Daoust had not *hit* her, it was considered novel that the expert testimony on BWS was admissible. The court was likely persuaded by evidence of Daoust’s constant threats to kill Hoppe and her daughter, his extreme verbal abuse, his tight control of her money and all her activities, and his frequent raping of Hoppe. Following his conviction for second-degree child abuse, Daoust appealed, alleging that the evidence of BWS was improperly admitted. The Court of Appeals determined that evidence of BWS was relevant and necessary to understanding Hoppe’s initial lies that Daoust had not harmed her daughter. Evidence of Daoust’s prior abuse of Hoppe’s daughter was also deemed admissible as probative of their relationship dynamics, consistent with BWS.<sup>473</sup>

Particularly in cases with unsympathetic defendants, an expert may be the battered defendant’s only hope to explain her state of mind and lack of resources. In *Matter of Glenn G.*, a mother was accused of failing to protect her children from sexual abuse perpetrated by their father,

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<sup>467</sup> *Id.* at 332.

<sup>468</sup> *Id.*

<sup>469</sup> Stark, *supra* note 20, at 251.

<sup>470</sup> 577 N.W.2d 179 (Mich. Ct. App. 1998).

<sup>471</sup> *Id.* at 182; see also *Two Recent Decisions Admit Evidence of Prior Bad Acts and Expert Testimony on Domestic Violence*, 4 DOMESTIC VIOLENCE REP. 85 (Aug./Sept. 1999).

<sup>472</sup> See *Two Recent Decisions Admit Evidence of Prior Bad Acts and Expert Testimony on Domestic Violence*, *supra* note 471.

<sup>473</sup> *Daoust*, 577 N.W.2d at 185–86.

which sometimes occurred in her presence.<sup>474</sup> The court found that not only must the mother be permitted to offer BWS as a defense, but also that the charges against her would be dismissed as she had no capability to protect her children from the abuse.<sup>475</sup>

An expert may be helpful in offering credible analogies that enhance the judge's and jury's understanding of the battered mother's actions. For example, in Daniel Ellsberg's book about his release of the Pentagon Papers, he describes how, for decades, even top officials repressed their concerns about presidential policies in Vietnam.<sup>476</sup> Ellsberg, himself a longtime Pentagon aide and former Marine commander, explains that loyalty and the bonds of secrecy resulted in the conspiracy of lying in defense of policies they knew to be dangerous and faulty.<sup>477</sup> Depending on the facts of a "failure to protect" case, an expert could explain that the battered mother may share a similar sense of loyalty toward her partner, that—in addition to her fear of his retaliation—results in otherwise inexplicable silence. There are many analogies between war and serious family violence: at the least, both require careful strategic planning to avoid annihilation by the enemy.

Counsel should use the strongest possible language in making a battered client aware of the consequences of her actions, while being respectful and listening to the client's issues. The battered mother may have such low self-esteem that she cannot conceive of life without her present partner.<sup>478</sup> In such cases, it can be helpful if the battered mother is willing to attend a support group, speak with an experienced advocate or counselor, or read brief articles about battering. For some abused mothers, this criminal litigation will be their first exposure to the concept of personal rights, such as the right to be safe from abuse. For those battered mothers who are also child abuse or sexual assault survivors, there may exist an assumption that abuse is part of the norm.<sup>479</sup> Given that most jurors will not understand such thinking, counsel ought to consider using an expert in cases where the battered mother is being charged with not adequately protecting her children from the abuser.

Counsel representing battered women involved with the child protection system must understand the political context in which it operates and must be prepared to argue that *Nicholson* increased the protection of rights of poor battered women. When framing the victim's traumatic history for CPS, counsel must ensure that she does not inadvertently reinforce the assumption that an abused mother has a diminished capacity to parent

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<sup>474</sup> 587 N.Y.S.2d 464, 464 (N.Y. Fam. Ct. 1992).

<sup>475</sup> *See id.* at 470.

<sup>476</sup> *See generally* DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* (2002).

<sup>477</sup> *Id.*

<sup>478</sup> *See generally* HERMAN, *supra* note 365, at 74–95.

<sup>479</sup> *Id.*; *see also* Author's Experience, *supra* note 46.

because she could not flee her abusive relationship. Practitioners representing battered defendants in such cases must scrutinize jurors during the *voir dire* process regarding their assumptions about mothers who have been unable or unwilling to prevent harm to their children, while continuing to emphasize mitigating circumstances in arguments to the court.

### C. Analyzing Defense Options

Some practitioners mistakenly believe that a battered woman's defense is based on a form of psychiatric illness, related to insanity or the heat of passion.<sup>480</sup> Battered women's advocates have intentionally eliminated use of the term "battered woman's defense" specifically to avoid any notion that they are requesting special treatment. Rather, in representing a battered defendant, counsel should apply self-defense doctrine only when the facts of a particular case merit that defense.<sup>481</sup> The following defense options are offered on the assumption that counsel will carefully scrutinize the facts of each case to properly determine the most appropriate strategies.

Battered defendants *have* prevailed in cases in which their attorneys have made faulty defense selections, including when attorneys relied on self-defense law to the exclusion of other *relevant* defenses, such as provocation and heat of passion.<sup>482</sup> Such mistakes logically arise when counsel is unfamiliar with the substantive and ancillary issues inherent in domestic violence cases. Here, in particular, normative arguments can lead to acquittal or at least help the decision maker view mitigating evidence more openly. The most proficient trial attorneys know that the social context of domestic violence must be woven into case theory<sup>483</sup> and trial arguments.<sup>484</sup>

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<sup>480</sup> See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

<sup>481</sup> See Dowd, *supra* note 5, at 574.

<sup>482</sup> *But see* Schneider, *supra* note 10, 46–47 (describing how lack of skilled legal representation effectively discriminates against battered women).

<sup>483</sup> See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988); see also Binny Miller, *supra* note 59; Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

<sup>484</sup> See, e.g., Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); see also Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45 (1998); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994-1995).

1. *Battered Woman's Syndrome—The Polemics of Essentialist Versus Revised Models*

BWS<sup>485</sup> is not a defense, but rather a pattern of symptoms used to describe the effects of abuse on the victim.<sup>486</sup> In *People v. Romero*, the California Court of Appeals offered clarification: "There nevertheless still exists a misconception by some lawyers and judges that there is a defense called 'battered woman syndrome' giving women who are battered some unique right simply because they are battered. That is not the law in California (or, as far as we can tell, anywhere else)."<sup>487</sup> Sixty-nine percent of states admit expert testimony to explain the effects of battering and the dynamics of abusive relationships,<sup>488</sup> and at least twelve states mandate by statute that expert testimony on battering be admissible in self-defense cases.<sup>489</sup> Thirty-nine states admit expert testimony on domestic violence to show that the defendant fits within the paradigm of BWS and should be considered a battered woman.<sup>490</sup> Such extensive admissibility of BWS is perhaps a tardy attempt to redress previous legal and societal insensitivity;<sup>491</sup> courts are finally recognizing that when a battered woman kills her abuser, there are actually two victims.<sup>492</sup>

Initially hailed as a powerful tool to help battered women explain the reasonableness of their behavior and state of mind, evidence of BWS may be misapplied in ways that greatly harm victims.<sup>493</sup> Some practitioners adhere too strictly to Walker's cycle theory (tension-building, then violent episodes, followed by loving contrition),<sup>494</sup> insisting that if the pattern of abuse has not precisely tracked these three phases, then the defendant cannot be considered a battered woman. Very often, the battered client does not experience abuse in either the sequence or the man-

<sup>485</sup> The term "battered woman's syndrome" was coined by clinical psychologist Lenore Walker to describe the response of abuse victims to the violence perpetrated against them. See generally LENORE WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER, *THE BATTERED WOMAN*]. Walker expanded this theory several years later. See WALKER, *supra* note 86. She theorized that domestic violence occurs in cycles typified by three phases: tension building, explosive incident, and honeymoon. See *id.* at 95–96.

<sup>486</sup> See, e.g., Dutton, *supra* note 365; see also WALKER, *supra* note 86; see also State v. Pisciotto, 968 S.W.2d 185, 186 (Mo. Ct. App. 1998).

<sup>487</sup> 13 Cal. Rptr. 2d 332, 337 n.8 (Cal. Ct. App. 1992).

<sup>488</sup> See Parrish, *supra* note 359, at 117–18.

<sup>489</sup> *Id.* at 99.

<sup>490</sup> *Id.* at 117.

<sup>491</sup> See Beecher-Monas, *supra* note 111, at 149 n.148 (citing Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 466 (1966) (explaining the ways that evidence law is impacted by politics)).

<sup>492</sup> See *People v. Evans*, 631 N.E.2d 281, 288 (Ill. App. Ct. 1994) (acknowledging that "the law can no longer ignore the fact that in reality what occurred involved two victims").

<sup>493</sup> See Moore, *supra* note 87, at 301 (pointing to the troubling nature of "battered woman jurisprudence, given its debasing female stereotyping which describes abused women as 'suffering' from battered woman syndrome").

<sup>494</sup> See WALKER, *THE BATTERED WOMAN*, *supra* note 485, at 55–70 (describing the cycle theory and three accompanying phases).



ner that Walker describes. Many battered women do not receive warning of impending violence and are never given apologies for the abuse.<sup>495</sup> However, should counsel deem BWS useful, she will want to ascertain those aspects that will be most beneficial in the instant case. While Walker characterizes the first two phases as creating “cumulative terror,”<sup>496</sup> this term is probably applicable to most victims’ abuse and not limited to those patterns that exactly follow Walker’s temporal sequence.

Additionally, many survivors are insulted by Walker’s description of battered women as engaging in “learned helplessness”—the victim’s learned, but mistaken belief that she is not powerful enough to escape.<sup>497</sup> There are many problematic aspects of this concept,<sup>498</sup> not the least of which is the notion of volition—that battered women stay in violent relationships even in the face of appealing alternatives. Learned helplessness conveniently ignores the myriad economic, social, psychological, and legal obstacles victims face,<sup>499</sup> inviting unfettered victim-blaming by courts, juries, and the public.

Furthermore, BWS’s demeaning portrayals of abused women are inaccurate and highly prejudicial in their reductionist formulations.<sup>500</sup> BWS has been used to buttress insulting, unrealistic female stereotypes such as docility, instability, weakness, and inability to protect oneself.<sup>501</sup> That juries often do not accept the traditional BWS explanations<sup>502</sup> ought to compel practitioners to search for models more accurate to their instant cases. By essentializing the definition of woman to exclude anyone who is not a white, middle-class, stay-at-home mom, traditional BWS invites the legal system to distinguish between deserving and undeserving victims. When battered women do not conform to the essentialist BWS victim model, they are disbelieved and prevented from using any positive aspect of BWS in their self-defense actions.<sup>503</sup>

Unfortunately, some lawyers and judges applying BWS reinforce the cliché that a little knowledge can be dangerous. In *Thigpen v. State*, a battered defendant charged trial counsel as ineffective for failing to use

<sup>495</sup> Author’s Experience, *supra* note 46.

<sup>496</sup> WALKER, *supra* note 86, at 96.

<sup>497</sup> See generally *id.* at 86–94.

<sup>498</sup> See Moore, *supra* note 87, at 301–02.

<sup>499</sup> See generally Buel, *Fifty Obstacles to Leaving*, *supra* note 18.

<sup>500</sup> See Moore, *supra* note 87, at 301–02.

<sup>501</sup> See, e.g., SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 75 (noting that some scholars view the feminist emphasis on victimization as reinforcing sex-stereotypical views of women as fragile and passive).

<sup>502</sup> See Parrish, *supra* note 359, at 86–87 (noting that in a study of 152 battered women’s appeals from state court decisions, sixty-three percent resulted in affirmance of the conviction).

<sup>503</sup> See Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN’S RTS. L. REP. 213, 216 (1992) (noting that BWS reinforces the very “sex-stereotypes of female incapacity which women’s self-defense work has sought to overcome”).

BWS to explain that she justifiably killed her ex-husband.<sup>504</sup> The Georgia Court of Appeals refused to fault the trial attorney, explaining that the violence perpetrated against Thigpen by her ex-husband did not span a prolonged period of time, as required by its understanding of BWS. The decision followed in part from Thigpen's trial lawyer's testimony at her hearing for a new trial, in which he said that he had considered using BWS but rejected it because inadequate time had elapsed from the first violent assault to the time of the killing.<sup>505</sup> Perhaps Thigpen would have fared better if an expert had testified that BWS's duration, frequency, and severity of abuse are not rigid confines but rather guidelines that underscore a pattern of repeated physical, sexual, or psychological abuse. Walker herself states that as few as two serious battering incidents can constitute the necessary prerequisite to develop BWS.<sup>506</sup>

The *Thigpen* court opined that, "Not only was there no evidence of a pattern of physical abuse over an extended period of time, Thigpen's swift response in seeking a restraining order and warrant for her ex-husband's arrest falls far short of demonstrating the 'psychological paralysis' that is the hallmark of the battered woman syndrome."<sup>507</sup> The record reflected that Thigpen's husband first battered her in July of 1998, with a second incident in October of 1998, after which she sought a restraining order. Thigpen shot her husband in self-defense on January 6, 1999. According to the court, seven months of abuse—July of 1998 to January of 1999—was not sufficient time to constitute an abusive relationship.<sup>508</sup> A knowledgeable expert could have educated the court about the devastating impact of verbal abuse,<sup>509</sup> as well as batterers' abilities to control victims completely through intimidation, coercion, and threats. Acute terror can be achieved without the use of physical contact, and domestic violence perpetrators tend to be quite proficient in accomplishing that end. An expert also could have taught the court that it is the severity and type of violence, not necessarily the duration, which indicates heightened danger and precipitates a victim's accurate sense of impending, life-threatening behavior by the batterer.<sup>510</sup> Courts frequently complain that abuse victims do not avail themselves of restraining or protective orders, yet in the instant case, Thigpen was penalized for doing just that.

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<sup>504</sup> 546 S.E.2d 60 (Ga. Ct. App. 2001).

<sup>505</sup> *Id.* at 61.

<sup>506</sup> See *State v. Riker*, 869 P.2d 43, 50 (Wash. 1994) (citing *LENORE E. WALKER, TERRIFYING LOVE* 102 (1989)).

<sup>507</sup> *Thigpen*, 546 S.E.2d at 62.

<sup>508</sup> *Id.*; see also *People v. Gomez*, 85 Cal. Rptr. 2d 101, 108 (Cal. Ct. App. 1999) (finding that a single, violent incident, without evidence of other physical or emotional abuse, is not enough to meet the standard for BWS, as expert testimony on BWS is admissible only if defendant can show that she is a battered woman).

<sup>509</sup> See generally *EVANS*, *supra* note 303, at 42–50 (describing the consequences of verbal abuse).

<sup>510</sup> See *Adams*, *supra* note 99, at 23–24; see also *DUTTON & GOLANT*, *supra* note 102, at 30; see also *JACOBSON & GOTTMAN*, *supra* note 92, at 148.

A Tennessee abuse victim, Georgia Hagerty, who was recently charged with first degree murder, appealed a trial court's exclusion of expert testimony on BWS.<sup>511</sup> The trial court stated that Hagerty's sanity was not in question and that she had voluntarily remained in a bad relationship rather than seek prosecutorial and police assistance. The court found that Hagerty failed to meet the burden of showing a "particularized need" to protect her right to a fair trial. In granting a discretionary review, the Tennessee Court of Criminal Appeals ruled that before the trial court could find that Hagerty had chosen to stay in a "bad relationship," an expert witness should be permitted to address the court on this issue. The appellate court also found that, when factored into the defense, BWS often refutes the premise of premeditated murder. Thus, an expert on BWS and PTSD would also help elucidate a claim of self-defense based on the battered defendant's reasonable belief of imminent danger.<sup>512</sup> This case illustrates a beneficial application of BWS—one that assists the jury and judge in better understanding the mental state of the battered defendant and in viewing the case facts in a more realistic light than they might first appear.

When applied to women of color, BWS tends to perpetuate spurious stereotypes, with the worst effect on African American women, who are stereotypically perceived as overbearing, hostile, sexually promiscuous, tough, and forceful.<sup>513</sup> Professor Shelby Moore persuasively argues that such discriminatory images interfere with African American women's ability to receive fair treatment in the legal system. If these stereotypes are believed, judges and jurors may have difficulty finding that African American battered women have experienced psychological harm and may blame them for the abuse.<sup>514</sup> Practitioners contemplating use of BWS when representing clients of color must be sure to address its inherent racial and cultural biases. Furthermore, the experiences of Latina, Asian American, Native American, and other women of color are particularly relevant, as feminist scholarship addressing race often refers only to African American and white women.<sup>515</sup> Particularly in the aftermath of September 11, 2001, counsel representing clients of Middle Eastern and South Asian descent should seek knowledgeable community members to assist in educating themselves and the courts regarding the culture, religion, and customs of the parties to the case.<sup>516</sup>

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<sup>511</sup> See *State v. Hagerty*, No. E2001-01254-CCA-R10-CD, 2002 WL 707858 (Tenn. Ct. App. Apr. 23, 2002).

<sup>512</sup> *Id.* at \*3. The appellate court also noted that the trial court could still consider cost control and scheduling in further rulings of this case.

<sup>513</sup> See Moore, *supra* note 87, at 302; see also Allard, *supra* note 87; see also Vernetta D. Young, *Gender Expectations and Their Impact on Black Female Offenders and Victims*, 3 JUSTICE Q. 305 (1986).

<sup>514</sup> See Moore, *supra* note 87, at 333.

<sup>515</sup> See Coker, *supra* note 113, at 1012.

<sup>516</sup> See, e.g., Nooria Faizi, *Domestic Violence in the Muslim Community*, 10 TEX. J.

It is argued that the conceptual framework of BWS is contrary to equal protection,<sup>517</sup> as it engenders divergent views of equality.<sup>518</sup> Practitioners should have at least a basic understanding of this debate in order to craft successful case strategies. Those adhering to notions of formal equality believe that the court must apply all law uniformly, with no consideration of gender or mitigating circumstances.<sup>519</sup> Those opposing a formal approach argue that even male-focused criminal law<sup>520</sup> is not uniformly applied to women.<sup>521</sup> Substantive equality must be the paradigm applied in battered women's cases because it emphasizes that the legitimacy of law is rooted in legal consequences. Given that consistent application of the law to both genders brings about unequal results,<sup>522</sup> substantive equality is the more persuasive paradigm. Although laws may be facially gender-neutral, the social subordination of women creates disparate outcomes.<sup>523</sup> Counsel can apply this concept by emphasizing to the court that a woman may reasonably perceive imminent, life-threatening danger at a time when a man would not.<sup>524</sup>

The impetus for case and statutory law allowing evidence of BWS was based in part on recognition of the fact that gender-neutral laws fail to accurately reflect women's experiences and accounts.<sup>525</sup> Critics of the substantive equality concept suggest that by allowing one group to utilize different rules, the proverbial slippery slope threatens orderly process as other groups, such as minorities, come to expect similar consideration. Maguigan counters that evidence of social context should be admissible to address state of mind; "the voices of overlapping groups of outsiders does not require hearing one group while silencing another."<sup>526</sup>

However, in addressing the cultural defense and BWS arguments, practitioners must take care not to reinforce negative stereotypes by stressing the "otherness" of battered women, particularly those of color. Addi-

WOMEN & L. 209 (2001).

<sup>517</sup> U.S. CONST. amend. XIV, § 1.

<sup>518</sup> See Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443, 450 (1999).

<sup>519</sup> See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 3 (1991).

<sup>520</sup> See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995) (contending that criminal law is centered on male perspectives and that treating two groups of people the same way does not necessarily result in equality).

<sup>521</sup> See Maguigan, *supra* note 107, at 383; see also Parrish, *supra* note 359, at 78-79.

<sup>522</sup> See Maguigan, *supra* note 107, at 383.

<sup>523</sup> See Schulhofer, *supra* note 520, at 2152.

<sup>524</sup> Elizabeth Schneider & Susan B. Jordon, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, in WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE 4 (Elizabeth Bochnak ed., 1981); see also Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 98 (1994).

<sup>525</sup> See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 150 (2000).

<sup>526</sup> Maguigan, *supra* note 484, at 96-98.

tionally, when the syndrome is situated with the victim, the batterer appears absolved of wrongdoing while the abused partner is branded sick or crazy. What must be included in this analysis is the factual underpinning that but for the batterer's violence, the victim would not be suffering psychological and physical manifestations of the trauma.

While the term "battered woman's syndrome" may be repugnant to some, it is now specifically cited in much statutory and case law. As a result, counsel may have little choice but to use the term once it has been determined that the jury could benefit from hearing expert testimony on the dynamics of domestic violence. Because lawyers representing battered women need a formal, general term in some cases to describe how the client has been impacted by the abuse, battered women's advocates should consider using an unessentialized model of BWS that allows counsel to adapt the general concepts to the nuances of the case.

For example, one court ruled that it may not be necessary for counsel to utilize BWS when other mitigating evidence is used. In *Brown v. State*, the Indiana Supreme Court ruled that counsel was not ineffective, though he had failed to introduce BWS, because he had presented evidence of the battered defendant's low IQ, abusive childhood, and bad relationship with her co-defendant.<sup>527</sup> While counsel did present mitigating circumstances, a review of the case indicates that the court might have benefited from hearing how these unfortunate life events impacted the battered defendant in the context of her unlawful conduct.

Consistent with the assertion that counsel should utilize mitigating domestic violence evidence in non-homicide cases,<sup>528</sup> a defense attorney successfully employed BWS in a drunk driving case. In *Commonwealth v. Barrett*, counsel argued that Barrett could not pass four field sobriety tests because of her fear of her husband's abuse. The jury acquitted Barrett after hearing that she suffered from BWS as a result of prior violence.<sup>529</sup> Similarly, a woman being tried for narcotics offenses was permitted to introduce BWS testimony to show particularized fear in support of her duress defense.<sup>530</sup> These cases represent examples of defense attorneys utilizing BWS for the benefit of their clients in non-domestic violence criminal cases. It is hoped that other defense counsel will also employ creative, albeit careful, approaches using BWS.

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<sup>527</sup> 698 N.E.2d 1132, 1139–40 (Ind. 1998). Defendant was sentenced to death for murder in the stomping death of a seven-year old girl and for not stopping her companion from sexually assaulting and choking a nine-year old girl to death.

<sup>528</sup> See *supra* Part III for discussion on use of defense options, including duress.

<sup>529</sup> See *Commonwealth v. Barrett*, No. 99-57JC000225 (D. Mass. 1999); Judge Kenneth R. Spanagel, *Gavel Raps: Tales of Justice from Across the State: New Ways to Beat the Rap?*, CHRONICLE (Ass'n of Mun./County JJ. of Ohio, Inc.), Spring 1999, at 5, available at <http://www.state.oh.us/ojc/chroniclespring99.pdf>.

<sup>530</sup> See *United States v. Marenghi*, 893 F. Supp. 85 (D. Me. 1995).

## 2. *Self-Defense*

Particularly in cases where battered women have killed their abusers in self-defense, counsel must be prepared to counter the societal double standard that often views men's violence against women sympathetically and minimally, yet simultaneously mandates that even women who have endured brutality ought not respond in self-defense.<sup>531</sup> Jurors will likely assert that the battered woman could have done *something—anything* short of killing the abuser, but they are loathe to offer realistic options. As discussed above, counsel must explain to the jury how the abuse impacted a particular battered woman's reasonable perceptions of danger.

Most states allow the use of deadly force in self-defense if three elements are met: the actor must have (1) had a reasonable belief that she faced imminent death or serious bodily harm; (2) had no other viable options; and (3) resorted to no more force than was necessary to repel the danger.<sup>532</sup> In the majority of states, the burden is on the prosecution to disprove the battered defendant's self-defense claim, although in other jurisdictions the burden of proof rests with the defendant.<sup>533</sup> A cadre of experienced defense attorneys have argued for some time that, in most cases involving battered women killing their abusers, classic self-defense should be argued without reference to BWS. Maguigan contends that the problem of too many battered women being wrongfully convicted lies not with the current self-defense laws but rather in the unequal treatment of battered women attempting to use the defense in trial.<sup>534</sup> Maguigan's empirical study of battered women's self-defense cases indicates that trial judges repeatedly issued erroneous rulings regarding the admission of testimony on domestic violence dynamics and failed to instruct the jury properly.<sup>535</sup> Appellate courts frequently overrule such decisions,<sup>536</sup> but the potential for reversal is little comfort to the battered defendants who lack appellate counsel or have spent years in prison awaiting assistance.

Maguigan's research also indicates that the perceptions of legal professionals and the public about why battered women kill are based on erroneous conjecture. However, it is often difficult to dispel wrong beliefs. The movie *The Burning Bed* portrays the true story of a brutally battered wife, Francine Hughes, who ultimately killed her husband while he slept. The movie appears to have fostered the mistaken notion that most battered women kill their abusers as they sleep or when they are

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<sup>531</sup> See SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 116–17.

<sup>532</sup> See, e.g., George E. Dix, *Self-Defense*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 946, 947–48 (Sanford H. Kadish ed., 1983).

<sup>533</sup> See Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3d 221 (1972 & Supp. 1999).

<sup>534</sup> See Maguigan, *supra* note 107, at 432, 434–47.

<sup>535</sup> See Maguigan, *supra* note 113, at 432.

<sup>536</sup> *Id.*

otherwise not posing an immediate lethal threat. However, Maguigan documented that in at least seventy-five percent of claimed self-defense cases, battered women killed their abusers in the midst of an assault or when he objectively posed an imminent threat.<sup>537</sup> Thus, practitioners must address the misperception that women who take steps to defend themselves do not fit the stereotype of the passive victim and thus do not warrant a self-defense instruction.

In *People v. Day*, the prosecutor's closing argument included the comments: "Valoree's in mutual combat here. It's Valoree and Steve in the ring again, just like happened so many other times. She's in it and this other is a lie."<sup>538</sup>

In reversing the trial court's exclusion of BWS testimony, the appellate court said it was admissible to counter stereotypes that "a woman in a battering relationship is free to leave at any time[,] . . . [that] women are masochistic[,] . . . and that they intentionally provoke their husbands . . . ."<sup>539</sup> In his ignorance (and to his client's obvious detriment), Day's defense counsel also described her behavior as "mutual combat."<sup>540</sup> The common misconception that domestic violence frequently involves mutual combat has been refuted in numerous studies,<sup>541</sup> but an onerous burden is still placed on a battered defendant when her counsel employs false characterizations of her conduct, reinforcing the inaccurate stereotypes.

Most state self-defense statutes specify that verbal threats alone do not excuse use of deadly force.<sup>542</sup> However, verbal provocation with fear-inducing acts will allow the defendant to obtain a jury instruction on self-defense.<sup>543</sup> The battered client may not identify the individual incidents of verbal abuse as threatening, but taken in their totality, they can allow counsel to introduce evidence of BWS to show the client's reasonable belief of impending harm.<sup>544</sup> Counsel's ability to prove a battered client acted in self-defense can have benefits beyond the immediate criminal case. In

<sup>537</sup> *Id.* at 397. In another five percent of the cases Maguigan found inadequate facts to ascertain if the battered defendant was under attack at the time of the killing or not. *Id.*

<sup>538</sup> 2 Cal. Rptr. 2d 916, 923 (Cal. Ct. App. 1992). Here the prosecutor refers to "this other" in referencing the defense argument that Valoree had fought back in self-defense.

<sup>539</sup> *Id.* at 923-24.

<sup>540</sup> *Id.* at 923.

<sup>541</sup> See *supra* discussion and studies cited in Part II.A.1.b.

<sup>542</sup> See, e.g., TEX. PENAL CODE ANN. § 9.32(a)(3)(A) (Vernon 1994 & Supp. 2003); see also *Valentine v. State*, 587 S.W.2d 399 (Tex. Crim. App. 1979).

<sup>543</sup> Compare *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. Crim. App. 1994) (holding that statute's standard met when deceased "walked toward" the defendant while threatening to kill her), with *Lane v. State*, 957 S.W.2d 584, 586 (Tex. App. 1997) (holding that statute's standard not met when the threat of murder was delivered by phone, lacking an explicit act).

<sup>544</sup> See *Parker*, *supra* note 71, at 555 (noting that in Georgia courts "psychological abuse can warrant the introduction of expert evidence on BPS [Battered Person Syndrome] but only if the abuse is of such an extreme nature that the defendant reasonably believes in the imminence of the victim's use of unlawful force").

*Metropolitan Life Insurance Co. v. Fogle*, a court ruled that a battered woman would be allowed to collect the proceeds of her husband's life insurance policy, even though she killed him, because it was established that she had killed him in self-defense.<sup>545</sup> Fortunately, the court clarified that although Fogle stayed with her husband after he began beating her, the insurance company was not entitled to assume that she stayed for the purpose of killing him.<sup>546</sup>

*a. Reasonableness*

The first hurdle in arguing self-defense is convincing the court that the battered defendant was reasonable in her belief of imminent harm and, thus, justified in taking necessary steps to protect herself.<sup>547</sup> Once counsel has established that a battering relationship existed and self-defense is a probable defense, most state and federal courts admit expert testimony specifically to address reasonableness, imminence, and perception of danger.<sup>548</sup> While Wyoming and Georgia have ruled that BWS testimony is not relevant to reasonableness, nineteen states have found that expert testimony is germane to the defendant's discernment of imminent danger, six deem it appropriate as to the defendant's credibility, and two find it relevant in determining the proportionality of the self-defense violence to the threat.<sup>549</sup>

While self-defense is assumed to be a gender-neutral concept in the law, the reality is that battered women do not have an equal opportunity to explain the rationality of their conduct. Gender stereotypes, coupled with assumptions that battered women are inherently irrational, pose unique challenges for defense attorneys wanting to establish reasonableness based upon available evidence.<sup>550</sup> If a battered woman's responses to the abuse, such as remaining with the abuser, appear nonsensical, then counsel must first address the rationality of this behavior before tackling the reasonableness of her criminal conduct. Reasonableness is measured from the standpoint of an ordinary and prudent person in the same situation as the defendant when the killing occurred.<sup>551</sup> Counsel must be careful in presenting a credible combination of subjective and objective viewpoints to emphasize how the batterer's history of abuse contributed to the defendant's reasonable belief that a deadly assault was imminent. A Maryland appellate court summarized this concept succinctly:

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<sup>545</sup> 419 S.E.2d 825 (S.C. Ct. App. 1992).

<sup>546</sup> *See id.* at 828.

<sup>547</sup> *See, e.g.*, TEX. PENAL CODE ANN. § 9.32(a)(3) (Vernon 1994 & Supp. 2003).

<sup>548</sup> *See* Parrish, *supra* note 359, at 85.

<sup>549</sup> *Id.* at 121.

<sup>550</sup> *See* SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 119.

<sup>551</sup> *See, e.g.*, TEX. PENAL CODE ANN. § 1.07(a)(42) (Vernon 2001); *see also* Richardson v. State, 906 S.W.2d 646, 649 (Tex. Crim. App. 1995).



The objective standard does not require the jury to ignore the defendant's perceptions in determining the reasonableness of his or her conduct . . . . [T]he facts or circumstances *must* be taken as perceived by the defendant . . . *so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way.*<sup>552</sup>

Additionally, if physical size disparity, substance abuse, or other factors are present, counsel must ensure that their relevance to the reasonableness standard is clear to the jury. The client can also testify as to the batterer's pattern of aggression against her, augmented by any paper trail documenting the history of the abuse.<sup>553</sup> A number of states specifically allow a battered defendant to provide evidence of prior abuse by the deceased in an effort to bolster her claim that her conduct was reasonable.<sup>554</sup>

However, none of these improvements matter if counsel cannot effectively employ them. Initially, battered women claiming self-defense did not fare well due to stereotypical assumptions impacting fundamental bases of equality.<sup>555</sup> Jurors will need to understand the many courageous efforts battered women employ in their daily interactions to placate or flee violent partners, with the victim-agent paradigm alternating often, even within one day. A battered woman's adaptive behavior must thus be explained as reasonable in the context of her victimization. Kathryn Abrams characterizes battered women's accommodation tactics and secret preparations for leaving as "resistant self-direction." Such indirect forms of agency are not often seen as such and thus require that counsel explain the context-specific nature of her client's actions.<sup>556</sup>

#### *b. Proportionality*

A second impediment to utilizing self-defense may be establishing that the degree of force used by the battered client was proportional to the threat, and therefore essential for self-protection.<sup>557</sup> In most states, if deadly force is utilized, the defendant must show that she was defending herself from the exercise or threatened exercise of deadly force or that she was attempting to prevent victimization (such as a sexual assault, aggravated kidnapping, or murder).<sup>558</sup> Proportionality may be difficult to establish if

<sup>552</sup> *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249, 1259 (Md. 2001) (citing *Steve v. Marr*, 765 A.2d 645 (2001)).

<sup>553</sup> The paper trail can include documentation of the abuse via medical records, protective orders, witness statements, etc.

<sup>554</sup> *See, e.g.*, TEX. CRIM. PROC. CODE ANN. art. 38.36 (Vernon 1979 & Supp. 2003).

<sup>555</sup> *See* SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 79.

<sup>556</sup> *Id.* at 85 (citing Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832-35 (1999)).

<sup>557</sup> *See, e.g.*, TEX. PENAL CODE ANN. § 9.31(a) (Vernon 1994).

<sup>558</sup> *See, e.g.*, TEX. PENAL CODE ANN. § 9.31(a)(3) (Vernon 1994).

the batterer was not in possession of a deadly weapon at the time of the attack, but counsel can argue other compelling factors such as strength and physical size discrepancies, as well as a prior history of abuse.<sup>559</sup>

*c. Immediacy/Imminence*

Because women's and men's reasonable perceptions of danger can vary, concepts of imminence and immediacy may also differ by gender.<sup>560</sup> Use of an "apparent danger" analysis may be arguable in meeting the immediacy standard. Citing prior appellate cases dealing with the "apparent danger" analysis, the dissenting justice in *Lane v. State* argued that a battered defendant's subjective belief that she was in immediate danger should be the basis for the court allowing a self-defense claim.<sup>561</sup> In *Lane*, the defendant killed her sleeping husband five hours after he explicitly detailed how he would torture and kill both her and her daughter.<sup>562</sup> Both the majority opinion and the dissent state facts that make clear that emphasis should be placed on the defendant's perception of immediate danger, regardless of its factual truth.<sup>563</sup> Such cases would support defense counsel's contention that the batterer's history of terroristic behavior against this defendant could contribute to her perception of imminent danger.<sup>564</sup>

For cases in which the battered client was not being assaulted by the abuser at the time of the homicide, counsel can argue that several states have distinguished between *immediate* and *imminent* danger.<sup>565</sup> The Kansas Supreme Court stated:

[T]he time limitations in the use of the word "immediate" are much stricter than those with the use of the word "imminent." . . . [T]he use of the word "immediate" . . . places undue emphasis on the immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which had been systematically created over a period of time. "Imminent" describes the situation more accurately.<sup>566</sup>

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<sup>559</sup> See, e.g., *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. Crim. App. 1994) (specifying that the deceased boyfriend was "well-developed and well-nourished" and weighed 186 pounds, while the defendant was "only 126 pounds at the time of the killing"). *Id.* at 125.

<sup>560</sup> See Joan L. Cordutsky, *True Equality for Battered Women: The Use of Self-Defense in Colorado*, 70 DENV. U. L. REV. 117, 133 (1992).

<sup>561</sup> 957 S.W.2d 584, 587-92, 590 (Tex. App. 1997) (citing *Jones v. State*, 544 S.W.2d 139, 142 (Tex. Crim. App. 1976)) (James, J., dissenting).

<sup>562</sup> *Id.* at 585-86, 588.

<sup>563</sup> *Id.* at 588-89.

<sup>564</sup> See, e.g., *State v. Hundley*, 693 P.2d 475 (Kan. 1985).

<sup>565</sup> For example, the TEX. PENAL CODE ANN. § 9.32(a)(3)(B) (Vernon 1994 & Supp. 2003) specifies that deadly force may be used in self-defense if it is *immediately* necessary to prevent an *imminent* attack, including aggravated kidnapping, murder, or sexual assault.

<sup>566</sup> *Hundley*, 693 P.2d at 466-68; see also *State v. Wanrow*, 559 P.2d 548, 556 (Wash.

In *Devine v. State*, the Texas Court of Criminal Appeals cited the Black's Law Dictionary definition of "imminent" as "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."<sup>567</sup> Determining the degree of immediacy within this broad definition is thus necessary to accurately fashion the scope of the defense.

The requirement that the attacker's threat be imminent *or* immediate has posed fundamental problems in some battered defendant's cases. Several scholars argue that the imminence requirement impedes justice, depending on the facts of the case. Rather than mandate the presence of *immediate* harm, the standard should be modified such that a battered defendant would be justified in killing her abuser if she reasonably believed it was *necessary*;<sup>568</sup> victims must seize the opportunity to stop the terror when they have the greatest probability of succeeding.

Conversely, others have argued for the retention of a strict imminence requirement based on the fear that unnecessary murders will transpire.<sup>569</sup> This concern can be alleviated by clarifying that a relaxed imminence mandate would not automatically result in the acquittal of any battered woman who killed her abuser. The battered defendant would still need to show that she was reasonable in perceiving it was necessary for her to resort to this drastic action in order to save her own life. If such testimony were admissible, the jury could then determine the weight to which they would accord the defendant's perceptions.

#### *d. Duty To Retreat/Right of Pursuit*

In non-confrontational self-defense cases, counsel should review state law regarding duty to retreat since some jurisdictions impose a duty to retreat even if the attacker is a co-habitant.<sup>570</sup> In certain jurisdictions, self-defense can be argued only if the victim cannot extricate herself

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1977); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983); *McGarity v. State*, 5 S.W.3d 223, 227 (Tex. Crim. App. 1999) (discussing "imminence" using the definition in *Smith v. State*, 874 S.W.2d 269 (Tex. Crim. App. 1994)); *see also* Book Review, 4 VIOLENCE AGAINST WOMEN 625, 627 (reviewing DONALD A. DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW (1996) (arguing that "imminence" should be treated as "a serious potential for impending bodily harm or death" and not "immediate")); *see also* BLACK'S LAW DICTIONARY 676 (5th ed. 1979) (defining "imminent danger" in relation to homicide as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law."); *cited in* WRIGHT, *supra* note 325, at ch. 2, p. 5.

<sup>567</sup> 786 S.W.2d 268, 270 (Tex. Crim. App. 1989).

<sup>568</sup> *See* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 404-07 (1993).

<sup>569</sup> *See* Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 31 (1986).

<sup>570</sup> *See* *State v. Gartland*, 694 A.2d 564 (N.J. 1997) (including District of Columbia, Florida, Massachusetts, New Hampshire, New Jersey, Pennsylvania, and South Carolina).

from the situation without increasing her level of danger.<sup>571</sup> However, most states, even those with a duty to retreat, provide an exemption if one is attacked in her home as long as she did not initiate the attack.<sup>572</sup> This exemption is based on the common law "castle doctrine," from the adage that "a man's home is his castle," allowing a person attacked in her own home to fight back in self-defense.<sup>573</sup>

Most states have adopted the castle doctrine absolving defendants of the duty to retreat from their homes.<sup>574</sup> For example, the Florida Supreme Court recently allowed reargument of *Weiland v. State*, ruling that it involved an issue of substantial public importance—when a battered cohabitant can kill her assailant and claim self-defense.<sup>575</sup> At the original trial, Weiland argued that she suffered from BWS and reasonably believed her husband, who had battered her for many years, would kill her if she did not shoot him. Although the court allowed an expert to testify as to the behaviors associated with BWS, the jury instruction cautioned that, "[t]he fact that the defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if by retreating she could have avoided the need to use that force."<sup>576</sup> Rejecting the BWS testimony, an eight-woman, four-man jury convicted Weiland of second-degree murder, for which she was sentenced to eighteen years in the state penitentiary.<sup>577</sup>

In the reargument, the Florida Supreme Court expressed concern that imposing a duty on battered women to retreat in their own homes may place them in greater danger, further hindering them from protecting themselves. The court cited research, including the Florida Governor's Task Force on Domestic Violence report that found "forty-five percent of the murders of women were generated by the man's rage over the actual

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<sup>571</sup> *Id.* (commenting on New Jersey law).

<sup>572</sup> Alabama is one of the jurisdictions that does not impose a duty to retreat. Beginning in 1910, Alabama has held that there is no duty to retreat even if the attacker is a cohabitant. See H. J. Alperin, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 26 A.L.R. 3d 1296, 1299 (1969 & Supp. 1998), superseded by 67 Linda A. Sharp, A.L.R. 5th 637 (1999); see also *Hutcherson v. State*, 54 So. 119 (Ala. 1910). Other states in the majority are Arkansas, Delaware, Florida, Michigan, New York, North Carolina, and Pennsylvania. See Alperin, *supra*, at 1301–07; see also Dale A. Smith, *State v. Gartland: New Jersey Leaning Toward A More Lenient Application of the Duty to Retreat Rule As It Affects Battered Women Who Kill Their Partners*, 20 WOMEN'S RTS. L. REP. 173 (1999).

<sup>573</sup> For example, Justice Cardozo stated, "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home." *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914).

<sup>574</sup> See Douglas A. Orr, *Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 74 FLA. B.J. 14, n.10 (2000) (citing 67 A.L.R. 5th 637 (1999) (listing which states use the castle doctrine and those that do not)).

<sup>575</sup> See *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999).

<sup>576</sup> *Id.* at 1048.

<sup>577</sup> The sentence was upheld by Florida's Second District Court of Appeal. See *Weiland v. State*, 701 So. 2d 562 (Fla. Dist. Ct. App. 1997).

or impending estrangement from his partner.”<sup>578</sup> Additionally, the court expressed concern that *Weiland*-type jury instructions reinforce negative and inaccurate stereotypes about domestic violence victims, including the misconception that they are free to leave at any time.<sup>579</sup> Finally, the court held that permitting a jury instruction which suggests retreat as a viable option for abuse victims wholly undermines an expert’s testimony on BWS, saying, “[W]e hold that there is no duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee . . . although there is a limited duty to retreat within the residence to the extent reasonably possible.”<sup>580</sup>

New Jersey is one of the few states providing no exemptions in its duty to retreat statute, although its courts appear to be gradually altering this position.<sup>581</sup> In *State v. Gartland*, the New Jersey Supreme Court determined that Gartland was exempt from the duty to retreat because she had been battered by her husband for twenty years before he trapped her in her bedroom, threatened to kill her, and blocked the only exit from the room.<sup>582</sup>

Insisting that battered women must flee their own homes can force them into destitution and homelessness, particularly if the criminal justice system continues to provide them with inadequate protections.<sup>583</sup> Many victims who flee their batterers are stalked and forced to return to their homes, making their attempts to comply with the duty to retreat futile. In recognizing the quandary for battered women, an Ohio court found, “There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile . . . .”<sup>584</sup> However, in several states there is no duty to retreat prior to using deadly force if the deceased illegally entered the defendant’s home,<sup>585</sup> while in other states the duty to retreat remains even with unlawful entry.<sup>586</sup>

<sup>578</sup> Orr, *supra* note 574, at 16.

<sup>579</sup> The court noted that the prosecutor emphasized that *Weiland* failed to leave her abusive husband. *See Weiland*, 732 So. 2d at 1048–49, 1054.

<sup>580</sup> *Id.* at 1058.

<sup>581</sup> *See State v. Gartland*, 694 A.2d 564 (N.J. 1997).

<sup>582</sup> *Id.* at 574.

<sup>583</sup> *See, e.g., infra* Part II.A.

<sup>584</sup> *See State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1996) (ruling that a battered woman faced with serious injury is not mandated to retreat before resorting to deadly force); *see also* GILLESPIE, *supra* note 335 (documenting that abuse victims are often unable to protect themselves from the abuse, and therefore are forced to take the first opportunity to stop the batterer).

<sup>585</sup> *See* TEX. PENAL CODE ANN. § 9.32(b) (Vernon 1994 & Supp. 2003). In Texas this represents a statutory change that took effect September 1, 1995. Prior to that time, deadly force exercised in self-defense was excused only “if a reasonable person in the actor’s situation would not have retreated.” TEX. PENAL CODE ANN. § 9.32(a)(2) (Vernon 1994).

<sup>586</sup> *See, e.g.,* Melissa Wheatcroft, *Duty to Retreat for Cohabitants—In New Jersey a Battered Spouse’s Home is Not Her Castle*, 30 RUTGERS L.J. 539 (1999).

For some time, Texas courts have held that a defendant may claim self-defense even if she pursues a retreating attacker, if the attacker is in a position to recommence the assault or threatened assault.<sup>587</sup> If there is a pause in the batterer's attack, during which the abused defendant employs deadly force, she may argue right of pursuit if she presents plausible evidence that she remained in danger during the pause in the attack. With proper evidentiary support, a jury charge on the right to pursue would be required.<sup>588</sup> Thus, in Texas, a battered woman is not required to withdraw from any confrontation with an abuser who is unlawfully in her home.<sup>589</sup> While other states allow use of self-defense without requiring retreat during an attack by a cohabiting partner,<sup>590</sup> the Texas statute is unclear as to the defendant's duty to retreat from an abuser with whom she shares a home. The jury must decide what is reasonable in a given situation. Counsel can argue that the defendant should only be required to retreat when it is possible and safe to do so.<sup>591</sup>

In some states, evidence must first be presented to show that a reasonable person would not have retreated in order to subsequently argue self-defense. The requirement was satisfied in *Halbert v. State* when the defendant testified that during an attack, her boyfriend backed her into the kitchen, which contained only a locked door and barred windows.<sup>592</sup> She testified that the front door remained the only exit, and she believed her boyfriend would not let her reach it.<sup>593</sup> On the other hand, in *Hutcheson v. State*, the battered defendant stated that she was unsure why, after her estranged husband left the room, she stayed in his apartment, placed his shotgun beyond reach, and sat on the couch and waited for him to return.<sup>594</sup> The court found that insufficient evidence had been offered to rebut the retreat mandate.<sup>595</sup> Note that there is no broad duty that a victim leave an abusive relationship; the duty to retreat occurs only after the batterer has started using illegal force against the victim.<sup>596</sup>

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<sup>587</sup> See *Taylor v. State*, 947 S.W.2d 698, 705 (Tex. Crim. App. 1997) (citing *Hunter v. State*, 128 S.W.2d 1176, 1180 (Tex. Crim. App. 1939) and *Thompson v. State*, 276 S.W. 699, 702 (Tex. Crim. App. 1925)).

<sup>588</sup> See *Taylor*, 947 S.W.2d at 705; see also *McElroy v. State*, 455 S.W.2d 223, 225 (Tex. Crim. App. 1970) (finding that a right to pursue jury instructions must be allowed if the evidence warrants).

<sup>589</sup> This would be the case, for example, if the abuse victim has a protective order commanding that the perpetrator vacate the home and have no contact with the victim.

<sup>590</sup> See, e.g., ARK. STAT. ANN. § 5-2-607(b)(1) (2002); ME. REV. STAT. ANN. tit. 17-A, § 108(2)(C)(3)(a) (West 1983); N.Y. PENAL LAW § 35.15(2)(a)(i) (1997); 18 PA. CONS. STAT. ANN. § 505(b)(20)(ii)(A) (West 1998).

<sup>591</sup> See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 284-85 (2002).

<sup>592</sup> 881 S.W.2d 121 (Tex. Crim. App. 1994).

<sup>593</sup> See *id.* at 125.

<sup>594</sup> 899 S.W.2d 39 (Tex. Crim. App. 1995).

<sup>595</sup> See *id.* at 42.

<sup>596</sup> See *Halbert*, 881 S.W.2d at 125 (finding that self-defense is not excluded by the opportunity to retreat before the battering husband's attack, because the duty to retreat was

The duty to retreat requirement is understandably harder to establish when a battered woman kills her abuser absent a confrontation. Nonetheless, counsel can present evidence of the serious history of abuse and its deleterious effect on the battered client. Expert testimony may also be utilized to bolster the client's credibility, stressing the impact of severe abuse over time.<sup>597</sup> Such testimony may establish that the battered defendant had a reasonable belief that retreat was not a viable option for escaping the batterer.<sup>598</sup>

### 3. *Duress*

Outside the cases where an abuse victim killed her batterer, courts and feminist legal scholarship have recognized that battered women can be coerced or forced into unlawful conduct,<sup>599</sup> providing a basis for a duress defense. Victims have been forced to prostitute themselves, forge checks, commit burglaries, and deal, carry, or purchase drugs, among other varied crimes.<sup>600</sup> Under common law, a prima facie defense of duress requires that the defendant prove she had a reasonable belief of serious bodily injury or imminent death if she failed to comply with the batterer's demands to commit the crime. She must further show that the abuser's threat was the cause of her unlawful conduct.<sup>601</sup> The Model Penal Code (MPC) provides duress as a defense for one who engages in criminal acts as a result of the use or threatened use of force to which a reasonable person would have succumbed.<sup>602</sup> It should be noted that the MPC specifies that if a defendant is reckless, or in some instances negligent, by positioning herself such that it is likely she would be the victim

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presented only after the defendant comprehended the danger in the unlawful force of the attack).

<sup>597</sup> See TEX. CRIM. PROC. CODE ANN. art. 38.36(b) (Vernon 1979 & Supp. 2003) (providing for the admissibility of prior history of abuse and expert testimony on its impact by the deceased against a defendant).

<sup>598</sup> See, e.g., Lane v. State, 957 S.W.2d 584 (Tex. App. 1997) (James, J., dissenting) (citing Hamel v. State, 916 S.W.2d 491, 494 (Tex. App. 1996)) (maintaining that an actor is not required to retreat without a reasonable belief that she can escape the imminent threat of harm).

<sup>599</sup> See generally RICHIE, *supra* note 22; see also Boland, *supra* note 331, at 605; see also Meredith Blake, *Coerced into Crime: The Application of Battered Woman Syndrome to the Defense of Duress*, 9 WIS. WOMEN'S L.J. 67, 68 (1994); see also State v. Williams, 937 P.2d 1052, 1058 (Wash. 1997) (recognizing that a batterer could have coerced a woman accused of welfare fraud to take additional public assistance); State v. Lambert, 312 S.E.2d 31, 33–35 (W. Va. 1984) (also acknowledging the batterer's ability to coerce victim into unlawful conduct); but see Neelley v. State, No. CR-91-1036, 1993 WL 271873 (Ala. Crim. App. June 18, 1993) (stating that battered woman's syndrome can be argued only when the defendant has killed her abuser, not when committing crimes against a third party).

<sup>600</sup> See generally RICHIE, *supra* note 22.

<sup>601</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 432–34 (2d ed. 1986) (describing duress defense).

<sup>602</sup> See MODEL PENAL CODE § 2.09(1) (2001).

of duress, then such a defense would not be available.<sup>603</sup> A prosecutor may argue that if the battered woman stayed with the abuser after the first assault, she voluntarily assumed a position from which she would be threatened with harm if she would not conspire in the crime. Defense counsel should argue why the particular abuse victim was unable to leave,<sup>604</sup> using a detailed description of the batterer's past abuse to capture the cumulative impact on the client's state of mind.

The MPC definition can be distinguished from some state statutes because, although it does not require immediate danger or deadly force, it can be argued even in defense to homicide. Specifically, it allows the defendant to argue that the batterer's prior abuse effectively brainwashed her.<sup>605</sup> Most jurisdictions, however, do not permit the duress claim in murder cases because the basis for exoneration is that the defendant avoided greater harm by commission of the crime.<sup>606</sup> By adopting the MPC definition of duress in whole or in part, a substantial minority of states<sup>607</sup> have paved the way for counsel to utilize this defense in a greater variety of cases involving battered women charged with crimes. Particularly when charged with narcotics offenses, a well-presented defense of duress can provide the jury with a new lens through which to view the battered client's conduct. In *State v. Riker*, a battered defendant who was convicted of selling cocaine offered a novel duress argument based on *prior* abuse by men, not including the one who coerced her into delivering drugs.<sup>608</sup> Riker contended that the police informant's verbal threats induced her to sell drugs, based upon her history of being battered in other relationships. While Riker was allowed to testify about her lengthy history of prior physical and sexual abuse, she was not permitted to introduce expert testimony on BWS to explain how the previous abuse caused her to feel forced into complying with the informant's demand that she sell drugs.<sup>609</sup> Domestic violence expert Dr. Karil Klingbeil testified that Riker could not distinguish the informant's threats from those of her previous abusers. Riker proffered Klingbeil's expert testimony to support her du-

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<sup>603</sup> *Id.* at § 209(2).

<sup>604</sup> See generally Buel, *Fifty Obstacles to Leaving*, *supra* note 18.

<sup>605</sup> See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1344-45 (1989).

<sup>606</sup> See LAFAYE & SCOTT, *supra* note 601, at 434. Similarly, unlawful acts are excused with the necessity defense on the assumption that the avoided harm is greater than the committed offense. See MODEL PENAL CODE § 3.02(1)(a) (1995).

<sup>607</sup> See ALASKA STAT. § 11.81.440 (Michie 1983); ARK. CODE ANN. § 5-2-208 (Michie 1987); COLO. REV. STAT. ANN. § 18-1-708 (West 1986); CONN. GEN. STAT. ANN. § 53a-14 (West 1985); DEL. CODE ANN. tit. 11, § 431 (West 1987); HAW. REV. STAT. ANN. § 702-231 (West 1985); KY. REV. STAT. ANN. § 501.090 (Michie 1985); MO. ANN. STAT. § 562.071 (West 1979); N.J. STAT. ANN. § 2C:2-9 (West 1982); N.Y. PENAL LAW § 40.00 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 309 (West 1983); S.D. CODIFIED LAWS § 22-5-1 (Michie 1988); UTAH CODE ANN. § 76-2-302 (1978).

<sup>608</sup> 869 P.2d 43 (Wash. 1994).

<sup>609</sup> See *id.* at 45, 47-51.



ress defense by explaining that her apprehension of the informant's impending harm was reasonable.<sup>610</sup>

While stating that a previously battered woman would feel endangered because of the repetitive nature of domestic violence, Klingbeil acknowledged that it was novel to apply BWS to a case in which no intimate relationship existed. On that basis, the trial court excluded the testimony.<sup>611</sup> In declining to apply BWS, the court cited Walker's definition of a battered woman as one who is intimately involved with the person harming her.<sup>612</sup> Thus, *Riker* highlights yet another potential concern when employing BWS—its limited scope. *Riker* exemplifies the need for an expansion of BWS to address precisely such situations where, but for the history of abuse, the battered woman would likely not have responded to current threats in the same manner.

On appeal, the Washington Supreme Court acknowledged that, "Here, the expert testimony was offered to show that Riker's history of abuse built a cumulative patina of fear which resulted in her inability to resist or escape Burke's alleged coercion."<sup>613</sup> Ultimately, however, it affirmed the trial court's ruling, expressing its unwillingness to apply BWS in this context in the absence of precedent. Barring Klingbeil's testimony reflects judicial skepticism surrounding the defense of duress. The court cited Washington State's duress statute requiring "immediate" harm,<sup>614</sup> as opposed to its self-defense statute mandating only "imminent" harm.<sup>615</sup> Noting that duress may not be used as a defense against manslaughter or murder,<sup>616</sup> the court explained:

Whereas someone who acts in self-defense acts against the very person pressuring him or her, an actor who successfully raises a duress defense is freed from criminal liability for harm caused to an innocent third party. The more stringent requirements for the duress defense are a result of the more socially harmful outcome allowed by this defense, and reflect society's conclusion that, as a matter of public policy, the defense should be limited.<sup>617</sup>

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<sup>610</sup> *Id.* at 46.

<sup>611</sup> *Id.* at 46–47. Riker was found guilty on four counts and received a sentence of forty-six months on each count (at the lowest end of the standard range), to be served concurrently. *Id.* at 47, 53.

<sup>612</sup> *Id.* at 49–50 (citing WALKER, *supra* note 506, at 102).

<sup>613</sup> *Id.* at 50.

<sup>614</sup> *Id.* at 51 (citing WASH. REV. CODE ANN. § 9 A.16.060 (West 2000)).

<sup>615</sup> *Id.* (citing WASH. REV. CODE ANN. § 9 A.16.050 (West 2000)); *see also* State v. Janes, 850 P.2d 495, 506 (Wash. 1993) (distinguishing between "imminent" and "immediate").

<sup>616</sup> *Riker*, 869 P.2d at 51 (citing WASH. REV. CODE ANN. § 9 A.16.060(2) (West 2000)).

<sup>617</sup> *Id.*

While Riker and the State agreed that she had the burden of proof, Riker argued, as part of her request for a new trial, that the jury should not have been instructed that she had to prove duress by a preponderance of the evidence. Riker asserted that she need only have created a reasonable doubt as to her guilt, a standard more easily met than preponderance of the evidence. The court responded that inherent in claiming duress is the admission that the defendant committed the offense but has an excuse for doing so. Duress does not negate elements of the crime, thus it requires the higher standard of preponderance of the evidence. Furthermore, the court convincingly noted that it would be impossible for a defendant to meet the burden of creating reasonable doubt given the premise that she committed the offense and is simply offering a rationale that will pardon the conduct.<sup>618</sup>

The Northwest Women's Law Center's amicus brief argued that it is the State's burden to prove the absence of duress, based on Washington case law in *State v. Davis*.<sup>619</sup> However, the Washington Supreme Court stated that *Davis* is not consistent with a prior decision finding that the burden does indeed lie with the party trying to prove duress.<sup>620</sup> As such, it is worth counsel's effort to assess this burden of proof as grounds for appeal. In sum, *Riker* illustrates the need for counsel to scrutinize the underlying rationale of proffered arguments to ensure that they further their clients' interests.

The dissent in *Riker* offers much fodder for future arguments. Justice Utter states that it is legally inconsequential that Riker presented case facts different from prior BWS cases. He argues that the application of BWS "in this case would have been *identical* to the use we have held proper in other cases: to permit the jury to evaluate whether the defendant acted under a reasonable apprehension of harm given the effect of past abuse on that person's perception of harm."<sup>621</sup> As does the majority opinion, Justice Utter compares Washington's duress and self-defense statutes, focusing on the requirement of each that the jury assess the defendant's fear of harm from the defendant's reasonable perspective. He asserts that Washington case law confirms that the primary purpose of BWS testimony is to educate jurors regarding the impact of serious abuse on a victim's state of mind generally, and on her apprehension of danger specifically.<sup>622</sup> He further argues that because Riker wanted to introduce evidence regarding how an abuse victim gauges danger, it is irrelevant

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<sup>618</sup> *Id.* at 51–52.

<sup>619</sup> *Id.* at 51, n.6 (citing *State v. Davis*, 618 P.2d 1034 (Wash. Ct. App. 1980)).

<sup>620</sup> *Id.* (citing *State v. Razey*, 341 P.2d 149, 152 (Wash. 1959)).

<sup>621</sup> *Id.* at 54 (Utter, J., dissenting).

<sup>622</sup> *Id.* In support, the dissent cites *State v. Allery*, 682 P.2d 312 (Wash. 1984); *State v. Ciskie*, 751 P.2d 1165 (Wash. 1988); *State v. Janes*, 850 P.2d 495, 502 (Wash. 1993). *Riker*, 869 P.2d at 54.

that she and the informant did not have an intimate or physically abusive relationship.<sup>623</sup>

Citing expert testimony concerning Riker's early abuse by her stepfather and abuse up to the time of the offense, the dissent argues that when an abuse victim's discernment of danger has been altered, it is not necessarily material that the prior abuse was committed by a person other than the one who triggered the present fear response. It chides the majority's "unduly narrow view of the evidentiary function of [BWS],"<sup>624</sup> explaining that while it is usually applied in the context of a victim in a violent intimate relationship, BWS is technically a "psychological condition" induced by a pattern of serious abuse. The expert testified that Riker was a battered woman and, as such, likely to assess potential harm from that perspective. The dissent concludes that Klingbeil's expert testimony would have helped the jury better understand Riker's assertion that she was fearful of resisting the informant.<sup>625</sup> *Riker* is thus worth examining not only because it addresses a battered woman's crimes subsequent to violent relationships, but also for the dissent's blueprint for making creative duress arguments.

#### 4. *Heat of Passion/Provocation*

Sudden passion can be raised as a mitigating circumstance if the person killed caused sufficient provocation to justify the crime.<sup>626</sup> While for battered defendants the justification cannot be based solely on prior provocation, previous abuse constitutes a relevant and important basis of the defendant's actions. Once a defendant has presented evidence of sudden passion, she must be permitted a jury instruction even if the mitigating circumstance is weak, challenged, or implausible.<sup>627</sup> Practitioners must raise this issue with caution, for by characterizing the battered woman's conduct as provoked or as mutual combat, it is easier to find guilt, rather than viewing her violent response to provocation in light of her scant options.<sup>628</sup>

<sup>623</sup> See *Riker*, 869 P.2d at 54–55.

<sup>624</sup> *Id.* at 55–56.

<sup>625</sup> *Id.*

<sup>626</sup> See TEX. PENAL CODE ANN. § 19.02(a)(2) (Vernon 1994) ("'Sudden passion' means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.>").

<sup>627</sup> See, e.g., *Williams v. State*, 35 S.W.3d 783 (Tex. Crim. App. 2001).

<sup>628</sup> See, e.g., *State v. Tierney*, 813 A.2d 560 (N.J. Super. App. Div. 2003) (holding where defendant appealed first-degree murder conviction, that: (1) instructions on self-defense and passion/provocation manslaughter adequately apprised jury to consider evidence of BWS; and (2) principles of imperfect self-defense were adequately incorporated into instructions given for murder, aggravated manslaughter, passion/provocation manslaughter, and reckless manslaughter); see Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 497–99 (1996).

### 5. *Insanity/Diminished Capacity*

Some defense counsel choose to argue insanity or diminished capacity out of the mistaken belief that it is the only excuse a jury will accept. They reason that a woman must be insane if she kills her partner, regardless of the severity of past abuse. It is only within the past few decades that this attitude has gradually changed,<sup>629</sup> such that insanity is no longer the prevalent defense for battered women. In the past, courts found it more acceptable to acquit based on insanity than to recognize that severe abuse could provoke a rational woman to defend herself with violence.<sup>630</sup> The paradoxical implication was that battered women had to forfeit their rational identity to salvage their physical safety. A finding of insanity allowed the judiciary to ignore evidence of widespread physical and sexual abuse within families, and the resulting ire of the victims.<sup>631</sup>

Although there might be cases in which insanity would be an appropriate defense strategy, it is usually an option of last resort.<sup>632</sup> This is due, in part, to the recognition that a battered defendant's behavior is often a logical reaction to the abuse, not pathological.<sup>633</sup> As public awareness of domestic violence has increased, jurors are more receptive to understanding facts constituting self-defense, rather than assuming that insanity is the only tenable explanation for the battered defendant killing her abuser.<sup>634</sup>

In 1978, defense attorney Ayron Greydanus successfully employed the insanity defense on behalf of Francine Hughes, in the now infamous "burning bed" case.<sup>635</sup> Pleading insanity allowed Greydanus to present evidence of the long history of horrific abuse endured by Hughes. In his argument, Greydanus framed Hughes's eventual insanity as the result of her husband's longstanding brutality, rather than as any inherent frailty in her as a woman.<sup>636</sup> Based on the previous year's success in *State v. Wanrow*,<sup>637</sup> feminists tried to convince Greydanus to rely solely on self-defense in the Hughes's case. However, he believed pleading insanity to be a

<sup>629</sup> See Schneider & Jordon, *supra* note 524, at 29.

<sup>630</sup> See ANN JONES, *WOMEN WHO KILL* 158–66 (1996).

<sup>631</sup> See Stark, *supra* note 20, at 992–95.

<sup>632</sup> See WRIGHT, *supra* note 325, at ch. 2, p. 8.

<sup>633</sup> See Mary Ann Dutton, *Posttraumatic Stress Disorder Among Battered Women: Analysis of Legal Implications*, 12 BEHAV. SCI. & L. 215, 216, 221 (1994); see also Dowd, *supra* note 5, at 578; see also Moore, *supra* note 87, at 301–02.

<sup>634</sup> See Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13 L. & HUM. BEHAV. 253, 262–65 (1989).

<sup>635</sup> See FAITH McNULTY, *THE BURNING BED* (1980).

<sup>636</sup> See Schneider & Jordon, *supra* note 524, at 18–20 (indicating that sex bias exists in the legal doctrine of imminence).

<sup>637</sup> *State v. Wanrow*, 559 P.2d 548 (Wash. 1977). Although pleading self-defense and impaired mental state, in 1974 Wanrow was sentenced to two twenty-two-year sentences for killing an attacker whom she had reason to believe was a rapist and child molester. *Id.* at 550–51. The Washington appellate court held that a woman's reasonable perception of danger could be different than a man's. *Id.* at 559.

more prudent option given the historic biases against women who use violence to protect themselves.<sup>638</sup> It should be noted that a finding of insanity triggers commitment to a mental institution for psychiatric examination, and in most states, commitment for a time period up to the maximum allowed had the defendant been convicted.<sup>639</sup> Thus, an acquittal based on insanity does not free the defendant, and such a ruling will cause substantial difficulties for her in seeking employment, child custody, and living day-to-day life.<sup>640</sup>

### 6. *Tyranny Murder*

Professor Jane Cohen's provocative article suggests that when suppressed by the ruthless domination of tyrants, people throughout history have been justified in using violence—even murder—to escape. She argues that when a private tyrant, here a violent partner, uses the same tactics, the oppressed victim ought to be viewed as morally justified if she kills the tyrant to survive.<sup>641</sup> From an historical perspective, the tyrant need not have been in the midst of attacking the victim when the killing took place. Rather, the victim was deemed justified in killing the tyrant because of pervasive oppression. This argument obviates the need for addressing imminence, yet allows ample room for explaining the details of the tyrannical regime—in the case of a battered defendant, the long history of abuse. While perhaps a long shot, the argument is worth considering if counsel believes the court could be further persuaded by this moral justification. The concept of tyranny murder may constitute a core theory or underlying theme of counsel's defense, particularly in those cases where a battered woman kills her abuser at a time other than when under attack.

### D. *Post-Conviction Remedies*

In cases where battered women have been wrongly convicted, appellate counsel should be available to remedy the injustice.<sup>642</sup> When deciding which of the post-conviction remedies to pursue on behalf of an

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<sup>638</sup> See Schneider & Jordon, *supra* note 524, at 15–18.

<sup>639</sup> See, e.g., TEX. CRIM. PROC. CODE ANN. art. 46.03(4)(d)(1), (d)(7) (Vernon 1979 & Supp. 2003).

<sup>640</sup> The stigma of mental illness certainly extends to those battered women claiming even temporary insanity, as employers, courts, neighbors, and others who come in contact with her as she attempts to reconstruct her life.

<sup>641</sup> See Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and For the Criminal Law?*, 57 U. PITT. L. REV. 757, 790 (1996).

<sup>642</sup> For example, Texas Supreme Court Justice Deborah Hankinson and I have recently established a project through the Texas Bar Association Appellate Division's Pro Bono Section in which appellate attorneys are paired with law students to represent battered women in prison.

incarcerated, abused client, counsel must strategize based on the case facts, current political climate, amount of time already served, composition of and access to the state parole board, political connections with the governor's office, allies willing to write on the client's behalf, and any unique aspects of the case. Appeals are usually brought first, and only when exhausted are parole and clemency<sup>643</sup> considered. Clemency encompasses amnesty, commutations, pardons, remissions of fines and forfeitures,<sup>644</sup> and reprieves.<sup>645</sup> Amnesty is limited to the government's forgiveness of political offenses, while commutation shortens the original sentence to a reduced punishment.<sup>646</sup> In most jurisdictions, the governor also has the power to officially change the offense listed in the defendant's criminal record to a lesser-included offense and thereby justify a reduced sentence.<sup>647</sup> Counsel must be fully familiar with the distinctions in her state in order to craft the most appropriate post-conviction remedy.

As pardons can be either absolute or conditional,<sup>648</sup> counsel will want to seek a complete pardon. However, if political circumstances or case specifics render that request unlikely, attendance at a battered women's support group or community service at a shelter may suffice as the condition of release. Collaborations among community advocates, law professors, law students, and attorneys have started clemency initiatives. Maryland, Ohio, Florida,<sup>649</sup> California, Illinois,<sup>650</sup> Massachusetts, New York, Texas, and Colorado are among the states in which advocates have

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<sup>643</sup> Clemency refers to the power of the President or a governor to pardon a criminal or commute a criminal sentence. BLACK'S LAW DICTIONARY 245 (7th ed. 1999). *See, e.g.*, MONT. CODE ANN. § 46-23-301(1)(a) (2001) ("Clemency" means kindness, mercy, or leniency that may be exercised by the governor toward a convicted person. The governor may grant clemency in the form of: (i) the remission of fines or forfeitures; (ii) the commutation of a sentence to one that is less severe; (iii) respite; or (iv) pardon.').

<sup>644</sup> Remission of fines and forfeitures can discharge indebtedness that a battered defendant may have been ordered to pay as part of her sentence.

<sup>645</sup> A reprieve is granted to postpone an execution, generally because new evidence or creative arguments have been employed.

<sup>646</sup> *See Ammons, supra* note 108, at 25. Commutation describes a governor determining that the sentence will be shortened or commuted, allowing the defendant to go free without parole supervision upon release.

<sup>647</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2967.01(C) (West 2002) (stating that "'Commutation' or 'commutation of sentence' means the substitution by the governor of a lesser for a greater punishment . . . . After commutation, the commuted prison term shall be the only one in existence."); *see also* MD. CORR. SERV. § 7-101(d) (2002) (stating that "'Commutation of a sentence' means an act of clemency in which the Governor, by order, substitutes a lesser penalty for the grantee's offense for the penalty imposed by the court in which the grantee was convicted").

<sup>648</sup> *See* Harold Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL L. REV. 1665, 1679 (2001).

<sup>649</sup> In 1999, Florida advocates started The Battered Women's Clemency Project, in response to the Florida Supreme Court's reversing itself, in *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999) (determining that an abuse victim who kills a dangerous co-occupant of her home, in self-defense, can claim the "Castle" defense).

<sup>650</sup> *See* Illinois Clemency Project for Battered Women, at <http://pubweb.acns.nwu.edu/~mva472/clemency1.html> (last updated Feb. 4, 2002).

assisted incarcerated battered women in bringing clemency petitions for release, focusing on those cases in which the abuse victim was convicted of killing her abuser.<sup>651</sup> The National Clearinghouse for the Defense of Battered Women estimates that at least 124 battered women in twenty-three states have been released from prison since 1978 by both Republican and Democratic governors.<sup>652</sup>

Often in battered women's self-defense cases, the issue is not whether the woman committed the offense, but rather how to craft credible arguments to mitigate those actions. In *Ex parte Grossman*, the Supreme Court noted the necessity of clemency power as a moral check on courts' judgments.<sup>653</sup> Though a 1925 case, *Grossman* contains language that may be helpful for a battered defendant:

The administration of justice by the courts is not necessarily always wise or certainly considerate of *circumstances which may properly mitigate guilt*. To afford a remedy, it has always been thought essential in popular governments . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.<sup>654</sup>

In seeking appellate or clemency remedies, counsel will want to consider citing *Grossman* for its attention to the importance of arguing guilt mitigation. It is worth reminding the decision makers that clemency in no way confers a "not guilty" finding; it is, instead, the best way for the government to address the moral dilemma of crimes committed in the context of no-win, life-threatening circumstances.

The President's power of clemency is absolute. However, state constitutions vary as to whether there exist limitations on a state's gubernatorial clemency powers.<sup>655</sup> Colorado's clemency regulations offer practitioners guidance in specifying that its board may recommend commuting a sentence in order to remedy sentencing inequities, reward excellent in-

<sup>651</sup> See Ammons, *supra* note 108, at 4, n.8.

<sup>652</sup> See Pamela Burke, *Gov. Davis Commutes Battered Woman's Sentence*, WOMEN'S-ENEWS (May 17, 2002), at <http://www.womensenews.org/article.cfm/dyn/aid/911/context/archive>.

<sup>653</sup> 267 U.S. 87, 120–21 (1925).

<sup>654</sup> *Id.* (emphasis added).

<sup>655</sup> See Michael A. G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 355–56 (1996); see also Daryl M. Schumacher, *Intruders at the Death House: Litigating Third-Party Intervention in Executive Clemency*, 30 J. MARSHALL L. REV. 567, 571 (1997). In some states the parole board is appointed by the governor, and therefore is under his direct or indirect control. For example, the Texas Board of Pardons and Paroles is appointed by the governor, though he does not initially appraise cases under consideration. Florida's clemency board is comprised of the governor and several state cabinet members who meet quarterly to review cases. See Linda A. Osmundson, *Battered Women Imprisoned for "Crime" of Self-Defense*, ST. PETERSBURG TIMES, Dec. 18, 1991, at 2.

stitutional conduct, address compelling cases of incarcerated felons, or promote the interest of justice.<sup>656</sup> Professors Jacqueline St. Joan and Nancy Ehrenreich offer insights regarding strategies for filing clemency petitions in Colorado:

We had neither the time, the information, nor the resources to conduct an empirical study of sentencing patterns, so we had to rely on the facts of our particular cases. Even then only two of our cases revealed disparities in sentences of co-defendants. None of our clients had exceptional or exemplary institutional behavior, although they were generally good institutional citizens. We could argue that our clients' circumstances were "compelling" but they were hardly "unique," given the quotidian nature of domestic violence. In the end we conflated the "compelling" and "uniqueness" criteria, to argue that the interests of justice warranted grants of clemency to our clients because the very ordinariness of their experiences—indicating as it did how pervasive domestic violence is—was part of what made them so compelling.<sup>657</sup>

Utilitarian arguments, specifically that society will not benefit by the battered client's continued incarceration, should also be advanced. Counsel can argue that one of the fundamental tenets of criminal law is that punishment should be proportional to the offense committed. Mitigating circumstances—such as a history of dire abuse—should also be factored into determination of an appropriate sentence. When such consideration has not been taken at the trial level, clemency and early parole can afford a small measure of corrective remedy.

In 1991, Ohio Governor Richard Celeste took the unprecedented action of granting clemency to twenty-eight imprisoned battered women whom his staff determined had acted in self-defense when killing their abusers. Governor Celeste lowered twenty-seven of the women's sentences to time served plus 200 hours of community service, and in one case, afforded a pardon.<sup>658</sup> A pardon is generally considered the most difficult post-conviction remedy to obtain, because the governor must fully excuse the crime and most battered defendants lack the political muscle to engender such sympathies.<sup>659</sup> Governor Celeste pardoned

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<sup>656</sup> See Jacqueline St. Joan & Nancy Ehrenreich, *Putting Theory into Practice: A Battered Women's Clemency Clinic*, 8 CLINICAL L. REV. 171, 195 (2001) (citing Colorado Executive Order Reorganizing the Executive Clemency Advisory Board, B 00587 (1987)).

<sup>657</sup> *Id.* at 195–96.

<sup>658</sup> Beginning in 1989, Governor Celeste decided to review the cases of battered women in prison. See Ammons, *supra* note 108, at 2–3.

<sup>659</sup> See, e.g., OHIO REV. CODE ANN. § 2967.01(B) (West 2002) ("'Pardon' means the remission of penalty by the governor in accordance with the power vested in the governor by the constitution."); see also S.C. CODE ANN. § 24-21-940(A) (Law. Co-op. 2002)



Kathy Thomas, a battered woman who had completed her sentence<sup>660</sup> but whose trial judge refused to admit evidence of BWS, stating that such evidence was not scientifically based.<sup>661</sup>

Citing the desire to effect systemic changes in the trial process, Governor Celeste delineated five components of his clemency project: (1) conducting a thorough evaluation of the female prisoners to assess which cases warranted further review; (2) providing domestic violence educational trainings for the Ohio Department of Rehabilitation and Corrections, the parole board, and public defenders; (3) making available prison personnel to help with the petitions; (4) ensuring the parole board conducts investigations and hearings; and (5) having his senior staff review the cases and provide recommendations to him.<sup>662</sup> Closely following the recommendations of Linda Ammons, his legal counsel, Governor Celeste reviewed 123 cases, ultimately denying clemency for half and sending another quarter back to the parole board for more fact-finding because the data on those women was not sufficient to make a determination.<sup>663</sup>

Soon after Governor Celeste's action, Maryland Governor Donald Shaefer commenced a similar initiative with incarcerated battered women in his state,<sup>664</sup> ultimately commuting the sentences of eight convicted battered women because they killed in self-defense and were not threats to society.<sup>665</sup> Encouraged by the successful efforts in Ohio and Maryland, advocates in Massachusetts worked closely with the media and the governor's office to lay the groundwork for similar action.<sup>666</sup> Advocates

("‘Pardon’ means that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided.”).

<sup>660</sup> See Ammons, *Dealing With the Nastiness*, *supra* note 301, at 896 n.13.

<sup>661</sup> *Id.* (citing *State v. Thomas*, 423 N.E.2d 137, 138 n.1 (Ohio 1981)). The Governor also reduced the death sentence of Beatrice Lampkin to life in prison. *Id.* at 896–97 n.14.

<sup>662</sup> Linda L. Ammons, *Clemency: Post Conviction Relief for Battered Women Who Kill Their Abusers*, in *DEFENDING BATTERED WOMEN IN CRIMINAL CASES*, 6 (1992).

<sup>663</sup> See Ammons, *Dealing With the Nastiness*, *supra* note 301, at 897. Unfortunately, Governor Celeste left office prior to obtaining the additional facts and taking action on behalf of those women.

<sup>664</sup> See Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 725 (1994). While Governor Celeste had been committed to domestic violence issues prior to granting clemency in these cases, Governor Shaefer became involved only after Rep. Constance Morella (R-Md.) persuaded him to meet with several incarcerated battered women. *Id.* at 725. Schaefer used the Maryland Parole Commission to review and send recommendations to him regarding applications for pardon, parole, commutations, and clemency. *Id.* (citing MD. CODE ANN. art. 41, §§ 4-504(b)(3) (1993) (repealed 1999)).

<sup>665</sup> See Janet Naylor, *Schaefer to Free 8 Battered Women Who Fought Back*, WASH. TIMES, Feb. 20, 1991, at A1. He had considered twelve battered women's cases, based on information gathered by advocates from the House of Ruth shelter and the Public Justice Center. See Peter Jensen, *Schaefer, Moved by Tales of Abuse, Commutes Sentences of 8 Women*, BALT. MORNING SUN, Feb. 20, 1991, at 1A.

<sup>666</sup> See Editorial, *Women Doubly Victimized*, BOSTON GLOBE, Sept. 5, 1991, at 16. This editorial recommended that Governor William Weld examine the cases of battered women

documented that battered women acting in self-defense received particularly severe sentences,<sup>667</sup> with Walker establishing that “[t]he average length of time a woman today spends in prison for killing her husband . . . is 2 1/2 years. In this state, you can’t even think about getting her out until she spends 10 years.”<sup>668</sup> In response to these efforts, Governor William Weld issued new advisory commutation guidelines for an abused person seeking discharge.<sup>669</sup> In promulgating a uniform policy for petitions, Governor Weld emphasized that commutation was both “an extraordinary remedy and . . . an integral part of the correctional process.”<sup>670</sup> When the Parole Board began clemency hearings in July of 1992, eight cases had been brought forward—they were called the “Framingham Eight” because all were held in the state penitentiary for women in Framingham, Massachusetts.<sup>671</sup> Seven of the eight were eventually released with commuted sentences or early parole.<sup>672</sup>

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in prison for acting in self-defense against their batterers.

<sup>667</sup> See Stan Grossfeld, “*Safer*” and in Jail: Women Who Kill Their Batterers, BOSTON GLOBE, Sept. 2, 1991, at Metro/Region 1.

<sup>668</sup> *Id.*

<sup>669</sup> See Frank Phillips, *Weld Relaxes Prison Appeal by Battered Women*, BOSTON GLOBE, Sept. 27, 1991, at Metro/Region 17.

<sup>670</sup> Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 733 (1994) (citing COMMUTATION GUIDELINES AND PETITION (1)(c)(iii) (issued by Governor Weld, Sept. 1991)).

<sup>671</sup> See Toni Locy, *Prosecutor Urges Board to Reject Commutation Plea*, BOSTON GLOBE, July 29, 1992, at Metro/Region 16; see also Toni Locy, *Pardon Board Hears First Tale of Abuse: Woman Who Killed Mate Seeking Commutation*, BOSTON GLOBE, July 28, 1992, at Metro/Region 1 (stating that Elaine Hyde, who plead guilty to manslaughter in the stabbing death of her husband, was the first to have a hearing); Toni Locy, *Weld Urged to Free 8 Women: Commutations Sought for Inmates Who Killed Alleged Abusers*, BOSTON GLOBE, Feb. 15, 1992, at Metro/Region 15. The *Boston Globe*, Boston’s most highly regarded local newspaper, also urged clemency in several editorials. See Editorial, *Free the Framingham Eight*, BOSTON GLOBE, Dec. 11, 1992, at 22.

<sup>672</sup> See Toni Locy, *Woman’s Life Sentence Is Commuted: She Said Man She Killed Abused Her*, BOSTON GLOBE, Apr. 29, 1993, at Metro/Region 1 [hereinafter Locy, *Woman’s Life Sentence Is Commuted*] (reporting that Eugenia Moore was first woman to have her sentence commuted by the Governor’s Council); see also Shawn M. Terry, *Women Hold March Against Domestic Violence*, BOSTON GLOBE, July 10, 1994, at Metro/Region 22 (stating that Shannon Booker was released in June on early parole); Editorial, *Three Down, Five to Go*, BOSTON GLOBE, Sept. 24, 1993, at 18 (reporting that Patricia Allen’s manslaughter sentence was commuted and Meekah Scott, who was out of prison pending an appeal, had her sentence reduced to time served); see also Paul Langner, *Woman Gets Parole in Murder of Husband*, BOSTON GLOBE, July 26, 1994, at 19 (referring to Elaine Hyde). The Board voted against clemency for both Debra Reid, the lone lesbian among the Framingham Eight, and Patricia Hennessy. See Doris S. Wong, *Board Urges Clemency for 2 in Cases Tied to Battered Women’s Syndrome*, BOSTON GLOBE, Mar. 4, 1994, at Metro/Region 35. However, Reid eventually won her freedom when she was paroled in 1994. See “Framingham Eight” Inmate Wins Parole: Release is Expected Soon, BOSTON GLOBE, Oct. 20, 1994, at Metro/Region 30. For a description of the Massachusetts clemency procedure and an account of Patricia Allen’s case, see Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, 38 BOSTON B.J. 3 (1994).

In the cases of Shannon Booker and Lisa Grimshaw—two members of the “Framingham Eight”—we<sup>673</sup> decided to seek early parole for both women. Both Booker and Grimshaw had been physically and sexually abused for their entire lives and had made many attempts to flee their abusers, whose tenacious stalking and homicidal behavior ultimately brought about their deaths.<sup>674</sup> Grimshaw was released on December 23, 1992, and Booker was freed on June 23, 1993. However, both were assigned such abusive parole officers that we ensured they had volunteers accompany them to their appointments.<sup>675</sup> Indeed, even once released from prison, a battered client may need continued assistance from counsel to ensure that systemic mistreatment does not continue.

We decided to seek clemency for Eugenia Moore, another member of the “Framingham Eight,” because we believed that the trial court had erred in not admitting evidence of BWS and that her original counsel had been remiss in many aspects of the defense.<sup>676</sup> As a result of a proliferation of errors in her case, Moore had received a life sentence, even though there were eyewitnesses to and documentation of stalking and abuse by her batterer prior to her killing him in self-defense.<sup>677</sup> At the time, we had sought clemency for over seven years, working with the Boston media to ensure more accurate coverage of the stories of battered women defendants and their denied justice in the State’s courts.<sup>678</sup> Per-

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<sup>673</sup> “We” here refers to Stacy Kabat, the founder and director of Peace at Home (she started the first support group for battered women in prison in Massachusetts in 1987 and won the 1992 Reebok Human Rights Award for her work with incarcerated battered women and refugees around the world), assorted defense attorneys willing to help by representing the battered defendants or strategizing with us for their release, and me.

<sup>674</sup> The stories of Shannon Booker, Lisa Grimshaw, Eugenia Moore, Patricia Hennessey, and Meekah Scott are featured in the documentary, *DEFENDING OUR LIVES*, which won the 1992 Academy Award for Best Short Documentary. See *supra* note 270. I assisted with the interviews, research, and narration of the documentary.

<sup>675</sup> Until the parole officers learned that I was a prosecutor, they freely abused both Booker and Grimshaw, calling them liars regarding the abuse, accusing them of drug use and ordering that they attend mandatory classes though they passed all random urinalysis tests, making them disrobe—ostensibly to look for needle tracks (recall they have no history of drug use and have not tested positive for it)—showing up at their homes at five A.M. on Sunday morning and insisting upon entry without allowing them to dress (one was a male parole officer), interfering with their ability to regain custody of their children by refusing to write the Department of Social Services that both were in full compliance of all rules, and generally humiliating them at every opportunity. By far the favorite taunt of their parole officers was reminding Booker and Grimshaw that they could be returned to prison for any violation, no matter how slight, at the recommendation of the officer. This information is based on my eye-witness observations and those of volunteer law students from the Harvard Law School Women in Prison Project, who accompanied Booker and Grimshaw to their parole office appointments, as well as direct reports by Booker and Grimshaw to me and not denied by the officers when asked about the necessity of such conduct.

<sup>676</sup> See *Commonwealth v. Moore*, 514 N.E.2d 1342 (Mass. App. Ct. 1987).

<sup>677</sup> See Lucy, *Woman’s Life Sentence Is Commuted*, *supra* note 672. A mother of three, Moore was convicted of second-degree murder for the 1985 stabbing of her battering boyfriend. Moore would not have been eligible for parole until 2001, though she had served more than seven years of her sentence at the time of the commutation.

<sup>678</sup> See Eileen McNamara, *Judge Criticized After Woman’s Death*, *BOSTON GLOBE*,

haps partly due to this media pressure, Governor Weld commuted Moore's sentence in May of 1993, stating that the *Moore* case was an initial step in his efforts to correct the inequities of some battered women's trials in state courts.<sup>679</sup>

Battered women's advocates and lawyers continued reform efforts, beginning with a 1993 statute specifying that if a defendant claims to have suffered abuse, evidence regarding that harm is admissible when coercion, accident, duress, self-defense, or defense of others are proffered as defenses.<sup>680</sup> Furthermore, in *Commonwealth v. Rodriguez*, the Massachusetts Supreme Judicial Court held that battered women charged with killing their alleged abusers may introduce evidence of prior abuse and expert testimony regarding BWS.<sup>681</sup>

In Illinois, Governor James Thompson released five women convicted of killing or injuring their violent partners.<sup>682</sup> Subsequently, in February of 1993, Governor Jim Edgar released Denise Babula, who had been convicted of shooting her violent boyfriend just six months before.<sup>683</sup> In the fall of 1993, the Illinois Clemency Project for Battered Women, comprised of attorneys, law professors, law students, and community advocates, started interviewing incarcerated women, and by February 1994, twelve clemency petitions were filed.<sup>684</sup> The following April, a public hearing was held<sup>685</sup> and on May 12, 1994, Governor Edgar approved release for four women.<sup>686</sup> Governor Edgar then afforded clemency to seven more battered women in the fall of 1995, though denying the requests of at least seventeen additional women.<sup>687</sup>

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Sept. 21, 1986, at Metro 1.

<sup>679</sup> One of Moore's appellate lawyers, Susan K. Howards, applauded Governor Weld's role in changing parole guidelines as this allowed Moore's appeal. See Locy, *Woman's Sentence Is Commuted*, *supra* note 672. Moore's was the first petition for commutation filed on behalf of the eight women we had identified as needing immediate action. The vote was considered historic as it represented the first time a life sentence was commuted based on a history of domestic violence against the defendant.

<sup>680</sup> See MASS. GEN. LAWS ch. 233, § 23F (2000).

<sup>681</sup> 633 N.E.2d 1039, 1042 (Mass. 1994); see also John Ellement, *SJC Says Courts Must Consider Abuse Defense*, BOSTON GLOBE, May 27, 1994, at Metro/Region 1.

<sup>682</sup> See Julie Irwin, *Pardons Sought for 12 Women Who Killed Alleged Abusers*, CHI. TRIB., Feb. 19, 1994, at § 1, p. 5 (noting that none of these women have returned to prison).

<sup>683</sup> See Rob Karwath & Hanke Gratteau, *Edgar Frees Woman Who Killed Lover: Ex-Convict Boyfriend was Abusive*, CHI. TRIB., Feb. 4, 1993, at § 2, p. 1.

<sup>684</sup> See Irwin, *supra* note 682, at 5.

<sup>685</sup> See Laura Duncan, *Project Seeks Freedom for Abused Women*, CHI. DAILY L. BULL., Apr. 6, 1994, at 1; see also Joseph C. Nunes, *Show Mercy: Clemency Project Takes Up Cause of Battered Women*, CHI. TRIB., Sept. 12, 1993, at § 6, p. 1. Some of the local media expressed disapproval of this initiative. See, e.g., Michelle Stevens, *Justice Is Battered in Clemency Cases*, CHI. SUN-TIMES, Apr. 11, 1994, at 19 (suggesting that many of the petitions were of "questionable merit" and did not represent "genuinely battered women").

<sup>686</sup> See Laura Duncan, *Clemency Group Aims at Appeals Process*, CHI. DAILY L. BULL., May 13, 1994, at 3.

<sup>687</sup> See M.A. Stapleton, *Battered Women's Advocate Downplays Setback*, CHI. DAILY L. BULL., Oct. 9, 1995, at 1.

In Texas, the legislature, rather than the governor, headed clemency efforts by passing an act and a resolution to expedite the process for incarcerated battered women seeking clemency.<sup>688</sup> The statute permitted testimony regarding the abusive relationship between the defendant and the deceased.<sup>689</sup> As directed by the Act's resolution, the State Board of Pardons and Paroles and the Texas Council on Family Violence examined roughly forty cases, each of which involved a battered person serving a sentence for a domestic-violence related murder.<sup>690</sup> The joint resolution contained conciliatory language:

[The Texas criminal justice system has] jurisdiction over a number of women and children who have been doubly victimized first by their abusers and later by a criminal justice system that failed to recognize the legitimacy of their defense . . . . These victims are not common criminals who killed for profit or vengeance; rather, they . . . were driven by an unthinkable set of circumstances to perform this last desperate act of self-preservation . . . . In view of the extraordinary circumstances surrounding their crimes, these victims deserve an impartial review of their sentences so that their histories as victims of domestic violence are taken into account.<sup>691</sup>

While the Texas strategy appeared well-planned, its outcome has been unsatisfactory. More than 400 applications were reviewed by 1993, with 123 women and thirty men meeting the standard set forth in the law.<sup>692</sup> However, eighteen months later, not one battered inmate had been released, though hopes had been high that Governor Ann Richards would approve at least some of the most compelling cases. Even after losing her reelection bid, Governor Richards did not grant release to any battered women.<sup>693</sup> Since that time, efforts have focused on early parole, as neither Governor Bush nor Governor Perry were amenable to clemency overtures.

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<sup>688</sup> See generally Meredith J. Duncan, Comment, *Battered Women Who Kill Their Abusers and a New Texas Law*, 29 HOUS. L. REV. 963 (1992) (discussing Texas clemency procedures).

<sup>689</sup> In 1991, the 72nd Texas Legislature passed Senate Bill 275, which allowed evidence of domestic violence to be presented in a murder or voluntary manslaughter trial. See TEX. PENAL CODE ANN. § 19.06 (1991), *deleted by* Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

<sup>690</sup> Krause, *supra* note 664, at 736 (citing S. Con. Res. 26, 72d Leg., 1991 TEX. GEN. LAWS 3296). The Senate Concurrent Resolution empowered the Texas Board of Pardons and Paroles to investigate, with the assistance of the Texas Council on Family Violence, all cases where persons who pled or were convicted of murder or manslaughter claimed to have been victims of domestic violence. The Board would then make recommendations for pardons or clemency to be forwarded to the governor for consideration.

<sup>691</sup> *Id.*

<sup>692</sup> See Cindy Rugeley, *Freedom for Battered Women Proves to Be Elusive; No Prisoners Have Been Released Under State Amnesty Plan*, HOUSTON CHRON., July 11, 1993, at 1.

<sup>693</sup> *Id.* The Board of Pardons and Paroles rejected twenty-five applications, and Gover-

Early parole may be the only viable option if a case simply has "bad" facts, the client is unlikely to garner the governor's sympathy, or the governor is unwilling to incur political fall-out by granting commutation, pardon, or clemency. San Antonio battered mother Gricelda Moreno received a ninety-nine-year sentence for failing to protect her five-year-old daughter from the child's father, who murdered her while Moreno was not at home. St. Mary's Law School Professor Stephanie Stephens agreed to represent Moreno in a bid for early parole, with her students greatly assisting in collecting affidavits and corroborating evidence supporting the bid for release. University of Texas School of Law student Heather Wilson wrote the brief to the Texas Board of Pardons and Parole. The brief argued that the initial sentence was unjust, and asserted in the alternative that Moreno had already served fourteen years—a sufficient amount even if one believed her culpable.<sup>694</sup> One of the distinctive features of Wilson's brief was its focus on Moreno's help-seeking efforts to protect herself and her daughter from the batterer, in spite of language barriers and dire poverty. Wilson also documented the extreme history of abuse against Moreno and her inability to secure assistance from the police and other state actors, none of which was presented at the initial trial.<sup>695</sup>

Moreno was granted parole in January of 2002, in spite of practitioners' warnings that the Texas Board of Pardons and Paroles did not look favorably upon mothers who failed to protect their children, regardless of their particular circumstances. Had Stephens and Wilson relied solely on trial transcripts and the trial attorney's work product, it is likely Moreno would still be in prison.

The University of Denver's Battered Women's Clemency Reform Project was another successful effort in which law students and pro bono attorneys prepared clemency petitions on behalf of battered women in prison.<sup>696</sup> Due to state term limitations, Colorado Governor Roy Romer was serving his last term—a time some would argue is opportune for submission of clemency petitions.<sup>697</sup> What began as a student research

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nor Richards denied clemency for at least three women who made it past the Board's screening. See also Gayle Reaves, *Abused Spouses Rebuffed: Clemency Yet to Be Granted in Slayings*, DALLAS MORNING NEWS, Dec. 22, 1994, at 31A (noting allegations that Governor Richards may have turned down the three requests and let three others languish "because of the political problem of looking soft on crime"). No reports of releases were found by the author through November 1995.

<sup>694</sup> Brief for Gricelda Moreno, Tex. Bd. of Pardons & Paroles (May 2001) (on file with author).

<sup>695</sup> *Id.*

<sup>696</sup> See generally St. Joan & Ehrenrieck, *supra* note 656.

<sup>697</sup> See *id.* at 177 ("Governors are so afraid of signing their own political death warrant that clemency is just not exercised at anywhere near the rate it was 20 years ago. The only governors commuting death sentences are lame duck governors who are on their way out.") (citing Amy Chance, *Brown Targeted Over Opposition to Death Penalty*, SACRAMENTO BEE, Mar. 6, 1994, at A21) (quoting Gerald Eelmen, former dean of Santa Clara University

project resulted in a two-semester course, ultimately freeing four abused defendants.<sup>698</sup>

In 1991, several female prisoners in California started a grass-roots clemency effort, calling themselves Convicted Women Against Abuse (CWAA). Upon hearing of the successful clemency initiatives in Ohio, Maryland, and Massachusetts, CWAA members requested that California Governor Pete Wilson take similar actions with their cases, to little avail.<sup>699</sup> Advocates devoted hundreds of hours thoroughly investigating and preparing thirty-four cases. Governor Wilson received thousands of letters supporting the clemency petitions.<sup>700</sup> As in Texas, however, this well-organized effort met with little success.<sup>701</sup> A 1991 statute permitting expert testimony about BWS and evidence of previous abuse certainly helped the California effort.<sup>702</sup> However, of all the petitions that came before him, Governor Wilson granted only two: he reduced Brenda Aris's sentence and awarded a commutation to Frances Mary Caccavale because she was elderly and in poor health.<sup>703</sup> Continuing efforts with Governor Gray Davis have also achieved minimal results. In April 2002, Governor Davis granted early parole to Cheryl Sellers, incarcerated for seventeen years for killing her violent husband. Governor Davis acknowledged that Sellers posed little risk to society and her case presented ample evidence of the extreme cruelty of her deceased husband's abuse.<sup>704</sup>

Attorney Olivia Wang, the coordinator for the California Coalition for Battered Women in Prison, hopes that Governor Davis's action with regard to Sellers is predictive of further positive outcomes for other pending cases.<sup>705</sup> Two recently passed statutes also bode well for future efforts. The first mandates that the state parole board evaluate clemency petitions

Law School)).

<sup>698</sup> *Id.* at 179.

<sup>699</sup> *Id.*

<sup>700</sup> CAL. COALITION FOR BATTERED WOMEN IN PRISON, HISTORY OF THE CLEMENCY MOVEMENT IN CALIFORNIA, at <http://freebatteredwomen.org/history.htm> (last visited Mar. 19, 2003).

<sup>701</sup> See Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 6 (1993); see also Richard Barbieri, *Battered Women Push for Clemency Program; Bay Area Counsel Establish Coalition to Aid Prisoners*, RECORDER, Dec. 3, 1991, at 1. For in-depth discussion of California's clemency process, see Madden, *supra*, at 4-15; see also Rachel A. Van Cleave, *A Matter of Evidence or Law? Battered Women Claiming Self-Defense in California*, 5 UCLA WOMEN'S L.J. 217 (1994).

<sup>702</sup> CAL. EVID. CODE § 1107 (West 1995) (referencing 1991 Cal. Legis. Serv. ch. 812 (A.B. 785) (West)). California appellate courts previously had upheld the admissibility of such testimony. *People v. Aris*, 264 Cal. Rptr. 167, 180 (Cal. Ct. App. 1989). However, in spite of recognizing that Aris had not been allowed to introduce BWS, the appellate court upheld Aris's conviction. See *Aris*, 264 Cal. Rptr. at 183.

<sup>703</sup> See Greg Lucas & Teresa Moore, *Wilson Grants Clemency to 2 Battered Women: Petitions Denied for 14 Other Female Prisoners*, S.F. CHRON., May 29, 1993, at A1.

<sup>704</sup> See Burke, *supra* note 652. Sellers had received a twenty-five-years-to-life sentence and will complete her parole in 2003.

<sup>705</sup> *Id.*

and assess whether the convicted woman was suffering from BWS at the time of the offense. The second bill permits women tried before 1992 to have their cases reviewed if they believe that at the time of the offense they experienced BWS.<sup>706</sup>

Overall, efforts on behalf of battered women seeking clemency have been discouraging, says Carol Jacobsen of the Michigan-based Battered Women's Clemency Project, particularly in light of the successes in the early 1990s. Michigan's governor John Engler denied eight petitions without offering explanation. In Florida, no battered women have received clemency since 1999, in part because funding lapsed for attorney Jennifer Lee Greenberg, who had successfully represented fifteen incarcerated women from 1997 to 1999. She has resumed her advocacy work under the auspices of a small grant to the Florida Coalition Against Domestic Violence, noting that it is nearly impossible for a battered inmate to file her own petition and present the case to the parole board absent effective representation and the resources to gather necessary information.<sup>707</sup> Taking battered women's defense cases one-by-one, hoping for justice to prevail, is not sufficient. Attorneys must be instrumental in bringing together the necessary coalitions of community stakeholders to facilitate law reform.

#### IV. A DEARTH OF CHECKS AND BALANCES

This Article has attempted to provide a sense of the profound importance for our lawyers and courts to responsibly address domestic violence matters with which they deal. Further, this Article seeks to create a sense of urgency for redressing the irony that many abuse victims find themselves in greater danger *after* seeking assistance from lawyers and courts. Our system of government is predicated on the concept of checks and balances, with the executive, legislative, and judicial branches in a symbiotic paradigm of accountability. While at a macro level, this concept is clear, at the micro level, there appears to be little actual monitoring in cases of battered defendants. If imbalances are remedied from within the system, even those lawyers who have not received adequate training in handling domestic violence issues can obtain guidance in court, minimizing mishandling of the battered client's case.

Up until the last twenty years, American jurisprudence abysmally disregarded the rights of abuse victims. Attorney incompetence in han-

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<sup>706</sup> *Id.* Thirty-six battered women's cases were evaluated last year, with fourteen women determined to have suffered from BWS by the state parole board, and eight of those recommended for parole in 2002. Governor Davis has denied three of the petitions, having approved only Sellers's. For more information on the California efforts, see the California Coalition for Battered Women in Prison's Web site, <http://freebatteredwomen.org> (last updated Feb. 24, 2003).

<sup>707</sup> *Id.*



dling domestic violence cases reflects this neglect by law schools, continuing education programs, and legal scholarship. By the mid-1980s, every state had promulgated domestic violence prevention statutes, while emerging case law began to build the foundation on which the small amount of today's precedent rests.<sup>708</sup> Progress is usually evidenced by the proliferation of progressive statutes, but this measure ignores the reality that the implementation of these laws has, compounded by gender and racial inequality, proven illusory in many jurisdictions. That lawyers' ignorance reflects societal norms does not obviate the need for fundamental reforms, nor should it absolve attorneys of liability for failing to represent battered clients effectively. The lawyer disciplinary system affords little relief to injured clients largely because the client may not know she has been harmed by the lawyer's incompetence or believes there is no recourse for such harm. Those clients best able to make this assessment are not apt to file formal complaints with disciplinary authorities,<sup>709</sup> as often they are demoralized and exhausted from years of battling both the abuser and the courts.

#### A. Judges

Scrutiny of attorney practices generally requires an examination of the judiciary's ameliorative role, and this Article highlights examples of both positive and problematic conduct. Most jurisdictions have laws affording protective orders, criminal sanctions, and other legal remedies specifically designed to help abuse victims. However, "laws are no more effective than the judges who interpret, apply and enforce them."<sup>710</sup> Increasingly, well-informed judges are taking more responsibility for stopping domestic violence rather than merely rendering minimalist decisions in cases.<sup>711</sup> Judges have begun insisting upon minimal bases of practice. Just as judges may impose Rule 11 sanctions for litigation-related misconduct, so too should judges take action against lawyers who do not competently represent clients in domestic violence matters. Formal reprimands would not be necessary in many cases, as most attorneys will not want to risk even informal chastisement.

Judges should also be charged with laying the foundation for genuine offender accountability. When judges implement practices designed to improve the court's handling of civil and criminal domestic violence

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<sup>708</sup> See 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, 810 (1993) (stating that all fifty states have statutes providing access to civil protection orders for domestic violence victims).

<sup>709</sup> See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 823 (1992).

<sup>710</sup> Schafran, *supra* note 109, at 1068.

<sup>711</sup> See Kaye & Knipps, *supra* note 106, at 2.

matters, the likelihood of recidivist violence and murder decrease.<sup>712</sup> When a batterer flouts the law, too many courts appear unwilling to stop him. Ensuring that our courts work is the responsibility of judges and, to a lesser extent, the attorneys litigating cases before them. Neither can be competent stewards in isolation; both require informed, balanced guidance from those with expertise about victims, offenders, and children. Absent such direction, many lawyers are apt to remain focused on satisfying vested interests, and some judges will, given a choice, opt to move cases along expeditiously rather than applying the law. Although such a focus may represent acceptable balancing in many cases, it is not appropriate in matters involving the lives and safety of abuse victims.

Having made this somewhat discouraging commentary, the following judges and the descriptions of their practices serve as models for courts in the process of reform. In Texas, the presiding judge of Travis County's Domestic Violence Court, Judge Michael Denton, has overseen a transformation in the way in which these cases are handled. For more than six months prior to taking the bench, Judge Denton assembled a multi-disciplinary committee to meet weekly and plan how the court could improve its handling of every aspect of cases. Participants included staff from pre-trial services, probation, prosecution, defense, shelters, law enforcement, legal services, counseling programs, and administrative offices, among others.<sup>713</sup> Periodically, Judge Denton circulates questionnaires asking litigants and practitioners how his court can be improved. Abuse victims and perpetrators appearing before Judge Denton voice their appreciation for feeling heard, because they perceive that he is genuinely interested in their cases and will apply the law fairly.<sup>714</sup> Judge Denton also has donated the bulk of his private office space to create a victims' waiting room so that victims will not have to await hearings in a small hallway in close proximity to their batterers.

Civil and criminal laws designed to achieve abuse prevention should not be compromised by partisan politics. Absent a substantive legal reason for striking down legislation, the judiciary is charged with implementing the laws of its jurisdiction, regardless of personal predilections or biases. The New Jersey Supreme Court succinctly articulated courts' duties in domestic violence cases:

[I]t is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal reme-

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<sup>712</sup> See *supra* note 54 and accompanying text.

<sup>713</sup> I participated on this Committee and was constantly struck by the progress achieved through collaboration sparked by a well-respected leader.

<sup>714</sup> Based upon almost three hundred court watches conducted by my law students since the domestic violence court opened on January 2, 2000, in which court practices and litigants' feedback are documented.

dies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public. To that end, the Legislature encourages . . . the broad application of the remedies available under this act in the civil and criminal courts of this State.<sup>715</sup>

Of particular importance are appellate judges and policymakers who serve a critical role in the checks and balances scheme for recalcitrant trial courts and lawyers. Judges may be uneducated about domestic violence matters, and some jurists view their courtrooms as their own fiefdoms, refusing to enforce state abuse prevention laws with which they disagree.<sup>716</sup> That much domestic violence legislation has been promulgated through bipartisan efforts is of little importance if local judges effectively derail the hard-won progress of the past few decades.

Some judges report being personally insulted and angered by victims who recant earlier allegations of abuse, whether in the course of requesting the dismissal of a protective order, testifying for the batterer, or testifying in criminal cases.<sup>717</sup> It is ironic that such judges do not express outrage at batterers' insolence and dishonesty regarding *their* violent behavior,<sup>718</sup> yet ignore the irrefutable evidence that most battered women who recant do so under duress.<sup>719</sup> For the victim who feels she must lie to the court to stay alive, there is little choice but to acquiesce to the batterer's demands. Thus, a well-informed judge's willingness to provide safety plans to recanting victims is not simply an act of compassion, but it also reflects the legislative intent of abuse prevention.<sup>720</sup>

That so many battered women who initially seek help from the courts later ask that protective orders be rescinded or decline to participate in criminal prosecutions prompts a serious review of systemic policies and

<sup>715</sup> *Giovine v. Giovine*, 663 A.2d 109, 115 (N.J. Super. Ct. App. Div. 1995).

<sup>716</sup> See generally Schafran, *supra* note 109.

<sup>717</sup> One Travis County, Tex., Court judge and a Boston Municipal Court judge, as well as numerous others over the years, have expressed this opinion to me, and the sentiment is well-documented in domestic violence legal discourse. See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 6 (1999); see also Schafran, *supra* note 109, at 1063.

<sup>718</sup> See Adams, *supra* note 99, at 23; see also DUTTON & GOLANT, *supra* note 102, at 12–13.

<sup>719</sup> *Giovine*, 663 A.2d at 113 (“By definition, a battered woman is one who is repeatedly physically or emotionally abused by a man in an attempt to force her to do his bidding without regard for her rights.”) (citing *State v. Kelly*, 478 A.2d 364 (N.J. 1984)). MODEL PENAL CODE § 2.09(1) defines duress as an excuse for criminal conduct when the actor was under a threat of unlawful force. See discussion of duress *infra* Part V.E.

<sup>720</sup> See *Giovine*, 663 A.2d at 115. “The Legislature finds and declares that domestic violence is a serious crime against society . . . . It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.” *Id.* Additionally, the title of the Massachusetts Domestic Violence Restraining Order statute is “Abuse Prevention.” MASS. GEN. LAWS. ch. 209A (1998).

practices that contribute to this trend. Fayette County, Kentucky, District Court Judge Megan Lake Thornton recently held two abuse victims in contempt for having contact with the batterers against whom they had obtained protective orders.<sup>721</sup> After fining one of the victims \$100 and the other \$200, Judge Thornton stated that she had intended the original orders to forbid contact by the victims as well as the suspects. She noted, "It just drives me nuts when people just decide to do whatever they want . . . . They are orders of the court . . . . People are ordered to follow them, and I don't care which side you're on."<sup>722</sup> Attorney Cindra Walker, who represents both of the victims in this case, plans to appeal the decision, stating that domestic violence statutes are designed to protect victims, not punish them. Given that two years ago the Kentucky legislature declined to enact a law subjecting both parties to protective orders,<sup>723</sup> it appears that there is no legal basis for Judge Thornton's ruling.

Indeed, civil protective orders allow courts to mandate that *batterers* obey specific provisions prohibiting abuse or contact with victims, allocating temporary child support, custody, and other provisions the judge deems necessary to ensure victims' safety.<sup>724</sup> The only person under the aegis of the court and over whom the court has jurisdiction is the *batterer*. While the court may be frustrated with a survivor's decision to resume contact with the abuser, that does not constitute a legal basis for assessing court cost fines against her. There are many valid reasons why a victim may recommence a relationship with her batterer.<sup>725</sup> Sanctioning the victim for making a rational decision with which the court disagrees sends a chilling message that it is the victim who will be held responsible for the batterer's actions. Courts must be unequivocal in stating that even if the victim initiates contact with the batterer, it is the *batterer's* legal obligation to avoid such interactions.

A judge's sanctimonious condemnation of victims who ask to rescind their protective orders is both irresponsible and dangerous. The Code of Judicial Conduct not only stipulates that the appropriate demeanor is one of respect for all litigants but requires that judges not give even the appearance of partiality.<sup>726</sup> It is difficult to overstate the dysfunctions of some courts' handling of domestic violence cases, while other courts are taking affirmative steps to rectify their mistakes and are operating from a position of competence, innovation, and excellence.

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<sup>721</sup> See Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14.

<sup>722</sup> *Id.*

<sup>723</sup> *Id.*

<sup>724</sup> See TEX. FAM. CODE ANN. § 81.001 (Vernon 1997).

<sup>725</sup> See Part II.B.2, *supra*.

<sup>726</sup> ABA CODE OF JUDICIAL CONDUCT Canon 2 (2000).

### B. Organized Bar

It is arguably a responsibility of the legal profession to inform the community about intimate partner violence and the legal remedies available to assist victims, offenders, and their children. Local, state, and national bar associations are in optimal positions to provide leadership in this area as well as inspire and collaborate with other professionals. When corporate attorney Dale Harris<sup>727</sup> assumed the presidency of the Colorado Bar Association in 1999, he guided the group to its present status as a national leader in domestic violence intervention initiatives. Under his leadership, the Colorado Bar Association established a Domestic Violence Project and funded a staff attorney, longtime activist Kathleen Shoen, to coordinate the Project's many efforts. The Colorado Bar has devoted an entire issue of its journal, *The Colorado Lawyer*, to domestic violence articles and produced several comprehensive training and practice manuals on the topic.<sup>728</sup> They have sponsored key conferences on domestic violence and employment/labor law, as well as day-long training for the bench and bar on general domestic violence practice.<sup>729</sup>

Similarly, New Hampshire Judge Susan Carbon heads her state's domestic violence fatality review panel,<sup>730</sup> and has been recognized for Grafton County Family Court's model domestic violence program.<sup>731</sup> In Texas, the Travis County Defense Attorneys' Association has taken the unique step of sponsoring half-day training sessions for its members on representing the accused batterer and the battered defendant.<sup>732</sup>

### C. Individual Attorneys

Domestic violence impacts the practice of many professionals, including attorneys uniquely positioned to assist abuse victims and offenders<sup>733</sup> assuming they have learned how to intervene effectively.<sup>734</sup> While better serving clients, lawyers can also decrease their exposure to liabil-

<sup>727</sup> Dale Harris is a partner with the Denver firm of Davis, Graham & Stubbs.

<sup>728</sup> See 28 COLORADO LAW. (Oct. 1999), available at [http://www.cobar.org/tcl/tcl\\_vol.cfm?PubYear=1999&PubMonth=10](http://www.cobar.org/tcl/tcl_vol.cfm?PubYear=1999&PubMonth=10); see also COLO. B. ASS'N FAMILY VIOLENCE PROJECT, LEGAL ISSUES FOR SURVIVORS OF DOMESTIC VIOLENCE (2001), available at <http://www.cobar.org/group/index.cfm?EntityID=dpfvp&category=111>.

<sup>729</sup> *Supra* note 728.

<sup>730</sup> Diane Struzzi, *A Closer Look at Domestic Violence: From Couple's Grief Comes Fatality Review Panel*, HARTFORD COURANT, Aug. 4, 2002, at B1.

<sup>731</sup> Shirley Elder, *Shaheen Plans Changes in Picking Judges*, BOSTON GLOBE, May 28, 2000, at 9.

<sup>732</sup> This training was organized by Judge Denton, with speakers including Judge Denton, several defense attorneys, and the author.

<sup>733</sup> See COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK (Deborah M. Goelman et al. eds., 1996) (includes guidance and suggestions relevant to most areas of law).

<sup>734</sup> See Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187 (1995).

ity by understanding the dynamics of abuse. Legal malpractice in domestic violence cases can involve tortious conduct arising from deficient services, whether a breach of fiduciary duty or the standard of care.<sup>735</sup> Additionally, ineffective assistance of counsel has been found in criminal cases involving domestic violence victims, most often for the attorney's failure to provide sound advice or to present critical evidence or use key witnesses.<sup>736</sup> At trial, lawyers may also neglect to scrutinize verification of the abuse<sup>737</sup> or to properly craft defenses.<sup>738</sup> Just as the public (and therefore a jury) labors under staid misunderstandings about abuse victims, so too do criminal defense lawyers; malpractice indicates their susceptibility to the same misguided stereotypes. It is thus crucial for counsel to utilize experts to educate themselves, judges, and juries.<sup>739</sup>

For a battered defendant whose life may depend on her lawyer's ability to articulate her experience of domestic violence, as well as the social context, counsel's improper case handling is so pernicious as to constitute malpractice.<sup>740</sup> As difficult as it is for battered defendants to prove, courts have found ineffective assistance of counsel in an array of cases that reveal a continuum of ignorance and arrogance. It is thus clear, as Professor David Wilkins has argued, that context is particularly relevant in matters of ethics.<sup>741</sup> In handling domestic violence matters, a lawyer's ethical lapses will likely occur on a continuum, in part due to the hybrid nature of representation in such cases. Wilkins offers a theoretical construction of ethical codes that requires multiple paradigms to fit the practitioner's specific roles.<sup>742</sup> Wilkins further posits that the unitary

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<sup>735</sup> See RONALD E. MALLIN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE 4 (4th ed. 1996).

<sup>736</sup> See, e.g., *Commonwealth v. Miller*, 634 A.2d 614 (Pa. Super. Ct. 1993); see also *People v. Day*, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991); *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989); *Martin v. State*, 501 So. 2d 1313 (Fla. Dist. Ct. App. 1986).

<sup>737</sup> See, e.g., *People v. Rollock*, 577 N.Y.S.2d 90, 91 (N.Y. 1991).

<sup>738</sup> See, e.g., *State v. Adkinson*, 511 S.E.2d 527 (Ga. Ct. App. 1999).

<sup>739</sup> See DALTON & SCHNEIDER, *supra* note 94.

<sup>740</sup> Through reported appellate decisions holding attorneys liable for legal malpractice, all states have recognized such culpability. See MALLIN & SMITH, *supra* note 735. Legal malpractice may be defined as tortious conduct, with liability arising from rendition of inadequate legal services including errors, acts, and omissions.

<sup>741</sup> See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1990) [hereinafter Wilkins, *Legal Realism*] ("[C]onstructing a 'realist' understanding of legal ethics requires careful attention to the myriad ways in which insights that may be appropriate for the role of 'judge' or 'law professor' do not capture our legitimate aspirations for lawyers."); see also Wilkins, *supra* note 709, at 801 (stating that effective ethics rules "must account for relevant differences among professional norms and among various markets for legal services"); David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers?: Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 482 (1996) (arguing "that the traditional claim that a uniform set of ethical rules and enforcement practices governs all lawyers in all contexts is both descriptively false and normatively unattractive").

<sup>742</sup> See Wilkins, *Legal Realism*, *supra* note 741, at 470 ("[L]egal ethics should abandon both the normative premise that legal restraints should be interpreted from the perspective

model of ethics that currently attempts to cover many areas of practice engenders improper motivations.<sup>743</sup> As the following discussion indicates, the particularized nature of domestic abuse cases buttresses Wilkins's argument and presses for doctrinal application of the law, along with reasoned, plausible, and creative arguments.

In addressing how the legal community can improve its representation of abuse victims, a first step is teaching lawyers a prescriptive or normative impulse in approaching domestic violence matters. To be an effective advocate in domestic violence cases, counsel must be fully educated and committed to translating knowledge into language with which the judges and juries will identify and empathize. Reconceptualizing the threshold of acceptable practice is necessary as too many lawyers are unaware of their knowledge deficiency in the domestic violence arena.<sup>744</sup> Although the Model Rules mandate that attorneys possess sufficient familiarity with an area of the law prior to accepting a case, many lawyers appear to rely on television and Hollywood as their primary source of education.<sup>745</sup> Hopes that judges will rectify lawyers' ignorance are dashed with the realization that some courts operate on autopilot. Some lawyers and courts are overtly deferential to the batterer, denying relief to a victim even in the face of overwhelming evidence of abuse.<sup>746</sup> Such incompetence effectively constitutes collusion with the perpetrator, resulting in widespread intimidation and harm to abuse victims, while permitting batterers to continue their terroristic<sup>747</sup> behavior. It bears noting that bat-

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of client interest and the structural premise that ethical rules should apply to all lawyers in all contexts.").

<sup>743</sup> *Id.*

<sup>744</sup> For example, the Minneapolis-based Battered Women's Legal Advocacy Project (BWLAP) has a Battered Women's Defense Initiative, which helps lawyers representing battered women defendants. In recognition of the battered defendants' complex circumstances, the Project's purpose is to encourage innovative legal strategies, utilization of community resources, and use of an advocate-attorney partnership. The Project also prioritizes collaboration with communities of color and "counteracting racism so that systems work more effectively for all communities." Such programs provide a model for legal consultation services that will improve the quality of representation for battered women defendants. For more information, BWLAP's Web site is available at <http://www.bwlap.org/about.html> (last visited Mar. 19, 2003).

<sup>745</sup> Author's Experience, *supra* note 46.

<sup>746</sup> Collusion with the batterer can take many forms, including minimizing the severity of abuse, disallowing the full array of available remedies, or failing to enforce protective orders and not taking the abuse seriously. *See generally supra* Part II.A.

<sup>747</sup> This term is not used lightly, particularly since the September 11 terrorist activities. However, it is important to accurately label the reprehensible conduct, whether perpetrated by an intimate partner or a deranged stranger, such as the Oklahoma City federal building bomber, Timothy McVeigh, or the now infamous Osama bin Laden. At least since 1992, Lieutenant Mark Wynn, a decorated veteran of the Nashville Police Department and founder of their Domestic Violence Unit, has insisted that domestic violence should more aptly be called "domestic terrorism." The author has co-presented with Lieutenant Wynn on numerous occasions when he made such statements. *See, e.g.*, Sarah M. Buel and Mark Wynn, Presentation at the National Training Center on Domestic and Sexual Violence Enforcement Conference (Dec. 12, 2001) (on file with author).

terers often suffer from poor representation, as they too are ill-served by uninformed defense attorneys.<sup>748</sup> This Article therefore advocates for truth-in-lawyering standards as well as amendment of the model rules and disciplinary codes.

## V. INSTITUTIONALIZING AN ETHICAL MODEL OF PRACTICE

Attorneys receive little in the way of formal education on the handling of domestic violence cases and thus tend to view as prosaic its relevance and scholarship. *The Gender Bias Task Force of Texas, Final Report* documents that one reason domestic violence cases are improperly handled at all levels of the judicial system involves attorneys' lack of knowledge regarding the issue.<sup>749</sup> For people of color and other marginalized persons, victimization by intimate partners tends not to be addressed in the legal, racial, or feminist literature,<sup>750</sup> causing their counsel to ignore these issues. Many lawyers' intervention efforts fail because they employ strategies utilizing easily obtainable statutory and case law that does not reveal the context, nuances, and complexity of such issues. This Part focuses on the pedagogy of domestic violence jurisprudence within law schools and CLE programs, arguing for an expanded integration of these issues into curricula, bar exam questions, and advanced certification requirements.<sup>751</sup> Ensuring that domestic violence discourse addresses race and class issues can also engender remedial action on the part of the legal community to ensure that their employees better reflect the diversity of their communities.

### A. Law Schools and the Pedagogy of Domestic Violence Law

As domestic violence cases proliferate across a spectrum of legal matters, law schools and CLE programs must integrate relevant issues and courses to improve lawyers' handling of these cases. In order to avert later attorney malpractice in the handling of domestic violence matters, law schools should develop inclusive curricula to ensure that lawyers

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<sup>748</sup> While it is beyond the scope of this Article to address issues related to representation of batterers, see Smith & Seidman, *supra* note 57.

<sup>749</sup> See GENDER BIAS TASK FORCE OF TEX., SUPREME COURT OF TEX., FINAL REPORT 76–78 (1994).

<sup>750</sup> See Crenshaw, *supra* note 61, at 1243–44.

<sup>751</sup> Law schools, bar associations, law firms, and foundations should also be encouraged to fund student and attorney practice of domestic violence law. For example, Harvard Law School's Student Funded Fellowships provided a grant for me to spend the summer between my first and second years of law school working with battered women in prison, through the aegis of the Massachusetts Coalition of Battered Women Service Groups. At the University of Texas School of Law, Texas Law Fellowships provide student and faculty-funded grants for students wishing to engage in public interest law during the summers. Each year at least four or five of the participants choose placements involving substantial work on domestic violence cases.



have a broad base of knowledge. Attorneys will likely address domestic violence matters at some point in their professional, and perhaps personal, lives. Whether an attorney assists a petitioner in obtaining a protective order, sues an abuser for civil damages, advises a client on tax matters regarding the innocent spouse defense, or defends a battered woman who has killed her abuser in self-defense, domestic violence will be a relevant topic. Many of the lawyers failing to represent abuse victims in a manner consistent with professional standards, as well as those reluctant to handle the cases at all, could greatly benefit from the inclusion of these issues within their law school and CLE courses.<sup>752</sup> Additionally, a number of states are now including domestic violence related questions on their bar exams,<sup>753</sup> disadvantaging students who have not had full exposure to this genre of jurisprudence.

Law school is the ideal environment in which to introduce domestic violence jurisprudence because it offers many opportunities to do so, such as integrating domestic violence law into existing courses, offering specific “Domestic Violence and the Law” courses, ensuring clinical programs include abuse victims within their client bases, inviting domestic violence scholars to present colloquia at law schools, and supporting student-run victim advocacy organizations. Law school advocacy programs in particular have resulted in reduced batterer recidivism, while teaching students the ways in which theory informs practice. A study of the advocacy programs at Georgetown University Law Center and Catholic University of America, Columbus School of Law found that battered women with law student advocates reported substantially less repeat psychological and physical abuse than those victims obtaining routine court services.<sup>754</sup>

Furthermore, in spite of a growing body of scholarly literature on domestic violence, there exists a dearth of empirical research on the incidence of new cases, demographics of victims and offenders, effective legal and social interventions, and similar evaluative data. Collaborations between law faculty, researchers, and practitioners can remedy this deficiency and produce rich material to inform further scholarly discourse and practice.

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<sup>752</sup> See DEBORAH GOELMAN & ROBERTA VALENTE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT, AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, I-5 (1997), available at <http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/etedvtxt.txt>.

<sup>753</sup> For example, the July 1998 Texas Bar Exam’s family law question (one of six essay questions) asked examinees to fully describe the provisions of the state’s family violence protective order laws, including application, procurement, enforcement, and possible relationship to divorce actions. See *infra* Part V.B.

<sup>754</sup> See Margret E. Bell & Lisa A. Goodman, *Supporting Battered Women Involved With the Court System*, 7 VIOLENCE AGAINST WOMEN 1377 (2001) (finding that abuse victims, intensively supported by law students in obtaining protective orders, also reported improved emotional support in six-week follow up).

Finally, the creative pedagogy of domestic violence law fits squarely within the prescriptive framework for law schools outlined in the ABA's *MacCrate Report*.<sup>755</sup> Urging law schools to improve their teaching of fundamental professional values and lawyering skills, the *MacCrate Report* stressed four professional values: (1) working to promote justice, fairness, and morality; (2) providing proficient representation; (3) seeking to improve the profession; and (4) professional self-development.<sup>756</sup> The following five suggestions help further these goals.

### 1. *Integration of Domestic Violence Law into Existing Courses*

Domestic violence law is relevant in a myriad of first-year and upper-level law school courses. However, as most professors are unfamiliar with the pedagogy of domestic violence, the American Bar Association's Commission on Domestic Violence has conducted five regional conferences to facilitate course and clinical development in law schools across the country.<sup>757</sup> Participant law schools are provided with comprehensive manuals, including sample syllabi for "Domestic Violence and the Law" courses and hypotheticals from twenty fields of law to be used as exam questions or the bases for in-class discussions.<sup>758</sup>

First-year law courses are ideal starting points to teach future lawyers about the importance of domestic violence in their practices. In civil procedure courses, Schneider suggests raising the critical issues of domestic relations exceptions to federal subject-matter jurisdiction, the Violence Against Women Act, and protective order effectiveness.<sup>759</sup> In teaching first-year torts, I found domestic violence cases ideally suited for coverage of intentional tort issues, negligence of state actors and third parties (police, employers, physicians, and schools), and battered women's self-defense issues.<sup>760</sup> Some of the liveliest discussions of the semester arose when students grappled with balancing the competing interests of victims, offenders, insurance companies, and related stakeholders in domestic vio-

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<sup>755</sup> SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS'N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP I (1992) (The MacCrate Report).

<sup>756</sup> *Id.* at 140-41.

<sup>757</sup> As of March 2002, the regional conferences have been held at law schools in Washington; the District of Columbia; Berkeley, California; Missoula, Montana; Chicago, Illinois; and Durham, North Carolina. Brooklyn Law Professor Elizabeth Schneider and I have spoken at these conferences, sharing our experiences with the goal of motivating participants to replicate model courses and clinics.

<sup>758</sup> To obtain additional information, see The American Bar Association's Commission on Domestic Violence Web site at: <http://www.abanet.org/domviol> (last updated Feb. 10, 2003).

<sup>759</sup> See SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 224.

<sup>760</sup> See James T. R. Jones, *Integrating Domestic Violence Issues into the Law School Torts Curriculum*, 47 LOY. L. REV. 59 (2001).

lence cases.<sup>761</sup> As a result of exposure to these issues, several students per semester volunteer in various community-based programs assisting abuse victims. Criminal law classes also offer an obvious opportunity to discuss prosecution and defense issues inherent in domestic violence cases, including representation of battered defendants. Contracts and family law courses can examine implications of pre-nuptial, marriage, divorce, child custody, visitation, and child support agreements. In property law, protective and divorce orders raise questions regarding whose rights are recognized in mortgage, rental, and co-habitation agreements.

Courses on evidence, civil rights, mediation, alternative dispute resolution, human rights, feminist jurisprudence, and constitutional, family, health, international, labor, sports, and poverty law also present exciting opportunities to teach applicable domestic violence law.<sup>762</sup> Both constitutional law and federal courts courses could devote time to discussion of the policy implications of the Violence Against Women Act and the cases it has spawned. International and human rights law could address the global recognition of rape and domestic violence as human rights violations in the context of war and home life, while identifying the continuum of legal and social responses. Labor, employment, and corporate law should necessarily include discussions of liability for employers failing to intervene properly in workplace intimate partner violence and sexual harassment.

## 2. *Specialized Courses*

Specific “Domestic Violence and the Law” or “Battered Women and the Law” courses can afford a more thorough understanding of this substantive topic. Having taught such a course since 1992, I can confirm its popularity with law students (despite its rigorous requirements) and its positive impact on students, law schools, community agencies, and victims.<sup>763</sup> My course devotes substantial time to the ethical representation of battered defendants and plaintiffs, including viewing the 1992 Acad-

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<sup>761</sup> My students responded favorably to my showing the documentary *DEFENDING OUR LIVES* and then asking them how many potential tort actions they could identify. The excellent film is available in forty-one- and thirty-minute versions, portraying the stories of four incarcerated battered women who were failed by the criminal justice system, first as victims, then when charged with killing their batterers. *See supra* note 270.

<sup>762</sup> *See* SCHNEIDER, *FEMINIST LAWMAKING*, *supra* note 14, at 224.

<sup>763</sup> Every semester I have had to expand the size of the class and still turn away students wishing to enroll. From 1993 to 1996, I taught “Domestic Violence and the Law” at Boston College Law School, with enrollment averaging almost fifty students per semester. From 1997 to the present, I have taught this course at the University of Texas School of Law, at first attempting to teach it as a seminar limited to twelve students, but in response to student demand, I have allowed up to forty-one per class and still turn away those who are not third-year students. Each semester, graduate students from other departments, as well as LL.M. students, also take the course. It is heartening that, consistently, at least one-third of the students are men.

emy Award-winning documentary *Defending Our Lives*, then role-playing the lawyers and defendants. Students are also required to complete four court watches of domestic violence cases, noting, on prepared forms, the system's response with regard to protective orders, child support, and criminal cases. In lieu of an exam, students must write a twenty-five-page paper involving substantive legal research on a topic that will benefit lawyers and courts handling domestic violence cases.<sup>764</sup> A number of students' papers have been published, further enhancing the body of domestic violence scholarship.<sup>765</sup> Specialized courses can also include a clinical component that allows students to receive additional credit for direct service work in domestic violence programs. For example, when Professor Schneider taught the course "Battered Women and the Law" at Harvard Law School, I had the privilege of serving as clinical supervisor for her students working in clinical placements throughout the community.<sup>766</sup>

### 3. Clinics

Clinical programs encourage the pedagogical goal of integrating theory with practice. Students consistently ask to be taught practical skills, which can easily be combined with legal theory when addressing domestic violence and poverty law issues. Over forty law schools now operate clinics providing legal services to battered women.<sup>767</sup> Law school-based domestic violence clinics meet a critical need within their communities and greatly enrich students' academic experience. Student participants in clinics are also more likely to handle domestic violence cases upon graduation, either on a pro bono basis or as a principal part of their practices.

Several clinic models exist, from those limited to assisting abuse victims in procuring protective orders to those fully representing clients

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<sup>764</sup> I provide my students a thirty-five-page list of over 125 possible paper topics, a number of which address ethical practices in defense cases (list on file with author). Several students per semester provide the legal research and necessary document drafting for appellate briefs and parole, clemency, commutation, and pardon petitions for battered women in prison. Students have been instrumental in the release of battered defendants. As mentioned previously, third-year law student Heather Wilson wrote the brief to the Texas Board of Pardons and Parole for Gricelda Moreno, who had received a ninety-nine-year sentence after being convicted of failing to protect her five-year-old daughter from the child's murderous father. Moreno was granted parole in January 2002, thanks to the joint efforts of Wilson and St. Mary's Law School Professor Stephanie Stevens. *See supra* note 695 for additional details on Gricelda Moreno's case.

<sup>765</sup> *See, e.g.,* Faizi, *supra* note 516; *see also* Daigle, *supra* note 437; Perin, *supra* note 169.

<sup>766</sup> Forty students were enrolled, with seventeen of them opting for a clinical placement. As the clinical supervisor, my role was to assist them in making the most of their clinical experience, in part by ensuring that they had sufficient opportunities to fully discuss the complex legal and social dynamics of their victim-centered work. For a fuller discussion of this effort, see SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14, at 212-23.

<sup>767</sup> *See* GOELMAN & VALENTE, *supra* note 752, at A-7 to A-20.

in family, criminal, and related matters. Though some clinics offer course credit for students while others rely solely on volunteers, all provide training on effective advocacy and related law.<sup>768</sup> The Harvard Legal Aid Bureau (HLAB) requires that students make a two-year commitment to devote an average of twenty hours per week in representing their clients. Students handle a variety of civil poverty law cases, with a substantial number of domestic violence matters presenting in the context of family, housing, consumer, and public assistance legal problems.<sup>769</sup>

Law school clinics with attorney supervisors should attempt to represent abuse victims fully, not limiting their services to protective orders, which non-attorney advocates or prosecutors can handle quite well. Many battered women are losing custody of their children to abusers<sup>770</sup> and are similarly disadvantaged in divorce, visitation, and other family law matters largely because they lack access to competent counsel. Additionally, these cases are often complex matters requiring the kind of focused attention which law students can provide. Full representation also trains these future lawyers in the proper handling of such cases.

As funding of law school clinics is usually a challenge, Pennsylvania is to be applauded for its creative use of IOLTA<sup>771</sup> funds for this purpose. In 1996, when the Pennsylvania Supreme Court mandated lawyer participation in the state's IOLTA program, it also compelled inclusion of law school clinics within its funding plan.<sup>772</sup> Subsequent to this \$5.1 million infusion, all seven Pennsylvania law schools now offer full clinical programs, where previously there had been few or no options.<sup>773</sup>

<sup>768</sup> See Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 NEW ENG. L. REV. 383 (1993); see also SCHNEIDER, *FEMINIST LAWMAKING*, *supra* note 14.

<sup>769</sup> Based on my experience as a law student in HLAB from 1988 to 1990, and the HLAB Annual Reports, 1990–2002, generally.

<sup>770</sup> See GENDER BIAS STUDY COMM'N, MASS. SUPREME JUDICIAL COURT, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 59 (1989) (finding, in a study of custody cases not necessarily involving domestic violence, that “fathers who actively seek custody obtain either primary or joint *physical* custody over seventy percent of the time”).

<sup>771</sup> IOLTA stands for “Interest On Lawyer Trust Accounts,” a program through which the interest accruing on clients’ funds being held short-term is channeled to poverty law programs within that state.

<sup>772</sup> Legal Services and pro bono programs are the other intended recipients of IOLTA monies. See Carl Oxholm III & Alfred J. Azen, *IOLTA Grantee Spotlight . . . Law School Clinical Programs Foster Legal Skills and the Pro Bono Ethic*, 6 DIALOGUE (ABA Division of Legal Services Access to Justice Newsletter), Spring 2002, at 9, available at <http://www.law.vill.edu/currentstudents/clinicsandexternships/docs/iolta.pdf> (citing PA. RULES OF PROF'L CONDUCT R. 1.15: IOLTA funds are to be used for “educational legal clinical programs and internships administered by law schools located in Pennsylvania”).

<sup>773</sup> Not only were schools able to extend their services to more abuse victims, but Temple University James E. Beasley School of Law and Duquesne University School of Law were able to increase the work of their community economic development law clinics to assist in handling all aspects in the formation of shelters for battered women and the homeless. “In these clinics, students have an opportunity to help community-based non-profit organizations form, meet zoning requirements, acquire buildings, and obtain federal

The University of Texas School of Law's Domestic Violence Clinic often handles difficult cases other attorneys will not take, thus teaching our students the full panoply of issues confronting abuse victims. The Clinic handles only civil matters, seeking to provide students at least a minimal education on domestic violence law and the opportunity to handle cases fully while in law school. Under the supervision of Attorney Jeana Lungwitz, students handle a wide range of complex cases, often tackling tangential client issues involving mental health and substance abuse problems, as well as involvement with Child Protective Services, the Department of Welfare, the Public Housing Authority, and the criminal courts.

Another model is the New York University Law School's Criminal Defense Clinic, directed by Professor Maguigan. This Clinic is unique because it handles criminal matters for the victims, affording students the opportunity to represent battered women accused of misdemeanor and felony crimes, such as homicide.<sup>774</sup> Also worthy of replication is Professor St. Joan's Battered Women's Clemency Reform Project, a clinical course and pro bono community project at the Denver College of Law.<sup>775</sup> In addition to working in teams on clemency petitions, students also tackle policy matters, such as re-writing Department of Corrections rules regarding modification of clemency guidelines and drafting a policy memorandum sent to the Governor with the clemency petitions.<sup>776</sup> It is a sad commentary on the state of clinical practice that the notion of operating a client-focused clinic is deemed "novel."

#### 4. *Student-Run Legal Advocacy Programs*

Student-run victim advocacy organizations should also be fully supported by law schools with financial and supervisory aid. One example is Harvard Law School's (HLS) Battered Women's Advocacy Project (BWAP), started in 1988 in an attempt to fill the unmet legal needs of abuse survivors in the community. Although I had been a battered women's advocate for ten years prior to attending law school, I assumed that course demands would preclude me from continuing such work while attending law school. However, as local shelters and court staff continued asking for help, I placed a notice in the HLS Bulletin, hoping for maybe five or ten volunteers interested in learning legal advocacy for battered women. Professor Martha Minow agreed to serve as our faculty

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non-profit tax status in order to establish shelters for homeless people and for women and children seeking to escape domestic abuse." *Id.* at 11.

<sup>774</sup> See GOELMAN & VALENTE, *supra* note 752, at 3.

<sup>775</sup> St. Joan & Ehrenreich, *supra* note 656, at 171. (The program is no longer operational).

<sup>776</sup> *Id.* at 177. Four of the eight petitions were granted, and four were denied as described in further detail above. *Id.* at 171-73.

advisor and HLS provided a small office and funding to print our training manual. Seventy-eight students attended the first meeting of our fledgling BWAP, and by the end of the first year, 215 law students had joined, thirty percent of them men. Co-founder Suzanne Groisser and I wrote the BWAP Training and Resource Manual, mostly using materials from existing shelter and advocacy programs and tailoring them for use by law students.<sup>777</sup>

BWAP expanded to include active sub-committees addressing legislation, shelter needs, court advocacy, legal research for the lawyers of abuse victims, and community education. We provided a series of four-hour training sessions, in addition to informal group meetings, in which students could de-brief about their experiences in court. In response to courts' welcoming student participation in the protection order process, we also wrote a ten-section script outlining areas in which specific information should be provided in the hearing. For instance, if a batterer is contesting that the victim be awarded custody of the children, the script offers potential issues to raise, ranging from abuse that has occurred in the presence of the children and refusal to obey the protective orders to continuing harassment and non-payment of child support.

A number of law schools now have active student-run battered women's advocacy projects, including Boalt Hall, Boston College, Boston University, Catholic University, Georgetown University, Northeastern University, New England, Suffolk University, University of Texas, and Yale, among others.<sup>778</sup> It is hoped that a better-informed faculty will further spur student interest in such programs.

### 5. *Colloquia, Symposia, and Conferences*

It is necessary for law schools to include domestic violence issues in their colloquia, conferences, and related speaking events, because many domestic violence concepts continue to be misunderstood and misapplied in practice. Law schools should increase their efforts to invite scholars with domestic violence expertise to take part in such programs.<sup>779</sup> To as-

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<sup>777</sup> Sarah Buel & Suzanne Groisser, HLS BWAP Training and Resource Manual (unpublished manuscript, on file with Students Organized for the Prevention of Domestic Violence (STOPDV), formerly HLS BWAP). The manual includes sections covering background dynamics of abusive relationships, applicable case and statutory law, information and referral resources, and details on specific courts (on file with author).

<sup>778</sup> See GOELMAN & VALENTE, *supra* note 752, at A-7 to A-20.

<sup>779</sup> Law schools should be honored to include in their programs high-caliber legal scholars such as Professors Linda Ammons, Maria Arias, Cynthia Bowman, Naomi Cahn, Jane Cohen, Donna Coker, Rhonda Copelon, Kimberlé Crenshaw, Karen Czapanstkiy, Clare Dalton, Justine Dunlap, Karen Engle, Deborah Epstein, Leslie Espinoza, Zanita Fenton, Ann Friedman, Sally Goldfarb, Judith Greenberg, Angela P. Harris, Suzanne Jackson, Lois Kanter, Laurie Kohn, Holly Maguigan, Martha Mahoney, Isabel Marcus, Joan Meier, Martha Minow, Shelby Moore, Jane Murphy, Susan Deller Ross, Elizabeth Schneider, Ilene Seidman, Ann Shalleck, Brenda Smith, Leti Volpp, Kathleen Waits, Merle Weiner,

sist law school adoption of course and clinic initiatives, the American Bar Association's Commission on Domestic Violence hosted five regional conferences titled "Educating to End Domestic Violence."<sup>780</sup> More than fifty law schools sent teams of law professors, students, and administrators to workshops concerning five topics: integrating domestic violence into existing courses; offering specialty courses; establishing domestic violence clinics; supporting student-sponsored projects, such as court advocacy; and increasing the involvement of domestic violence scholars in law schools symposia, conferences, and colloquia.<sup>781</sup>

The ABA conferences were modeled on a conference convened by Robin Hassler Thompson as director of Florida Governor Lawton Chiles's Domestic and Sexual Violence Task Force.<sup>782</sup> Thompson's program was also the prototype for the ABA's successful law school conferences held regionally around the country. In 1999, the Texas Bar Foundation provided a portion of the funds to sponsor a similar conference for the ten Texas law schools.<sup>783</sup> Subsequent to this conference, at least two Texas law schools have established Domestic Violence Clinics, and several more have integrated domestic violence law into their curricula.<sup>784</sup>

In April of 2002, a symposium worthy of replication was sponsored by the Women and the Law Program at American University's Washington College of Law. Titled "Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Lawmaking,"<sup>785</sup> the symposium brought together thirty-four feminist scholars to consider how theory and practice have shaped the evolution of domestic violence law. The presentations were divided into four topics: domestic violence and feminism; the importance of race, ethnicity, culture, and

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and Zipporah Wiseman, and experts Julie Goldscheid, California State Senator Shiela Kuehl, Lenora Lapidus, Nancy Lemon, and Jody Raphael, among others. *See* THE AALS DIRECTORY OF LAW TEACHERS, 2001-2002 (Assoc. of Am. Law Sch., 2001) (contains further information about professors).

<sup>780</sup> *See supra* note 757. *See infra* Part V.A.

<sup>781</sup> *See, e.g.*, COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, LAW SCHOOL CONFERENCE: EDUCATION TO END DOMESTIC VIOLENCE CONFERENCE MANUAL (Feb. 18-19, 2000) (on file with author).

<sup>782</sup> Domestic Violence Education in Florida's Law Schools, a conference held September 10-12, 1997, at Florida State University College of Law in Tallahassee, Florida, co-sponsored by the Governor's Task Force on Domestic and Sexual Violence and the Florida Bar Foundation. The Florida Bar Foundation provided the funds to bring together representatives from all Florida law schools for three days of presentations and planning.

<sup>783</sup> Domestic Violence Education in Texas Law Schools, a conference held April 15-16, 1999, at the Texas Law center in Austin, Texas, co-sponsored by The National Training Center on Domestic and Sexual Violence, State Bar of Texas Legal Services to the Poor in Civil Matters Committee, Texas Lawyers Care/State Bar of Texas, Texas Supreme Court's Gender Bias Reform Implementation Committee, and the Texas Young Lawyer Association's Women and the Law Committee.

<sup>784</sup> Based on subsequent conversations between representatives of these law schools and the author.

<sup>785</sup> The title of the symposium is in reference to SCHNEIDER, FEMINIST LAWMAKING, *supra* note 14.



class in shaping our changing conceptions of and responses to violence against women; the law school as a site for theory, education, and advocacy; and changes in understanding and practice.<sup>786</sup>

### B. Bar Exams

Inclusion of domestic violence legal issues in bar exam questions sends a powerful message to students that this is an important area of practice and will spark greater interest on the part of law schools. In July 1998, one Texas Bar Exam essay question asked for a full recitation of the state's protection order laws, including available remedies and enforcement provisions.<sup>787</sup> I received many calls from angry students, shocked that relevant domestic violence issues had been neglected in law school. Since 1998, many of my students studying for the bar exam have reported references to domestic violence law in several sections of their bar review courses, from civil procedure and family law to evidence and criminal law. Since the purpose of the bar exam is to ensure that students have sufficient knowledge to be competent practitioners, attorneys should ensure that domestic violence issues are incorporated into their states' bar exams.

### C. Advanced Certification Requirements/Boards of Specialization

Legal specialization programs offer an optimal mechanism for ensuring that lawyers learn how domestic violence impacts various areas of practice. After the ABA House of Delegates adopted the Model Plan of Specialization in 1979 to help states develop state-sponsored certification programs, most jurisdictions began to offer certification for legal specialization.<sup>788</sup> By 1990, the ABA Standing Committee on Specialization published *Model Standards for Specialty Areas*, with certification standards for lawyers in twenty-four areas of practice.<sup>789</sup> Each state's supreme court has general oversight, while a board of legal specialization produces the standards and procedures for certification and generally administers the programs.<sup>790</sup> The ABA Commission on Domestic Violence published *The Impact of Domestic Violence on Your Legal Practice: A*

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<sup>786</sup> Chaired by Professor Ann Shalleck, the symposium began with a dinner for participants on the evening of April 19, 2002, with full discussions taking place throughout the day on April 20, 2002, in Washington, D.C. Professor Shalleck directs the Women and the Law Program at Washington College of Law, which provided funds to cover travel costs for those whose schools or agencies could not do so. The *American University Journal of Gender, Social Policy & Law* is in the process of publishing a symposium issue of the papers presented at this remarkable event.

<sup>787</sup> See TEX. BD. OF BAR EXAM'RS, BAR EXAM (July 1998).

<sup>788</sup> See Melissa M. Serfass, *Standards for Certification of Appellate Specialists*, 1 J. APP. PRAC. & PROCESS 381 (Summer 1999) (citing Judith Kilpatrick, *Specialist Certification for Lawyers: What is Going On?*, 51 U. MIAMI L. REV. 273, 285-86 (1997)).

<sup>789</sup> See Kilpatrick, *supra* note 788, at 288.

<sup>790</sup> *Id.* at 290; see also Serfass, *supra* note 788, at 381 n.5.

*Lawyer's Handbook*,<sup>791</sup> which could serve as a starting point for the boards of legal specialization to develop relevant components for their certification programs. Since domestic violence presents across a spectrum of legal matters, state supreme courts and their certification programs should take a leadership role in teaching domestic violence law to practicing attorneys.

#### *D. Continuing Legal Education*

CLE seminars offer attorneys the opportunity both to learn the basics of domestic violence practice and to stay abreast of current developments in the law. Lawyers must further educate themselves regarding domestic violence issues because these cases differ from others in distinct ways. First, domestic violence litigation is both retrospective and prospective. The abusive conduct which precipitates the court action involves events that have already transpired. However, in many domestic violence cases, the dispositions reflect a desire to target prospective behaviors, generally by articulating the sanctions for future violence. Second, these cases require specific, ongoing safety planning because the battered partner remains at high risk for further harm. Certainly, teaching black letter law and creative case strategy is important, but the critical role of nuance, context, and extreme danger in domestic violence cases warrants particular attention from CLE programs.

#### *E. The Politics and Ethics of Language*

In discussing the institutionalization of an ethical model of practice, it is necessary to discuss both the politics and ethics of the language used in domestic violence discourse. As part of the effort to hold perpetrators of domestic violence accountable, the use of passive voice must be eliminated from feminist discourse on battered women. When stating that, "four women per day were killed in 2001," the passive construct takes the focus away from typically male offenders. The more accurate statement is: "In 2001, men murdered four women per day." This construct provides a more accurate picture of the true nature of domestic violence. The term "violence against women" is also problematic because, again, the actual concept being voiced is "men's violence against women." However, the use of the more precise terminology causes feminists to be labeled "male bashers"—a term that itself connotes violence.<sup>792</sup> This label is an interesting choice since women are not only the targets of the slur but also the underlying abuse. The phrase "male basher"

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<sup>791</sup> See COMM'N ON DOMESTIC VIOLENCE, *supra* note 733.

<sup>792</sup> THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 173 (2d ed. 1987).

is an overt attempt to silence honest discourse and represents what can be called “Orwellian Doublespeak.” Just as George Orwell’s novel *1984* highlighted inaccurate use of language,<sup>793</sup> the doublespeak surrounding domestic violence is a thinly disguised effort to de-gender the discourse of men’s violence against women. In *1984*, all words challenging the power of the government were eliminated, and severe sanctions resulted from their use.<sup>794</sup> Similarly, batterers seek eradication of words likely to hold them responsible for their abusive conduct.

Terms such as “domestic violence” encourage the dialogue to be inclusive of female *and* male victims, in part to ensure those who are lesbian and gay are not made invisible. But, as educator Jackson Katz points out, the term “male basher” is unfair to men, because men are most often victimized by other men and deserve to have their experiences accurately characterized,<sup>795</sup> and also because it implies that men will not tolerate true reporting of criminal activity.<sup>796</sup>

## VII. UNINTENDED CONSEQUENCES

Anticipating the unintended consequences of insisting on minimum standards of professional practice will enable lawyers to diffuse some of the potential negative repercussions of reform, and will help them decide, on balance, which of the remaining consequences are necessary evils. Such foresight includes an analysis of how minimum standards can best be utilized to achieve the desired results of attorney competence and access to fair trials for battered defendants.

Given that many attorneys are reluctant to represent abuse victims at present, insistence upon minimum standards could make obtaining counsel even more difficult. However, there are several explanations for attorneys’ hesitation that must be addressed prior to condemning minimum standards as counterproductive. First, some attorneys fear that domestic violence cases will be never-ending, with recurring emergencies and contested matters dragging the case on for years. Second, there exists a common stereotype that the battered client is unstable, prone to hysteria, and will generally be difficult. Third, attorneys may fear that the perpetrator will retaliate against the victim’s lawyer with violent or harassing behavior and refuse to comply with agreed upon court orders. Fourth, a number of attorneys may be concerned that, as an emerging area of prac-

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<sup>793</sup> GEORGE ORWELL, *1984* (Secker & Warburg 1999) (1949).

<sup>794</sup> *See id.*

<sup>795</sup> Jackson Katz, *More Than a Few Good Men: American Manhood and Violence Against Women*, Keynote Address at the Colorado Attorney General’s Annual Violence in the Workplace Conference (May 9, 2002); *see also* JACKSON KATZ’S VIDEOTAPE: TOUGH GUISE (Sut Jhally 1999) (available for sale at <http://www.mediaed.org/videos/MediaGenderAndDiversity/ToughGuise> (last visited Mar. 19, 2003)).

<sup>796</sup> *Id.*

tice, there is simply too much to learn and no adequate guidance from statutory or case law, creating potential liability. While there are additional reasons why lawyers are reluctant to take on domestic violence cases, these four will be addressed as the most commonly articulated concerns.<sup>797</sup>

The imposition of a minimum threshold of practice would necessitate comprehensive trainings affording the opportunity to address the above concerns and, in the process, actually increase the number of attorneys accepting domestic violence case referrals. With regard to the first apprehension that the case will be prolonged, the training could offer guidance as to how tenacious advocacy can expedite cases. The second issue, reflecting the misconception that abuse victims will inevitably be problematic, can best be described as erroneous, unjustified, and without merit in most cases. For example, when dealing with difficult business or estate planning clients, lawyers develop strategies for either coping with or, in extreme cases, withdrawing from such matters. Additionally, if a lawyer feels overwhelmed by the emotional frailty, confusion, or ambivalence of her battered client, she can request (with her client's permission) assistance from the experienced domestic violence advocates in her community.<sup>798</sup>

The third cause of trepidation, fearing the batterer, is an emotion worth heeding but can be overcome by taking precautions, including safety planning for self and staff. However, such planning should be undertaken in every law practice, as disgruntled clients or adversarial parties in virtually any case can become dangerous.<sup>799</sup> The fourth area of concern, liability for practicing without adequate knowledge, can be remedied by skills training, practice manuals, and advice of experienced practitioners.<sup>800</sup>

Thus, while there may be problems incorporating domestic violence cases into one's practice, there are advantages as well. Many lawyers and judges express genuine satisfaction, albeit tempered by the presence of distressing facts, in handling cases involving battered defendants when the dispositions render some degree of ameliorative justice. Attorney Kris Davis-Jones says, "I think lawyers ought to relish these cases; they

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<sup>797</sup> Based on the author's twenty-five years working with abuse victims, her attempts to secure legal counsel through official and informal channels, and her two years coordinating a private bar referral program within Legal Services. *See* Author's Experience, *supra* note 46.

<sup>798</sup> *Id.*

<sup>799</sup> *See generally* GAVIN DE BECKER, *THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE* (1997). An expert on violent behavior, Mr. de Becker advises that we must all learn to value our gut instincts: "[I]ntuition heeded is far more valuable than simple knowledge. Intuition is a gift we all have, whereas retention of knowledge is a skill." *Id.* at 28.

<sup>800</sup> A number of local bar associations have established experienced attorney panels to assist those handling domestic violence matters. For example, Attorney Heidi Stoudemyer, then president of the Phoenix Bar Association, established such a panel that is still widely used by counsel in her community.

provide so much more to work with than many criminal matters. They give lawyers the chance to express the same kind of righteous indignation that prosecutors so often unleash on so many of their other clients.”<sup>801</sup>

## VII. CONCLUSION

Effective assistance of counsel for battered defendants must include broadening the definition of competence, with a focus on integrating the constructs of race and class into the litigation process. Just as physicians are responsible for treating patients based on a specific medical standard of care, lawyers are also obligated to employ minimum standards of care in representing battered defendants. In much the same way that physicians should carefully examine the role of heredity and socioeconomic status in designing the most effective treatment plan, so too must lawyers address race and class issues in this context. This Article provides substantial empirical data documenting poverty’s deleterious impact on battered women’s options, including obtaining quality legal assistance and permanently extricating themselves from abusive relationships. Much progress has ensued from the politicization of domestic violence issues over the past few decades; feminist scholarship now identifies as systemic and relevant an issue that had previously been viewed as individual and private. But that analysis is worthless if it still deprives the true victims of access to legal remedies early enough to prevent the tragedies described herein. Indeed, the triumph of reform statutes and the spread of progressive court practices in the aftermath of advocates’ insistence are certainly causes for optimism. However, it is too early to declare victory given the continuing torture and terroristic conduct perpetrated against abuse victims by their abusers, as well as the terror revisited upon them in new forms as defendants in the criminal justice system. Ineffective counsel so often provided to battered defendants results in their unnecessary incarceration, particularly for victims who are of color, poor, or both.

This Article attempts to address these mistakes and propose a normative construct for their correction—essentially a prescriptive reform framework for lawyers and judges handling these cases. It is necessary for lawyers, bar associations, and law schools to become proactive in assisting legal services and battered women’s advocacy programs within their communities. Race and class are indeed essential constructs of effective representation of battered defendants, given that civil rights and feminist jurisprudence rarely address domestic violence from the victim’s perspective,<sup>802</sup> and when such issues are not addressed, normative analy-

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<sup>801</sup> E-mail from Kris Davis-Jones, Defense Attorney, to Sarah Buel, Clinical Professor, University of Texas School of Law (July 29, 2002) (on file with author).

<sup>802</sup> For jurisprudence that does look at victims’ perspectives, see, for example, the work

ses are often missing. The development of transformative theory can only be achieved by scholars collaborating with lawyers, judges, community service providers, and the less privileged, in bridging the gap between theory and practice. Within the academy, interested scholars are in an ideal position to facilitate such collaborations and ensure that the voices of abuse victims who are poor or of color are included. Given that lawyers possess the knowledge and models to implement remedial action, we must now ensure that the right to competent counsel is treated in practice as fundamental for battered women defendants.

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of Kimberlé Crenshaw, *supra* note 61, Angela P. Harris, *supra* note 132, and Shelby Moore, *supra* note 87.