

BATTERED WOMEN: A PERSPECTIVE ON INJUSTICE

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INTRODUCTION

I began to learn about battered women when, twelve years ago, I defended a woman who had fought back against her abusive husband. Prior to this experience, I viewed battered women as victims of private, personal injustices. I then learned that the abuse, in any individual case, is a symptom of a pervasive injustice affecting women as a group.

To focus only on the blows that bruise the body and break the bones misses the core of the problem. The beliefs that violate basic concepts of equality scar the soul far longer than the time it will take the bones and bruises to heal. The abuse of women by men dates from the earliest recorded history. Laws and religion codified the subjugation and abuse of women by men. For thousands of years, these principles continued to deny women their basic human rights by virtue of their gender. In light of the prejudice and discrimination women face, men feel comfortable committing acts of violence against women. We must understand this history of injustice before we have any hope of eradicating it.

The legacy of these legalized injustices impacted heavily on our culture. Women were pressured to choose professions such as secretaries, nurses and teachers rather than lawyers, doctors and engineers so that they could prepare for their true roles as mothers and homemakers. I stress that all of these professional options would be praiseworthy if they were the product of the free choice of a woman. The reality is that women were effectively barred from careers in construction, law enforcement and executive level positions. In addition to the issue of which careers were saved for women, a women's choice to pursue any career rather than raise her children questioned her femininity. Until men accept women gaining a freedom of choice equal to them, no real equality can exist.

It is the respect that flows from the belief in another's equality that will still the hand that does the violence. Until that day comes, we must demonstrate our outrage at the inequality. For

example, we must show anger that women are not assured freedom from marital rape in places like Oklahoma and North Carolina and that other states only make it a crime when accompanied by physical injury.

This paper examines the history of violence against women in order to gain a perspective on the current status. It is based on my experience representing battered women.

The research done on domestic violence began less than twenty years ago. Dr. Lenore Walker pioneered the research with theories which focused on the woman's reaction to prolonged violence and coined the phrase "battered woman's syndrome." Other work focused on the batterer and use of power and control to dominate the relationship. The research is continuing and growing. Inherent in this progression is debate about the theories. This debate is a healthy index of progress in a new field.

The figures for intra-family violence today are similar to those compiled fifteen years ago. Wife-beating remains the single major cause of injury to women, more significant than rape, mugging, and auto accidents combined.¹ Between three and four million women in the United States are beaten in their homes each year by their intimate partners.² In 1986-87 the Federal Bureau of Investigation revealed that 40 percent of all female homicide victims are killed by family members or other intimate partners.³

Women in abusive relationships are always asked, "Why did you stay?" When we ask a woman why she didn't leave or how she could allow the violence to happen to her, we become accomplices of her abuser. It is wrong to focus blame on the victim rather than the victimizer.

The injustice of the question itself reflects the reality of the injustice of an abusive relationship. Battered women have long understood what research has documented: leaving can be more dangerous than staying. According to the Department of Justice, a woman who leaves her abusive spouse or lover is fourteen

¹ Jane O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23; E. Stark & A. Flitcraft, *Violence Among Intimates, An Epidemiological Review*, Handbook of Family Violence, (1988).

² New York State Correctional Association (1991). Other sources have estimated the number of battered women to be as high as six million per year, O'Reilly, *supra* note 1, at 23, and as low as 1.8 million per year, LEGISLATIVE COUNCIL OF MARYLAND, REPORT OF THE JOINT COMMITTEE ON GENDER BIAS IN THE COURTS at 1 (May 1989).

³ FBI, CRIME IN THE UNITED STATES (1986-87).

times more likely than a woman who stays to be the victim of a violent crime at the hands of the abandoned spouse or lover.

There are other compelling reasons why a woman stays. Some women, like many of us, continue to love the people who hurt them. Love in this form seems strange to us, but love is often a difficult and contradictory emotion and the lessons are often taught to us as children. Children are often taught to associate violence and pain with love when their parents spank them. How many times have you seen a parent on a street or in a shopping mall hit a child and tell them, "I only did it for your own good," or "because I love you" or "you made me do this." The old axiom, "Spare the rod and spoil the child," says it all. If we understand why children continue to love the parent who hits them, why are we unable to understand the woman who loves her abusive husband?

We continue to be conditioned to expect pain in our adult relationships. Many of us, including myself, grew up listening to the Mills Brothers love song "You Always Hurt the One You Love." Even after we have been hurt by a loved one, we hope that with enough love and care we can turn things around. Very few people, including abusive husbands, are all bad. Research has shown, in fact, that most batterers are loving and contrite after a violent episode: begging forgiveness, showering the woman with affection and promising never to do it again. Many of us would find it difficult to disregard the heartfelt promises of a loved one, especially if we truly wanted to believe them.

Other social and economic pressures serve to keep women in abusive relationships. Religion plays a part by *its* commitment to the institutions of marriage and family. Traditional notions of femininity, that the woman is the caretaker of the children and the hearthstone and is responsible for the emotional side of family life, still create an ideal figure of womanhood against which women judge themselves. If the family structure fails, she fails at life. The seedling of feminism, which appeared to flourish in the seventies, is still no match for the redwood of patriarchy that has been growing for thousands of years.

Once a battered woman has taken physical action against her abuser, society is suddenly placed in an uncomfortable position: it wishes to punish the perpetrator of a serious crime, but it is not altogether sure who the real victim is. Often prosecutors and the media explain the rationale for punishing the woman by saying that if we do not prosecute her for striking back at her spouse, we will be giving *women* a license to kill their husbands. Recent his-

tory shows, however, that if any such license has been given, it has been given to men.

Between 1976 and 1987, there was a twenty-six percent decrease in the number of men killed by intimate partners. A similar decrease was not noted for female victims of intimate homicide. This decrease in female-perpetrated partner homicides has been linked to the increased availability of options for women out of abusive relationships. It seems clear that resources such as shelters, crisis hotlines, pro-arrest policies and newly enacted laws are saving the abusers' lives while women continue to die. This is convincing evidence that women are likely to try alternatives to violence when they believe them available.

The vast majority of women who finally killed their abusers sought outside help prior to the fatal incident. Thus, society often had an opportunity to halt the violence before the lethal incident and failed. Why is this so? One reason is that very little effort is focused on changing the conduct of the batterer. Studies show that without a change in the batterer's conduct, the violence in an abusive relationship will just continue to escalate. Second, although treatment programs exist, they are grossly inadequate in number. Third, the shelters for battered woman established in the United States only in the mid-1970's are insufficient. It is shocking to discover that there are now three times more animal shelters in the United States than shelters for battered women.⁴

There has been progress. The New York State Office For The Prevention of Domestic Violence and organizations like Victims Services Agency, in New York City, have been vigorously training police departments, health care providers, and parole and probation officers to recognize and assist battered women, but the demand far exceeds their capacity to deliver this training. Finally, the domestic violence laws currently in place need to be vigorously enforced. Even if a police officer arrests a batterer, unless the rest of the criminal justice system responds effectively, the laws will have no bite. Lawyers in criminal and civil settings need to be trained to better represent and aid battered women. New York State, in conjunction with Pace University and its Law School, has created the Pace University Battered Women's Justice Center and is developing intensive programs to train lawyers

⁴ S. REP. No. 101-545, 101st Cong., 2nd Sess. (1990), *available in* 1990WL 201794 (Leg. History).

and law students to prosecute abusers and represent abused women in the forums where they are needed. Attorneys in private practice will have this training available to them, at no cost, in return for their guarantee of pro bono service to battered women in civil and criminal proceedings. Many battered women are raped and sexually abused by their abusive partners. This training comports with the recommendations made by the Governor's Task Force on Rape and Sexual Abuse.⁵ Judges also need to be educated and concerned about batterers and their victims. Without the support from those who work in the judicial system, the battered woman has one less way out of her violent life.

Lastly, this document will engage the issue of battered women and a criminal justice system that is necessarily a product of a society that has been less than fair to women. Battered women who kill often see themselves as the victims of a criminal justice system created and dominated by men. We address the debate about the standards fundamental to a woman who claims she acted in self defense when she killed her abuser. No system designed by humans can be perfect, but we can and must insist that it be fair. Each case of a battered woman must be judged individually on its own merits by judges and juries breathing the air of equality and justice. To deny the past injustices to battered women is to be blind to the light of reason that can lead us forward. To claim that it has always happened makes us equally handicapped to proceed. Future generations will have every right to judge us by our ability to see the truth.

This document is intended to help us focus on where to go from here.

CHAPTER I HISTORY OF SPOUSAL ABUSE

The history of wife abuse in Western society explains why injustice is rooted in our civilization today. This article examines the history of spousal abuse in Western culture.

Early social philosophies encouraged chastisement of women. It was viewed as a practice necessary to a woman's well-being, and as a husband's right, emanating from the ownership of his wife and the mastery of his household.⁶ Early religious phi-

⁵ FINAL REPORT OF THE GOVERNOR'S TASK FORCE ON RAPE AND SEXUAL ASSAULT, 78 (1990).

⁶ See, e.g., DEL MARTIN, BATTERED WIVES (1981) [hereinafter MARTIN]; LENOR WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER]; Davidson, *Wife Beating: A Recurring Phenomenon Through History in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY*

losophies also recommended regular chastisement of women. For example, the New Testament, commanded women to be silent and obedient, and accepting of their husband's authority. Thus, the New Testament states, "[L]ikewise, you wives, be submissive to your husbands."⁷

The origin of spousal abuse as a societal institution lies in the belief that women were inferior to men. Even today many good people deny their beliefs about female inferiority to absolve themselves of any responsibility for violence resulting from these beliefs. Such denial renders us powerless to correct the injustice. It would also be a mistake to observe the past and believe our journey to justice is at an end. Less than ten years ago it was not a crime in New York for a man to rape his wife.

Women's status was first codified in Roman marriage laws,⁸ which ordered women to obey their husbands, and husbands to control their wives. Roman husbands were responsible for their wives' behavior and were expected to punish them for committing crimes. Husbands were allowed legally to use reasonable physical force, including blackening her eyes or breaking her nose to discipline their wives.⁹

English common law denied women status as individuals with personal rights and freedoms.¹⁰ For example, it dictated that the "wife's duty was to 'submit' and 'defer' to her husband's rule."¹¹ The English principle of coverture established that a married woman could not own property free from her husband's claim or control.¹² In fact, women themselves were considered

OF DOMESTIC VIOLENCE 2 (M. Roy ed., 1977) [hereinafter Davidson]. See also Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985) [hereinafter Waits]; Stedman, *Rights of Husband to Chastise Wife*, 3 VA. L. REV. 241 (1917) [hereinafter Stedman]; Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 547 (1988) [hereinafter Mather].

For purposes of this Article, and in accord with the primary theorists, a battered woman is defined as one who has been physically, sexually and psychologically abused by her intimate partner at least twice. We use the terms intimate partner, husband, spouse and mate interchangeably, to denote relationships which do or have included cohabitation and sexual intimacy. These relationships may include husbands at law or at common law, or boyfriends, regardless of the current status of the domestic relationship, whether it remains *in situ*, or where the partners are separated, divorced or living apart.

Although this paper does not specifically discuss violence between homosexual partners, I recognize that this problem exists and recommend further research.

⁷ 1 Peter 3:1.

⁸ See Walker, *supra* note 6; Davidson, *supra* note 6; Waits, *supra* note 6; Stedman, *supra* note 6; Mather, *supra* note 6.

⁹ WALKER, *supra* note 6.

¹⁰ MILDRED D. PAGELOW, FAMILY VIOLENCE 283 (1984) [hereinafter PAGELOW].

¹¹ SIGLER, DOMESTIC VIOLENCE (1989) [hereinafter SIGLER].

¹² BLACK'S LAW DICTIONARY 366 (6th ed. 1990).

property.

English common law considered rape a crime against the father, husband or fiance of the victim rather than a crime against the victim herself. Rapists were punished by compensating the male "owner" of the victim for damage to his "property."¹³ Marital rape was inconceivable, as wives could not legally refuse their husbands' conjugal rights.¹⁴

English common law sanctioned wife-beating under the infamous "rule of thumb,"¹⁵ which decreed that a man might use a "rod not thicker than his thumb"¹⁶ to chastise his wife. This law was intended to *protect* wives from overzealous husbands.¹⁷

In the late 19th century, England instituted many social and legal reforms to benefit women. It expanded a wife's legal grounds for divorce to include a severe beating by her husband, prohibition of the sale of wives and daughters into prostitution, and abandonment of the practice of imprisoning women for transgression of their wifely duties.¹⁸

The prevailing belief that women were property and should be subservient to men was exemplified by a 16th century Russian domestic code, which recommended beating "disobedient wives . . . but 'not straight on the face or on the ear,' since the husband would be sorely disadvantaged should his spouse become blind, deaf, or otherwise incapacitated. 'Keep the whip, and choose carefully where to strike. . . .'"¹⁹ In many parts of Europe, a man could even kill his wife without legal penalty, well into the 1600's,²⁰ while a wife who killed her husband would be penalized as if she had committed treason, because her act of homicide was considered analogous to murdering the king.²¹

These late 19th century English standards of civility travelled to America. For example, women were then allowed greater freedom to transact business and sign contracts.²² By the

¹³ SIGLER, *supra* note 11.

¹⁴ *Id.*

¹⁵ See A. BROWNE, WHEN BATTERED WOMEN KILL 167 (1987) [hereinafter BROWNE]; Waits, *supra* note 6, at 268 n.5; Interview with Dr. Julie Blackman in New York, N.Y. (June 13, 1991) [hereinafter Interview with Blackman].

¹⁶ Davidson, *supra* note 6, at 18. See also 1 W. BLACKSTONE-COMMENTARIES ON THE LAWS OF ENGLAND 1602, 445-6 (R. Welsh & Co. ed., 1897) [hereinafter BLACKSTONE].

¹⁷ Mather, *supra* note 6, at 547-548.

¹⁸ SIGLER, *supra* note 11.

¹⁹ PAGELOW, *supra* note 10, at 282.

²⁰ SIGLER, *supra* note 11.

²¹ Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 628-29 (1980) [hereinafter *Equal Rights to Trial*] (citing BLACKSTONE, *supra* note 16).

²² PAGELOW, *supra* note 10.

close of the 19th century, both the rule and the right to beat one's wife were withdrawn by most states.²³ The first American court declared that a husband could not "beat a wife with a stick, pull her hair, choke her, spit in her face, or kick her on the floor."²⁴ By 1910, 35 out of 46 states had passed reform legislation classifying wife-beating as assault,²⁵ but the prevailing belief in the sanctity and virtual inviolability of the family continued to work against women who attempted to obtain legal remedies for abuse by their spouses.

In the 20th century women made progress usually in single issue causes. For example, in the multi-purpose woman's movement of the 1970's activists demanded greater protection for victims of domestic violence.²⁶ The term "battered wife"²⁷ was coined to focus attention on the plight of women subjected to physical, psychological, and sexual abuse by their intimate partners.²⁸

In 1975 the National Organization for Women formed its task force on battered women and household violence. Following this, battered women's services and advocacy groups developed nationwide,²⁹ growing from a handful in 1976³⁰ to more than 1,500 in 1991.³¹ Those efforts were the foundation of what has become known as the battered women's movement—a decentralized, grass-roots ground-swelling, aimed at ending abuse

²³ 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, 12 n.5 (1986). Rosen cites the following examples of cases withdrawing a man's right to beat his wife: *Fulgham v. State*, 46 Ala. 143, 146-47 (1871); *Harris v. State*, 71 Miss. 462, 465, 14 So. 266, 266 (1893); *State v. Oliver*, 70 N.C. 44, 45 (1874); *Gorman v. State*, 42 Tex. 221, 223 (1875).

²⁴ BROWNE, *supra* note 15, at 167 (quoting *Fulgham*, 46 Ala. at 146-147).

²⁵ SIGLER, *supra* note 11.

²⁶ Mather, *supra* note 6, at 548 (citing WALKER, *supra* note 1, at 192). See also ERIN PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974).

²⁷ One of the first to use the term "battered woman" was British author, Erin Pizzey (*SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* (1974)), who opened Women's Aid, the first shelter for battered women, in the United Kingdom in 1971. Her work spurred similar efforts in the United States. See Waits, *supra* note 6, at 268 n.2 and accompanying text; Mather, *supra* note 6, at 548 (citing S. SCHECTER, *WOMEN AND MALE VIOLENCE* 1-2, 53-58 (1982)).

²⁸ See *supra* note 6 for definitions.

²⁹ Early referral and service groups for battered women in the United States included New York's Abused Women's Aid In Crisis (AWAIC), which opened in February, 1975. Linda Bird Francke, *Battered Women*, NEWSWEEK, Feb. 2, 1976, at 47.

³⁰ *Id.* (reporting that the United Kingdom had 28 open shelters and an additional 83 in the process of forming, while the United States lagged far behind).

³¹ More than 1,500 programs and organizations are listed in the 1991 National Shelter Directory. Telephone interview with Tania Abdulahad, Directory Coordinator, National Coalition Against Domestic Violence (July 31, 1991). New York State has more than 100 agencies and residential programs. Telephone interview with Gwen Wright, Executive Director, New York Coalition for the Prevention of Domestic Violence (July 31, 1991).

of woman through education and social reform, increased and improved services for battered women, domestic violence prevention legislation, and more aggressive enforcement of sanctions for abusers of women.

One immediate result of the increased activity on behalf of battered women was a rise in public awareness of intrafamily violence through news stories and films. The shocking reports on the abuse of women resulted in legislative willingness to intervene in family affairs.³² The criminalization of domestic abuse³³ and the redefining of rape laws to include marital rape in some jurisdictions followed.³⁴

Unlike the legislature, the judicial system, committed to justice, often failed women. Women who attempted to press charges against their abusive spouses often discovered that the entrenched "hands-off" policies of law enforcement agencies and the criminal courts were much harder to change.

For example, in New York in 1977, a woman who was knifed and seriously injured by her husband was forced to prosecute her case in family court, rather than criminal court, despite her stated wish to bring criminal charges. The appellate division found that criminal court was an inappropriate forum in which to resolve family matters, because it considered criminal sanctions, which might include imprisonment, to be too harsh for domestic cases.³⁵

Another example of judicial failure to a woman occurred in 1984 when I defended a battered woman who had killed her husband in Queens County. In this case, her husband had beat her so savagely he had bent a fireplace poker. The judge allowed the prosecution to introduce evidence that my client was a lazy and sloppy housekeeper. The judge told the jury that he admitted the evidence to let the jury know what my client did to provoke her husband to beat her.³⁶

In 1986, a Massachusetts judge criticized a woman who re-

³² BROWNE, *supra* note 15, at 2-3.

³³ Until the mid-1980s in New York State, domestic violence complaints were handled by the family courts. Family court judges did not have the jurisdiction to sentence abusers to jail; most often they acted as arbitrators.

³⁴ By definition, rape could not occur in a marital relationship in the United States until the mid-1970s. JULIE BLACKMAN, *INTIMATE VIOLENCE 2* (1989). *But see* BROWNE, *supra* note 15, at 102 ("By 1980 only three states had eliminated the marital rape exemption . . . and five states had modified it. However, by 1982, [thirteen] other states had extended their exemptions to include cohabiting couples as well as the legally married.").

³⁵ *Librizzi v. Chisholm*, 55 A.D.2d 954,955, 391 N.Y.S.2d 154,156 (2d Dep't 1977).

³⁶ *People v. Ciervo* 123 A.D. 2d 393,396; 506 N.Y.S. 2d 462,464 (2d Dep't 1986); trial transcript.

quested a protective order for "taking up the court's time when it has a lot more serious matters to contend with."³⁷ Six months later, the woman was kidnapped and murdered by her estranged husband. The judge was criticized for showing "contempt for [the Massachusetts] abuse prevention act and gave his opinion that . . . these [were] matters to be resolved within the marital relationship."³⁸

Battered women who struck back at their abusers were met with conflict with an unyielding and unsympathetic legal system. They found that the traditional self-defense doctrine was unavailable to battered women who killed their abusers, because the elements of self-defense, as applied, presupposed two men of equal size and fighting experience.³⁹ Therefore, battered women often defended themselves when charged with killing their abuser by pleading mental disease or defect, insanity, or extreme emotional disturbance.⁴⁰

If a battered woman proved she was laboring under a mental disease or defect at the time of the offense, she was found not guilty by reason of insanity.⁴¹ The price for her successful defense sometimes resulted in involuntary commitment to a mental facility for an indefinite time.⁴² If, on the other hand, a woman were unable to meet the standard for mental disease or defect and her alternative theories of defense were rejected, she was found guilty as charged. Lawyers representing battered women learned that the defense of mental disease or defect was very difficult to interpose and prove; even if successful, the defendant suffered the social and personal stigma of insanity.⁴³

³⁷ BROWNE, *supra* note 15, at 169-70 (citation omitted). Dunn was accosted by her estranged husband as she waited at a bus stop with her mother. He sprayed the mother with mace, shot Dunn in the abdomen, then kidnapped her. Dunn was found the next morning, battered and dead, face down in mud at the local rubbish dump.

³⁸ *Id.*

³⁹ State v. Wanrow 88 Wash.2d 221, 559 P.2d 548, 558 (1977).

⁴⁰ At common law, the modern extreme emotional disturbance [EED] defense was embodied in the defense of provocation or "sudden heat of passion." A defendant was guilty of voluntary manslaughter, rather than murder, if she intentionally killed the victim while in a state of passion, if the passion was caused by adequate provocation, and if the homicidal act occurred before she had a reasonable time to cool off. See J. DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.08 (Reprint 1990)[hereinafter DRESSLER].

⁴¹ *Id.* § 25.02. The verdict "not guilty by reason of insanity" meant that the jury found that the prosecutor established the case in chief, that all of the defendant's other non-insanity defenses were rejected, and the defendant was insane at the time of the crime.

⁴² In some instances women have been confined to mental institutions for a longer time period than any other sentence a court could or would impose. Still, her incarceration in a mental hospital would likely be short, as the test applied is whether the mental disease or defect renders her a danger to herself or society.

⁴³ The use of an insanity plea has also been criticized because it "emphasizes [wo-

A battered woman who successfully used the defense of extreme emotional disturbance⁴⁴ merely reduced her degree of criminal culpability from murder to manslaughter in the first degree.⁴⁵ Historically, under the common law, judges only reduced a defendant's sentence if the defendant acted in the sudden heat of passion, without first brooding over the provoking incident, or having sufficient time to cool off. This "cooling off" time varied by jurisdiction.⁴⁶ Under common law, few types of provocation were considered adequate to sustain this defense. One such sanctioned provocation was available only to men: if a man killed his wife or her lover after observing them in the act of committing adultery, he could defend himself on grounds of extreme emotional disturbance, because adultery was considered the "highest invasion of [the husband's] property," and a killing provoked by this invasion was felt to be vindication of an injustice.⁴⁷ The same defense was not available to women.

Battered women who killed their abusers benefited from advances in sociological and psychological scholarship on abused women, which emerged during the late 1970s. Prior attempts to explain the phenomenon of the battered woman had looked to Freudian theory. This theory surmised that all women were naturally masochistic and that battered women stayed in abusive relationships because they enjoyed the violence.⁴⁸ This theory was

men's] mental weaknesses." *Equal Rights to Trial*, *supra* note 21, at 638. Furthermore, Schneider argues, "Since women are generally viewed as unreasonable even under normal circumstances, a woman trying to establish an insanity defense may be forced to prove she was 'really crazy and hysterical' before jurors will excuse her." *Id.* at 638, n.83.

⁴⁴ EED does not have to be affirmatively pled. The district attorney may choose to indict the defendant for manslaughter in the first degree under a theory of EED (N. Y. PENAL LAW § 125.20); in such a case, neither the district attorney nor the defendant need allege nor prove the existence of EED. *See* Emick, 103 A.D.2d 643, 481 N.Y.S. 2d 552, 560. (§ 125.20 was intended to "assure that [Extreme Emotional Disturbance] is neither an element of first degree manslaughter nor a defense thereto and need not be alleged by the People or proved by either party in a prosecution therefor.") (quoting FOURTH INTERIM REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON THE REVISION OF THE PENAL LAW AND CRIMINAL CODE, 30).

⁴⁵ N. Y. PENAL LAW § 125.25.

⁴⁶ *See, e.g.*, *State v. Yanz*, 74 Conn. 177, 180, 50 A. 37, 38 (1901) (defendant must have acted in the "first transport of passion"); *State v. Gounagis*, 88 Wash. 304, 153 P. 9 (1915) (the trial judge correctly refused to allow the defendant to argue provocation, even though the victim had sodomized the defendant and bragged about the sodomy to others, because the defendant had brooded over the abuse for three weeks).

⁴⁷ DRESSLER, *supra* note 40, § 31.08(C)(2)(b) (quoting *Regina v. Mawgridge* [1707] Kel. J. 119, 137, 84 Eng. Rep. 1107, 1115).

⁴⁸ *See The Wife Beater and His Wife*, TIME, Sept. 25, 1964, at 81-82. As recently as 1985, the American Psychiatric Association convened a meeting to define "masochistic personality disorder" as an official diagnosis for a revision of the Diagnostic and Statistical Manual of Mental Disorders (Third Edition), which was defined as "crucial . . . to the profession. Its diagnoses are generally recognized by the courts, hospitals and insurance companies." Among the seven feminist psychologist and psychiatrist attendees

widely debunked by sociologists and psychologists.⁴⁹

Later, theories on the psychological and physical effects of battering gained recognition from professional and medical groups, including the National Institute for Mental Health (NIMH). These groups attempted to generate a psychological profile of battered women, the dynamics of a battering relationship and the consequences of abuse by intimate partners.⁵⁰ As a result of this scholarship, in the 1980s, many jurisdictions recognized battered woman's syndrome and allowed the introduction of expert testimony on the syndrome for the defense of battered women who killed their abusive partners.⁵¹

Unfortunately, the increase in public awareness of domestic violence, the small number of new programs and services for battered women, and the paucity of advances on the legal front, indicate that help for battered women has not gone far enough. An insufficient number of services and programs are available for women who seek them. Inadequate attention has been focused on reform of anti-woman bias in the law and enforcement of existing laws. As a result, a woman who chooses to leave a violent relationship may not be able to do so safely. New York has less than a thousand beds in battered women's shelters. These shelters are critical for battered women because they provide the necessary support services and their locations are secret. Instead of adding more to this inadequate number of shelters, New York is in serious danger of losing some of these beds because of the economic crisis.

CHAPTER II

DEFINING "BATTERED WOMEN" AND ITS EFFECTS ON THE VICTIM

When first used in the 1970s, the term "battered woman" described a woman subjected to physical abuse by a man. Later research on battered women and their abusers by psychologists

was Dr. Lenore Walker, then chair of the women's caucus of the American Psychological Association, who suggested that "masochism is casually diagnosed in many [battered] women." The meeting resulted in an agreement to forego the masochism diagnosis in favor of "self-defeating personality disorder." John Leo, *Battling Over Masochism: Psychiatrists and Feminists Debate Self-Defeating Behavior*, TIME, December 2, 1985, at 76.

⁴⁹ See, e.g., VIOLENCE IN THE FAMILY (S. Steinmetz & M. Straus eds., 1974); MARTIN, *supra* note 6; WALKER, *supra* note 6; PAGELOW, *supra* note 6; Dutton & Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 VICTIMOLOGY: INT'L J. 139 (1981) [hereinafter Dutton & Painter].

⁵⁰ See e.g., BROWNE, *supra* note 15; WALKER, *supra* note 6; THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING (M. Roy ed., 1982).

⁵¹ Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 237 (1986).

and social scientists pragmatically redefined the term "battered women." This research focused on the effects of recurring psychological and physical violence in an intimate relationship. Researchers were responding to demands by the medical and legal professions for firm ground on which to base treatment methodologies. It is vitally important to understand that this research is relatively new. Lenore Walker, in the context of battered women, created the wheel. The refinements and discussion of issues in this area demonstrate its vitality.

Like any group united by a single characteristic, "battered women" are otherwise individuals with few commonalities.⁵² As research on victims of criminal abuse progressed, women have been likened to hostages and prisoners of war,⁵³ concentration camp inmates, and victims of a variety of natural and man-made disasters.⁵⁴ In each of these cases, very disparate types of victims were categorized together primarily because they had been in the wrong place at the wrong time. The difference among women with the commonality of being victims of batterers makes defining "battered women" difficult.

Unlike hostages or prisoners, the battered woman is most often physically free to flee, although her perception of her ability to flee in the face of past and threatened violence renders her as helpless as any shackled prisoner. One question is invariably asked: Why doesn't the battered woman leave her abuser?⁵⁵ This question, while valid, ignores the other half of the issue: Why does the batterer abuse his spouse?⁵⁶ Focus solely on the

⁵² WALKER, *supra* note 6, at 31. Walker's attention to the differences between her research subjects was not as marked as her attention to their similarities, however, she did note that the women in her study were of all ages, and came from varying social, economic, and racial backgrounds.

⁵³ Waits, *supra* note 6, at 282 n.74 and accompanying text (citing Dutton & Painter, *supra* note 49, at 146-7).

⁵⁴ Waits, *supra* note 6, at 282 n.74 and accompanying text (citing M. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH* 21-44 (1975)) [hereinafter Seligman] (Learned helplessness theory has been used to explain the passive behavior of liberated concentration camp victims and others who have been subjected to "random uncontrollable and repeated violence.").

The shock reactions of battered women have been found to closely resemble those reactions of other victims of trauma. See D. FINKLEHOR & K. YLLO, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* (1985) (comparing battered wives to disaster and war victims); BARD & SANGREY, *THE CRIME VICTIMS' BOOK* (1979) (discussing the emotional reactions of victims of assault).

⁵⁵ See *supra* note 48 and accompanying text and Chapter III for a discussion of why battered women do not leave.

⁵⁶ Research on batterers is in its infancy, although several studies of battered women have revealed some third-hand information about batterers. One connection that has been briefly explored in this fashion is the relationship between childhood viewings of abuse by one's parents, or childhood victimization by a parental abuser, and adult expectations of or participation in abusive relationships. See *infra* note 158.

victim implies blame.

Several theories have tried to mold the definition of battered women. For example, one theory uses a pathology viewpoint to describe battered women. This view teaches that the battered women have a "syndrome" or illness that can be measured by quantifiable symptoms or experiences, including an inability to respond appropriately to abuse. It focuses on the psychological result of battering rather than on its cause. This is potentially confusing because it views battered women as unitary and passive, acquiescent, or even paralyzed by the controlling behavior of their abusers. Objections to this model point out the danger of characterizing battered women as sufferers of an ailment when defining this term. Critics argue that it so narrows the definition that women who do not exhibit all the prescribed symptoms of the illness⁵⁷ may be unable to obtain needed legal or medical aid. This model also has the potential for dividing abused women into either a "good" or "model" battered woman or a "bad" "nonstereotypical" battered woman. All too often, only a passive, helpless, and uneducated woman satisfies society's perception of a victim.

Another perspective suggests that the battered woman's retreat from abuse, whether emotional or physical, may be appropriate. This view of battered women portrays victims as those who explored available avenues of escape and concluded that no safe exits exist.⁵⁸

One further group theorizes that each battered woman may exhibit some characteristics or behaviors of each of the preceding perspectives.⁵⁹ This broadened view, leery of the pathology model of the battered woman which serves to reinforce female stereotypes of submission and passivity, yet recognizing that some battered women reflect stereotypical behaviors, marks the direction in which battered women's research is heading today.

A. Walker's Theory of Battered Women

The first major theory on battered women was developed by

⁵⁷ David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 644 (1986) [hereinafter Faigman] ("Researchers have not . . . convincingly demonstrated that the battering experience gives rise to a single distinctive behavior pattern. It is a mistake to use one theoretical construct to describe all women who are victims of domestic violence.").

⁵⁸ See, e.g., BROWNE, *supra* note 15, at 86 ("The fact that women maintain a home and often care for children as well as caring for the abuser, while they are being physically attacked and threatened, testifies to the depth of their resiliency and strength.").

⁵⁹ Interview with Blackman, *supra* note 15.

Dr. Lenore Walker, whose pioneering psychosocial study⁶⁰ provided the springboard for contemporary research. Walker conducted detailed interviews with 120 battered women, and "listened to fragments of over 300 more stories."⁶¹ She compiled a "self-volunteered sample . . . not randomly selected" which she insisted could not be considered "a legitimate data base from which to make specific generalizations."⁶² Yet, despite her disclaimer, Walker did generalize about the phenomenon of battering. She extrapolated from the women's reports some information about their abusers as well. She found common characteristics among battered women including low self-esteem, acceptance of guilt and denial of terror and anger, traditionalist views of home and sex roles, and acceptance of responsibility for the batterer's acts.⁶³

Walker's three-phase "cycle" theory⁶⁴ of battering focuses on the relationship between physical and psychological interactions during and following batterings. In the first phase, which Walker calls "the tension-building stage,"⁶⁵ the battered woman experiences minor battering incidents⁶⁶ which she may be able to control by modifying her behavior to conform to the batterer's whims or demands.⁶⁷ Phase two involves the "acute battering incident."⁶⁸ This abuse differs from the preceding type in three ways: (1) the severity of the attack (2) the seriousness with which the battered woman and her batterer view the abuse, and (3) the batterer's lack of control as he "discharge[s] . . . tensions that have built up during phase one."⁶⁹ During the third phase, "kindness and contrite loving behavior,"⁷⁰ the batterer, recognizes that he has gone too far during phase two. He attempts to make up with his victim by exhibiting loving contrition during which the battered woman slips into "denial," or blames herself

⁶⁰ See WALKER, *supra* note 6.

⁶¹ *Id.* at xiii.

⁶² *Id.*

⁶³ *Id.* at 31.

⁶⁴ WALKER, *supra* note 6.

⁶⁵ *Id.* at 56-59.

⁶⁶ This is not to say that the injuries caused during this phase are slight in all cases. In many instances, what one woman or couple will consider to be a minor injury, another may consider to be an extreme injury. As each woman's response to battering and injury is determined by her prior experience with violence—whether she is part of a violent household where fists and objects are routinely raised against family members by any of the parties, or she has no prior experience of violence in a family setting—some women will never describe their abuser's behavior as battering.

⁶⁷ WALKER, *supra* note 6.

⁶⁸ *Id.* at 59-65.

⁶⁹ *Id.* at 59.

⁷⁰ *Id.* at 65-70.

for her batterer's outburst.⁷¹

One tension illustrated by Walker's study was that a woman's behavior appears inconsistent. On the one hand, the battered woman is a passive victim, powerless to respond at the moment of attack and unable, during the cease-fire period, to comprehend the danger she faces. On the other hand, she appears to be an active woman who attempts to leave her relationship, or to return to it as a lesser of two evils. It is difficult to reconcile this tension. Most recent research indicates that each woman's experience of battering is different.

Additionally, for many women, particularly those whose family life is extremely violent, the contrition phase does not exist.⁷² Rather, they may experience a lull in hostilities.⁷³ Women with a history of participating in or accepting violence as a normal intrafamily behavior may not notice the behavior Walker depicts in the "tension-building phase." More recent studies of battered women have not uniformly shown the spiral of escalating⁷⁴ occurrences by the batterer between the contrition phase and the next tension-building phase.⁷⁵

Finally, research suggested that women who killed their abusers recognized a difference or turning point in the abuser's behavior that triggered the episode of defense. For example, the batterer might violently threaten something loved by the abused woman such as a child which in the woman's mind crosses an invisible line. This has been proven not to be the case with all women who killed their abusers.

Subsequent theorists reached a consensus on certain aspects of the definition of battered women based on Walker's study. Walker's twin theories of a cyclical process of battering and the battered woman's consequent learned helplessness became standard measures used by courts and therapists. Recent research indicates that Walker's theory does not account for many individual characteristics of battered women, thereby appearing to ex-

⁷¹ *Id.*

⁷² Interview with Blackman, *supra* note 15. The New York Office For The Prevention Of Domestic Violence has accumulated considerable data which demonstrates that the contrition phase is often non existent.

⁷³ All of the studies of battered women who have killed their abusers show an absence of loving behavior by the end of the relationship. Many of the women exhibit continuous hostility long before the relationship ends. *See, e.g.,* WALKER, *supra* note 6, at 69; BROWNE, *supra* note 15, at 63.

⁷⁴ In relationships where severe violence—including display and use of deadly weapons—is a daily occurrence, the woman may not describe her abuser's behavior as steadily escalating over time. Interview with Blackman, *supra* note 15.

⁷⁵ WALKER, *supra* note 6, at 56-59.

clude some abused women. Contemporary studies continue to build on her work.

Once she had defined a battered woman and portrayed her in an escalating violent relationship with an increasingly irrational and explosive partner, Walker attempted to explain why the battered woman was unable to simply walk away from the battering relationship. She relied on the social learning theory known as "learned helplessness" to explain the origin and growth of "victimization . . . perpetuated to the point of psychological paralysis"⁷⁶ in the battered woman, which she deduced from the subjects of her study.⁷⁷

Learned helplessness theory reviews one's capacity to manipulate the environment. In order to effect outcomes that are pleasing to us, we have learned to modify our responses to various stimuli. If our behavior produces acceptable results, we attempt to replicate it. If the outcome is unpleasant, we review and modify or re-evaluate our behavior. When a second or third try reproduces the desired outcome, we have learned by reinforcement⁷⁸ to recreate the desired outcome.

But if we find that our response does not produce the desired outcome, "we . . . look for explanations as to *why* such expectations did not take place. If we cannot find any logical explanations, after a time we assume we have no control over the outcome."⁷⁹ Intermittent and unpredictable reinforcement maintains the feeling of lack of control at a constant level. Those who assume they have no control over their environment become passive and docile. By analyzing battered women's behavior in light of learned helplessness theory, Walker posited a learned response, bolstered by the repetitive lessons of successive battering cycles, which effectively paralyzed the battered women into inaction, even during periods of relative calm between abusive episodes.

Perspectives built on Walker's work are directly at odds with the "learned helplessness" model, which perceives the woman's response to battering as passivity caused by dulled senses and an

⁷⁶ WALKER, *supra* note 6, at 43. Learned helplessness theory was developed in experiments on animals which were given electric shocks at random. At first, the animals attempted to control their environment and avoid further electric shock punishment. But, as the shocks were random, the animals soon became passive and compliant. They failed to rouse themselves even when readily available escape routes were shown to them. Waits, *supra* note 6, at 282 n.74 (citing SELIGMAN, *supra* note 54, at 21-44).

⁷⁷ WALKER, *supra* note 6, at xvi.

⁷⁸ *Id.* at 44-45.

⁷⁹ *Id.* at 45.

inability to recognize moments when action is possible. Contemporary feminist theorists suggest that the woman's behavior may be active rather than passive—although she may choose to refrain from action, her *decision* is not a passive one. Rather it is an active, rational response to an irrational situation, and is perceived by her to be the most appropriate choice at the time.⁸⁰ Given the statistics on homicides and severe injuries to women who attempt to leave their abusers,⁸¹ women may in fact be making the best choice by remaining.

B. *What Does the Abusive Relationship Encompass?*

Abusive relationships often exhibit several types of co-existing violence. As the relationship continues and the violence escalates, certain types of behavior may be observed. A woman may be abused verbally in a threatening manner, by disparaging comments⁸² escalating over time to taunts or threats of harm to the woman or to her children, members of her family, friends, and household pets.⁸³ She may be non-verbally abused by menacing gestures including attempted slaps, raised fists or brandished knives or guns.⁸⁴ The man may chase the woman around her home, imprison her in it, or follow her if she attempts to leave it. An apparent paradox in the woman's perceptual capacity results from this abuse; she may experience a breakdown of her ability to distinguish reality—believing that the abuse will stop if she changes her behavior⁸⁵ and, at the same time, may exhibit a heightened ability to recognize nuances in her abuser's behavior learned over successive abusive episodes.

The most common form of abuse is physical. The woman may be: slapped, punched with a fist, kicked or hurled bodily,⁸⁶ choked, shoved, grabbed, beaten with fists, thrown or dragged along the ground, beaten with objects, stabbed or shot. She may sustain minor bruises or severe injuries including lacerations, contusions, puncture wounds, broken bones, or miscarriage.⁸⁷

⁸⁰ Interview with Blackman, *supra* note 15.

⁸¹ See *infra* Chapter IV.

⁸² Faigman, *supra* note 57.

⁸³ BROWNE, *supra* note 15, at 57.

⁸⁴ See WALKER, *supra* note 6, at 56-59; BROWNE, *supra* note 15, at 69.

⁸⁵ In one study, women who reported changing their own behavior in order to calm their abusers said that "resistance only worsened an attack," and that failure to express their pain encouraged abusers to "hit . . . harder . . . until they inflicted enough damage to achieve the desired effect." BROWNE, *supra* note 15, at 107.

⁸⁶ See BROWNE, *supra* note 13, at 58.

⁸⁷ *Id.* at 69.

Pregnant women report increased incidents of abuse.⁸⁸

Many abused women report varying types of sexual abuse by their batterers.⁸⁹ Physical abuse frequently includes, precedes, or follows sexual assault. A woman may be raped by her abuser.⁹⁰ He may force her to have aberrant sex, or may aid or force other men to sexually abuse her.⁹¹ Forced intercourse and sodomy frequently follow other violent acts.⁹²

Between 22 and 35 percent of women who require emergency room treatment have been battered.⁹³ Unfortunately, statistics from hospital emergency rooms and other medical services fail to provide the complete picture because they comprise only a small portion of injuries resulting from spousal battering or rape. Doctors and emergency medical technicians may not recognize or inquire as to the cause of their patients' injuries.⁹⁴ Many women who need medical treatment do not seek help due to embarrassment or fear of spousal reprisal. "Battered women who are also poor are more likely to come to the attention of governmental officials than are their middle- and upper-class counterparts."⁹⁵ This does not indicate a greater incidence of abuse among the poor. Women from middle-class or affluent backgrounds may simply seek help privately.⁹⁶

Women who remain in abusive relationships may sustain permanent injuries and scars, both physical and psychological.

⁸⁸ Richard J. Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, J. MARRIAGE & FAM. (1988) (pregnant women surveyed had 28.3% greater risk of minor violence, 60.6% greater risk of severe violence, and 35.6% risk of overall violence). *But see* American Medical Association Report of the Council on Scientific Affairs, Report I-91, 12 (1991) [hereinafter AMA Report] (policy statement regarding violence against women) ("There is some controversy over whether the incidence of marital violence increases during an abused wife's pregnancy; however, we know it does not cease.")

⁸⁹ See generally WALKER, *supra* note 6, at 107-126; BROWNE, *supra* note 15, at 95-103.

⁹⁰ Department of Justice rape statistics compiled for 1979-1987 indicate an estimated 155,000 completed and attempted rapes each year, 14% of which are by intimate partners; while 52% of the completed rapes were by intimate partners. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF VIOLENT CRIME 7 (1991) [hereinafter FEMALE VICTIMS OF VIOLENT CRIME].

⁹¹ See WALKER, *supra* note 6, at 120-24.

⁹² BROWNE, *supra* note 15, at 95-96. Among rape victims over the age of 30, 59% are battered women. Stark & Flitcraft, *Spouse Abuse*, in SURGEON GENERAL'S WORKSHOP ON VIOLENCE AND PUBLIC HEALTH SOURCEBOOK (1990).

⁹³ KERSIT YLLO & MICHELE BOGRAD, FEMINIST PERSPECTIVES ON WIFE ABUSE (1988).

⁹⁴ The New York State Office for the Prevention of Domestic Violence has instituted a training program to sensitize medical workers and help them recognize and respond to domestic violence.

⁹⁵ Waits, *supra* note 6, at 276.

⁹⁶ Waits, *supra* note 6, at 276 nn.34-36 and accompanying text. Middle- and upper-class battered women with careers who project confidence and success are often loath to admit that they are being abused "because they're afraid it will hurt their image." Anastasia Toufexis, *Home Is Where The Hurt Is: Wife Beating Among the Well-to-Do is No Longer a Secret*, TIME, Dec. 21, 1987, at 68.

In quantifying the behavior that she would use to define a battering relationship, Walker "could not . . . ignore the pleas of battered women who insisted that psychological abuse was often more harmful than the physical." Walker recognized the difficulty in measuring the severity of psychological abuse in individual relationships, resulting from the need to take account of "both the frequency with which it occurs and [its] subjective impact" upon the battered woman.⁹⁷ Most of Walker's subjects named psychological humiliation and verbal harassment among their worst battering experiences, and all described an underlying and continual threat of physical violence.⁹⁸

While the scars remaining from physical abuse may fade, most battered women sustain psychological scars that influence their ability to create and maintain new relationships of trust. Severely abused women report serious losses of self-esteem and self-confidence which impair the healing process.⁹⁹

CHAPTER III

ANSWERING THE MOST COMMONLY ASKED QUESTION ABOUT BATTERED WOMEN: WHY DON'T THEY LEAVE?

Despite the proliferation of research and writing about battered women during the past decade, myths and misperceptions about the nature of intimate violence still abound. The most prevalent myth is that battered women can control the violence by leaving the household at any time, and are therefore at least partially to blame for their predicament.¹⁰⁰

The underlying assumption of this myth is that the violence stops when the woman leaves. This is most often untrue.¹⁰¹ Even when alternatives to the abusive home exist, leaving that home will generally not end the abusive relationship, and may, in fact,

⁹⁷ WALKER, *supra* note 6, at xiv.

⁹⁸ *Id.* at xv.

⁹⁹ One often noted result of consistent psychological abuse is the longevity of its effect on the victims of abuse. The renewal of a life free from abuse is difficult for the battered woman whose self-confidence has virtually disappeared. Women who are intimidated by their inability to foster a positive and meaningful relationship with their abusive partner may feel that they did in some measure deserve to be battered. These feelings are exacerbated in women with traditional views of the societal roles of men and women, home and family.

¹⁰⁰ See, e.g., WALKER, *supra* note 6; BROWNE, *supra* note 15; Mather, *supra* note 6; Waits, *supra* note 6.

¹⁰¹ BROWNE, *supra* note 15, at 109-10. Browne notes that leaving an abusive relationship in its earliest stages, when there has been only one or two violent incidents, may end the violence. However, this is dependent upon the batterer's state of mind, his desperation and his violent tendencies.

place the woman in greater danger.¹⁰² Women who leave abusive households¹⁰³ often face increased violence and a greater risk of being killed by their batterer.¹⁰⁴

There are a variety of factors that impact upon a battered woman's decision to remain in or return to the abusive household.¹⁰⁵ These factors include increased violence,¹⁰⁶ love of and commitment to the abuser, hope that the relationship can be repaired, economic dependence on the batterer, and shame. Women also fear losing their children in a custody battle or the separation having a negative effect on their children. Women may foresee practical problems in effecting a separation, and be numb with the shock reactions of victims of abuse.¹⁰⁷

Battered women are asked, either implicitly or explicitly, why they remain in a violent household.¹⁰⁸ Likely, such questioning attempts to blame the victim for her predicament.¹⁰⁹ Common myths which focus on battered women are: (1) women enjoy the

¹⁰² See *infra* notes 127-145 and accompanying text.

¹⁰³ In Browne's study, over 53% of the comparison group of 205 abused women had left the battering relationship by the time they were interviewed. A number of women in the homicide group had also left or attempted to leave their spouses before the homicidal incident. BROWNE, *supra* note 15, at 109-10.

Battered women will often leave and return to their abusive spouses a number of times. Their reasons for returning are similar to other women's reasons for staying. See *infra* notes 116-70 and accompanying text.

¹⁰⁴ See *infra* notes 127-45 and accompanying text.

¹⁰⁵ See *infra* notes 116-170.

¹⁰⁶ See Mather, *supra* note 6, at 552 (Mather notes that there are a lot of theories as to why women remain in their "tormented situations," but that the problem really defies analysis).

¹⁰⁷ BROWNE, *supra* note 15, at 110. Browne characterizes the "shock reactions of victims of abuse" as "reactions of fear and confusion, and acute sensations of powerlessness and helplessness. They may become dependent and suggestible, and find themselves unable to make decisions or to function alone. [V]ictims become aware of their inability to manage their environment or to assure their own safety, and either attempt to adapt to a powerful aggressor or reassure themselves that the traumatic event will never occur again." *Id.* at 123-24. See also Chapter II on the psychological effects of violence.

¹⁰⁸ Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 8 BEHAV. SCI. & L. 121, 128 (1990) ("The ever-popular question, 'Why does she stay?' expresses a bias before one begins to answer it. 'She,' the battered woman, is the responsible one, the one who could and should change, the person who could end her family's violence, if only she would leave.").

¹⁰⁹ Earlier theories of intimate violence directly blamed the woman for the battering by reasoning that she must have provoked the violence. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill In Self-Defense*, 18 HARV. WOMEN'S L.J. 121, 148-50 (1985). See also SCHECHTER, *supra* note 27, at 20-24; R. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES 102-03 (1979); MARTIN, *supra* note 6, at 49. This theory is no longer accepted.

The battered woman and her spouse both blame the woman for the battering. The batterer blames the victim because he tends to externalize and rationalize his criminal acts. The battered woman accepts the blame because she thinks that she can control the violence by correctly performing her family duties. Waits, *supra* note 6, at 281, 289. See also BROWNE, *supra* note 15, at 109.

violence, and (2) women deserve the beating because they did or failed to do something. These myths focus on the woman's role in the battering episode.¹¹⁰ A battered woman is frequently asked why she and her children did not "hit the road like fugitives, leaving the assailant the home and belongings, when he is the one who broke the law."¹¹¹ Most crimes, except perhaps rape, focus on the assailant's characteristics, not the victim's.¹¹² For example, burglary victims are not routinely asked why they continue to live in high crime neighborhoods, especially after they have been previously burglarized.

The woman's inability to leave often plays a role when she pleads self-defense in a criminal proceeding. Prosecutors invariably raise the issue of the battered woman's failure to flee. They argue that the woman's not leaving demonstrates the mildness of the abuse; they argue that a reasonable woman would not tolerate great abuse. Alternatively, they argue that if the abuse was as bad as claimed, the woman exhibited flawed judgment in staying and could not reasonably assess the danger before taking criminal action. The prosecution denies the woman her right to stand her ground in her own home. She is expected to act differently than a man would in an analogous situation.¹¹³ Some judges still adhere to the common law doctrine that a man's home is his castle¹¹⁴ and he has a right to defend both it and himself with deadly force.¹¹⁵

Different factors influence different women, and the factors may change over time in reaction to the abuse. A woman's decision to remain may be a rational response to a desperate situation.

¹¹⁰ *Equal Rights to Trial*, *supra* note 21, at 15. Schneider suggests that the myth that battered women deserve the abuse is centered in the historical background of wife beating. ("Woman abuse results from a patriarchal legacy that allots a dominant role to husbands and a submissive role to wives. Accordingly, wives have been called the appropriate victims of violence."). *Id.* at 628.

¹¹¹ BROWNE, *supra* note 15, at 110 ("Another way to look at the issue is to ask, 'Why should the woman leave?'").

¹¹² See Mather, *supra* note 6, at 625-30.

¹¹³ Men generally do not have to justify why they continued to associate with other men they knew to be violent, nor why they failed to stay away from bars or other places in which violence was known to occur. Crocker, *supra* note 109, at 148 n.127.

¹¹⁴ DRESSLER, *supra* note 40, § 18.02 (3)(b) (The castle exception is "based on the early property view that a man's home is his castle—a natural sanctuary from external aggression.") (citing *People v Tomlins*, 213 N.Y. 240, 243, 107 N.E. 496, 497 (1914) (opinion of Cardozo, J.)).

¹¹⁵ See N.Y. PENAL LAW § 35.15(2)(a)(i). See also N.Y. PENAL LAW § 35.20(3) ("A person in possession or control of . . . a dwelling or occupied building . . . may use deadly force to prevent or terminate the commission or attempted commission of [a] burglary.").

A. *She May Still Love Her Spouse and Hope That He May Change*

Violence committed by a stranger differs from violence committed by intimates in that the relationship between the parties engaged in an intimate relationship was originally based on love.¹¹⁶ That the abused woman may love her batterer surprises many people, and perhaps leads to the misperception that she enjoys the abuse or associates it with love.¹¹⁷ This idea confuses love of the batterer with love of the abuse. She may love the man she remembers from their courtship or who appears during the kind and contrite phase that follows the severe battering phase.¹¹⁸

Battered women often state that during courtship their abusers were the most courteous, communicative and romantic men they had ever met.¹¹⁹ Generally, the abuse begins after the woman has made a major commitment to the relationship, either by marriage or by moving in with the man.¹²⁰ When the first violent episode occurs, she often attributes it to other circumstances, such as jealousy, possessiveness, or a major life event, such as his loss of employment.¹²¹ While some women may leave or attempt to leave their abusers after the first physical attack, many do

¹¹⁶ Mather, *supra* note 6, at 552-53. See also WALKER, *supra* note 6 at 67-69; Sheehy et al., COMMUTATION FOR WOMEN WHO DEFEND THEMSELVES AGAINST ABUSIVE PARTNERS: AN ADVOCACY MANUAL AND GUIDE TO LEGAL ISSUES 16 (1992) (available from Harvard Law School Battered Women's Advocacy Project). See also Waits, *supra* note 6, at 296 ("Some victims retain strong positive feelings toward their mates, while others no longer feel any love for their abuser and stay in the relationship out of family loyalty, fear, hopelessness, or lack of alternatives.").

¹¹⁷ A common misperception is that battered women associate being beaten with love because that is how their parents expressed emotion toward them when they were children. While the majority of the battered women in Browne's study did experience violence during their childhoods (71% of the homicide control group and 65% of the comparison group), women did not perceive the abuse as a sign of affection. Instead, they reported feeling helpless, depressed and withdrawn. These same feelings were reported by women who had no childhood experience with violence. See BROWNE, *supra* note 15, at 28-29.

¹¹⁸ For an explanation of Lenore Walker's cycle theory of violence, See WALKER, *supra* note 6. See also Chapter II notes 60-75 and accompanying text.

¹¹⁹ BROWNE, *supra* note 15, at 40 ("Such characteristics as early and intense interest; a constant concern with the woman's whereabouts and activities; a desire to be with them all the time; wanting to do everything together, often alone; and major changes in the men's life-style were mentioned over and over again.").

¹²⁰ *Id.* at 47. Studies show that most women, 73% to 85%, do not experience a physical assault from their male partners until after marriage, usually within the first year. See, e.g., L.H. BOWKER, BEATING WIFE-BEATING (1983); DOBASH & DOBASH, *supra* note 109; PAGELOW, *supra* note 10; Rosenbaum & O'Leary, *Marital Violence: Characteristics of Abusive Couples* 49 J. CONSULTING & CLINICAL PSYCHOL. 63-71 (1981).

¹²¹ BROWNE, *supra* note 13, at 52 ("Especially if violence has never occurred before, the cause of an assault may be linked to a specific circumstance by both the women and the men. A concrete reason or an unexpected attack is comforting; women often attempted to adapt their behavior in light of the reasons given, in an effort to prevent further trouble.").

not.¹²²

Lenore Walker's theory of the cyclical nature of abusive relationships also helps to explain how a battered woman can still love her batterer and hope that the abuse will cease.¹²³ The third phase of this cycle is characterized by the man's kind and contrite loving behavior.¹²⁴ Because the woman experiences helplessness and depression after a severe battering episode,¹²⁵ she is especially vulnerable to his expressions of love and remorse.¹²⁶ She may believe his promises, and hope that the relationship can return to the way it was in the beginning, before the violence.

B. She May Fear or Have Been the Victim of Separation Violence

Underlying criticism of a woman's inability to leave is the assumption that leaving will end the violence. In a few cases, especially if the abuse is in its earliest stages, this may be true.¹²⁷ However, for many women, violence continues or intensifies after they leave. The loss of control that an abusive man feels when his spouse leaves him often translates into increased depression and anger, motivating him to take extreme measures to regain control over his spouse's life.¹²⁸ Ironically, although the batterer is reacting to the loss of his spouse when he seeks her out after separation, the chance of his murdering her increases at

¹²² *Id.* at 53. Browne found that the longer the couple had been together before the first physical attack and the more serious their commitment, the more likely they would remain together after the attack. *Id.* at 42.

¹²³ See WALKER, *supra* note 6; Mather, *supra* note 6, at 553. See also *supra* Chapter II notes 57-72 and accompanying text on Walker's cycle theory.

¹²⁴ WALKER, *supra* note 6, at 65-66. Browne found that this contrition phase occurred in 87% of the men in the homicide group and 72% of the comparison group. However, expressions of remorse or regret dropped sharply in the homicide group as the relationship continued. BROWNE, *supra* note 15, at 62.

¹²⁵ See *supra* notes 65-66.

¹²⁶ A battered woman is also most likely to flee the abusive relationship or seek outside help during this phase. However, her abusive mate will often be able to entice her to return, relying on her feelings of guilt for abandoning him and, if applicable, their children. Waits, *supra* note 6, at 294.

Some scholars also suggest that the man may be most amenable to help from outside sources during the contrition phase. Thus, arrest during or immediately after the severe battering phase may be the best time for the legal system to become involved. He is least defensive and most motivated to change and benefit from incarceration and specialized therapy. See Waits, *supra* note 6, at 310. See also WALKER, *supra* note 6, at 66-67, 231.

¹²⁷ BROWNE, *supra* note 15, at 109-10. At the same time, in the early stages of a relationship, either the woman is more likely to forgive her abusive partner or the pattern of abuse is not yet apparent.

¹²⁸ BROWNE, *supra* note 15, at 115-16 ("The point of, or even the discussion of, separation is one of the most dangerous times for partners in a violent relationship. Abusive men threatened with the loss of their mates may be severely depressed, angry, agitated, homicidal, or suicidal.").

this time.¹²⁹ It is estimated that a woman is at a seventy-five percent greater risk of being killed by her batterer when she leaves than she is when she remains.¹³⁰ Although nothing can predict when an abusive husband will follow his spouse,¹³¹ the probability of his doing so increases as the relationship lengthens.¹³²

Studies also suggest that the degree of the abuser's violence may continue to escalate even after separation.¹³³ Of the 1.5 to 2 million women who seek medical treatment each year because of an assault by a male partner,¹³⁴ approximately seventy-three percent sustained their injuries after leaving the household.¹³⁵ According to the United States Department of Justice,¹³⁶ a separated or divorced woman is fourteen times more likely to be the victim of a violent crime¹³⁷ perpetrated by her ex-spouse¹³⁸ than is a married woman who remains in the abusive house-

¹²⁹ *Id.* at 144 (citing Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. OF THE AM. ACAD. OF PSYCHIATRY & L. 271-80 (1982)). In one study, 57% of the men who killed their spouses were separated from them at the time of the attack. In contrast, only 9% of the female defendants were living separately from their spouses when the men were killed. See also, Casanave & Zahn, *Women, Murder and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia* (Paper presented at the Annual Meeting of the American Society of Criminology, Oct. 31, 1986) (reporting that 28.6% of the women killed by a spouse were attempting to end the relationship, and an additional 25% were legally separated or divorced from the men who killed them).

¹³⁰ Correctional Association of New York, Press Release 4 (March 4, 1991).

¹³¹ One study reports that at least 50% of all abused women continue to be victimized after they leave the relationship. BROWNE, *supra* note 15, at 110 (citing D.M. MOORE, BATTERED WOMEN (1979)).

¹³² BROWNE, *supra* note 15, at 110 ("The longer the relationship continues, and the more investment in it by both partners, the more difficult it becomes for a woman to leave an abusive mate safely.").

¹³³ See WALKER, *supra* note 6, at 180; Waits, *supra* note 6, at 283; BROWNE, *supra* note 15, at 114. See *supra* notes 72-75 and accompanying for a discussion of the escalation of violence in a battering relationship in general.

¹³⁴ BROWNE, *supra* note 15, at 9.

¹³⁵ Stark et al., *Wife Abuse in the Medical Setting; An Introduction for Health Personnel*, 7 DOMESTIC VIOLENCE MONOGRAPH SERIES (Apr. 1981) (available from National Clearinghouse on Domestic Violence).

¹³⁶ FEMALE VICTIMS OF VIOLENT CRIME, *supra* note 90.

¹³⁷ A violent crime is defined as rape, robbery, or assault, both simple and aggravated. An aggravated assault is one in which the offender used a weapon or seriously injured the victim. A simple assault is one in which the victim sustained either a minor injury (bruises, black eyes, cuts, scratches, swelling, or undetermined injuries requiring less than two days of hospitalization) or was verbally threatened. Eighty-five percent of all intimate violence reported was in the form of assault, approximately one quarter of which was aggravated. *Id.* at 2.

¹³⁸ The Department of Justice defines ex-spouse to include separated or divorced spouses. Data on intimate violence by ex-boyfriends is also included in the report, but it is not clear on all tables whether the term "ex-spouse" encompasses this group. Because this section is concerned with separation violence, only the data that clearly includes relationships where the partners are separated is used here. However, elsewhere in this paper, the terms "spouse" and "ex-spouse" include non-marital relationships. *Id.* at 1.

hold.¹³⁹ Although separated and divorced women comprised only ten percent of the surveyed population, they sustained approximately seventy-five percent of the intimate violence.¹⁴⁰ Only fifty-six percent of these crimes were reported to the police.¹⁴¹ This potentially lethal danger certainly impacts upon a battered woman's decision to stay or return to an abusive household.¹⁴²

Finally, the danger to a woman from an ex-spouse may linger for many years.¹⁴³ During this time, the batterer may constantly phone the woman, her family or her acquaintances both day and night. He may also phone or visit her place of business. He may appear at her home, her children's schools and playgrounds, or the grocery store.¹⁴⁴ Even if the woman flees the state, a batterer will frequently seek her out.¹⁴⁵

This data indicates that, for the short-term, a battered wo-

¹³⁹ *Id.* at 5. Data for this study was compiled for the years 1979-1987 and included only those victims who reported violence to the survey interviewers that they considered criminal and were able to relate. Interviews were often conducted with other family members present. Consequently, if offender and victim reside in the same household, it may have not been possible for the victim to relate her experience because of the presence of the offender or of other family members. This may account for some of the differences between the responses of married and separated or divorced women. Sample size ranged from 49,000 to 62,000 households and 100,000 to 137,000 individuals from those household units per year.

The total estimated number of women victimized by ex-spouses was 1,945,300 or approximately 216,100 per year; this number probably does not include ex-boyfriends. The total estimated number of women victimized by spouses was 512,000 or 56,900 per year; the total estimated number of women victimized by boyfriends was 1,789,200 or 198,000 per year. *Id.* at 1.

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 3. This number reflects a combined total for both separated and non-separated spouses and is included only to suggest that the numbers generated from police reports and other state agencies may reflect only half of all violent episodes between both groups of abused women.

Fifty-one percent of women who reported the crime to the police did so to avoid repetition of the incident. Forty-eight percent of women who did not report the violence to the police considered the incidents personal matters to be taken care of privately. Only nine percent failed to report the incident because they believed the police would not *think* it important enough. *Id.* at 3.

¹⁴² BROWNE, *supra* note 15, at 65-68, 114 (83% of the men in Browne's homicide group threatened to kill someone, either the woman, the children or others. Ninety-eight percent of the women in the homicide group thought that their abuser would or could kill them.).

¹⁴³ *Id.* at 115 ("Some of the women in the homicide group had been separated or divorced for up to two years before the final incident, yet were still experiencing life-threatening harassment and abuse from men unwilling to relinquish their connection.").

¹⁴⁴ The extreme lengths that a batterer may go to in order to pursue and harass his victim after she leaves may be explained by his emotional dependency on his wife. This dependency, coupled with his fears of inadequacy, tends to form a pathological jealousy; he wishes to be with her to the exclusion of all others. Waits, *supra* note 6, at 287 (citing A. GANLEY, PARTICIPANT'S MANUAL, COURT MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS 31 (1981)).

¹⁴⁵ Waits, *supra* note 6, at 115.

man may be safer if she remains in the abusive household. However, in the long-term, the abuse will escalate and be as dangerous as separation violence. Thus, most scholars and advocates recommend that battered women leave the abusive household.

C. There May Be Practical Problems That Prevent a Separation

Many battered women are unable to leave or remain away from the abusive household because they have few independent economic resources.¹⁴⁶ Even if employed outside the home, the battered woman may not earn enough money to sustain herself and her children. She may also not have control over money she earned while living in the household. If she decides to leave, she may face the severe shortage of shelter space or inadequate welfare allotments. She may be too isolated from family and friends or afraid of placing them in danger to stay with them.¹⁴⁷

There are conflicting reports about whether an employed woman faces abuse more frequently. The United States Department of Justice estimates that an unemployed woman is almost three times more likely to be the victim of domestic violence than an employed woman.¹⁴⁸ Other studies seem to indicate that battered women are no less likely to be employed than other women.¹⁴⁹ Even when employed, women frequently earn less money than men, making survival alone difficult, especially if

¹⁴⁶ While many people are able to understand why a battered woman who does not have any outside job skills or alternative living arrangements may stay with the batterer, a battered woman who has a job or family in the area is often criticized, sometimes by the legal system, for remaining in the household. This criticism is the result of a misperception about the dynamics of intimate violence; the lack of independent economic resources is only one factor that may influence women to remain, and it is not necessarily the strongest nor the most prevalent.

¹⁴⁷ In Browne's study, many women reported that their abusive spouses threatened them, their families and their friends if the women should ever leave the relationship or tell anyone about the abuse. Because these men had often carried out their threats in the past, the women had reason to believe that they would carry them out in the future. BROWNE, *supra* note 15, at 65-66.

¹⁴⁸ FEMALE VICTIMS OF VIOLENT CRIME, *supra* note 90, at 5. Interestingly, women in the armed forces were almost twice as likely to be victims of domestic violence than other employed women, and women who reported that they "kept house" for a living were five times less likely to be the victims of domestic abuse than unemployed women.

¹⁴⁹ In Browne's study, 48% of the women in both the homicide group and the comparison group were employed most of the time during the relationship, and another 28% of the homicide group were employed sporadically (compared to 17% of the comparison group). BROWNE, *supra* note 15, at 21. In 1989, approximately 55% of all women in the United States were employed, compared to 76% of all men. Alison L. Cowan, *Women's Gains on the Job: Not Without a Heavy Toll*, N. Y. TIMES, Aug. 21, 1989, at A14 [hereinafter Cowan].

children are involved.¹⁵⁰ Furthermore, abusive men typically engage in economic deprivation during the relationship; thus, even when a woman works, her control over the family finances and her paycheck may be limited.¹⁵¹ Therefore, battered women are typically forced to depend upon outside help in the form of shelters and welfare benefits. In most cases, however, welfare benefits are inadequate and shelter space in short supply.

In New York State, welfare benefits for a mother with two children total \$577 per month, only sixty-four percent of the \$900 per month the federal government says is needed.¹⁵² According to the United State Department of Housing and Urban Development (HUD), there is virtually no area of New York where a two bedroom apartment would consume less than seventy-two percent of New York's welfare grant, leaving approximately \$160 a month for all other household purchases.¹⁵³ Thus, a woman's only viable alternative becomes living with her children in a shelter.

However, New York State, for example, has an inadequate supply of shelter space. According to the New York State Department of Social Services, 12,433 women and children were denied emergency shelter in 1990, primarily for lack of space.¹⁵⁴ Because emergency shelters are considered temporary housing, a

¹⁵⁰ Cowan, *supra* note 149, at A14 (As of 1989, an average woman still earned only 70% of the wages of the average man.).

¹⁵¹ Mather, *supra* note 6, at 555-56 ("The husband will not give his wife any money without her 'justifying' it, or he will direct her to pay the bills and run the household without giving her adequate funds to do so. This form of abuse goes beyond mere economic dependence into a more sinister means of control by a man over his woman . . . [T]he coercive power of the economic deprivation . . . comes from both parties' knowledge that if the woman does not passively accept much of this behavior, the man is likely to explode and physically assault her.") (footnotes omitted). See also WALKER, *supra* note 6, at 13, 79-80, 108; SCHECTER, *supra* note 27, at 17.

¹⁵² Statement by Tracy Huling, Director of Public Policy for the Correctional Association of New York (March 4, 1991) (available from the Correctional Association of New York) [hereinafter Correctional Association of New York].

¹⁵³ *Id.* at 5-6 (citing United States Dept. of Housing and Urban Development). See also NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, REPORT: HOUSING FOR BATTERED WOMEN 12 (1989) (In New York City, "habitable apartments typically cannot be found for less than \$550 and often not for less than \$800, even in the poorest neighborhoods. . . . Since the Aid to Families with Dependent Children (AFDC) shelter rent allotment for a family of three in New York City is \$276 per month without and \$286 with heat, it is easy to see why so many welfare-eligible women end up in shelters or welfare hotels.").

¹⁵⁴ Correctional Association of New York, *supra* note 152, at 6. Seventy-one percent of the 12,433 were denied due to lack of space. Gwen Wright, *Women Who Need to Escape Men*, N. Y. TIMES, May 18, 1991, at A23.

In addition to being in short supply, shelters are often dirty, dangerous and difficult places to stay. Especially if she has children, a woman may be reluctant to place herself in a city shelter, regardless of its distance from the abusive spouse.

woman's stay there is limited.¹⁵⁵ Thus, if a woman can get emergency shelter, she is usually required to leave before adequate alternatives can be found. If she finds no alternative source of housing and finance, she may be forced to return to her spouse.

Friends and family are often unwilling or unable to house the woman and her children. Additionally, family members and friends often impede a woman's escape attempts by refusing to acknowledge symptoms or stories of her abuse, or by emphasizing the difficulties she will face upon leaving.¹⁵⁶ Even if her friends and family are empathic, they may fear her abusive spouse and be unwilling to help.¹⁵⁷

Finally, a woman with children may fear that her departure will focus her spouse's anger on her children, even if he has not abused them before, and regardless of whether she takes them with her.¹⁵⁸ Her spouse may use the children as a bargaining tool and threaten the woman with the loss of custody or a charge of kidnapping if she takes them.¹⁵⁹ Additionally, she may be reluc-

¹⁵⁵ NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, PROFILE OF SERVICES (1991). The maximum stay may vary from one week to 90 days [hereinafter PROFILE OF SERVICES].

¹⁵⁶ Waits, *supra* note 6, at 284-85. See also BROWNE, *supra* note 15, at 54 ("Women also talked to clergy who told them the abuse was a cross they must bear and advised them to be better wives; of [sic] marriage counselors who searched for what the women had done to provoke their husbands and assured them that the violence would not have occurred without some contribution on their part; and of attorneys who told them that the assaults sounded too minor to really be worth a court case, and advised them to see their ministers or a marriage counselor instead.").

¹⁵⁷ Richard J. Gelles, *No Place to Go: The Social Dynamics of Marital Violence*, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE 46, 56 (M. Roy ed., 1977). See also BROWNE, *supra* note 15, at 66 ("The women reported that threats by the men were particularly related to the woman's leaving the relationship, telling someone else about the abuse, or being with another man. In warning the women not to leave, the men also made threats toward those people the women might go to for shelter, such as relatives or friends, as well as threatening separation from or the loss of their children.").

¹⁵⁸ The number of abusive men who also beat their children is unknown. One researcher estimates that the number is as low as 12%. Coleman, *Conjugal Violence in the Family*, 6 J. MARITAL & FAM. THERAPY 207-13 (1980). Walker believes that the figure is closer to 66%. WALKER, *supra* note 6, at 27. Childhood victimization, or merely witnessing the parental abuse, is probably the most accurate indicator of which children will grow up to be abusive. According to one study, men who witness violence between their parents are almost three times more likely to hit their wives than men who do not witness parental violence. MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980). See also MILDRED D. PAGEDLOW, WOMAN BATTERING: VICTIMS AND THEIR EXPERIENCES (1981); Pagan, Stewart, & Hanson, *Violent Men or Violent Husbands?*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH (D. Finkelhor et al. eds., 1983).

¹⁵⁹ Robert Geffner & Mildred D. Pagelow, *Mediation and Child Custody Issues in Abusive Relationships*, 8 BEHAV. SCI. & L. 151-52 (1990) ("The pending termination of their marriage leads some men into abusive activities such as 'spying, breaking down the door at night, obscene phone calls, physical beatings, vandalism, and attempts at child-napping.' If normally non-violent husband-fathers can engage in such abusive, severely disorganized behavior during divorce, one can imagine the behavior of violent husband-fathers in their attempts to maintain control and domination of their families.").

tant to take her children away from their school and friends, especially if the immediate future she can envision is one of shelters and welfare checks.¹⁶⁰

D. She May Not Trust the System to Help Her

Many women do leave their abusive husbands and build independent lives.¹⁶¹ However, many others who attempt to leave their spouses fail, sometimes repeatedly, and must return to the household. Upon her return, however, especially if it was coerced, the abused woman likely blames herself for failure. The self-blame reinforces the destructive state of helplessness that will make future escape even more difficult.¹⁶²

Inadequate response by the police and justice system also reinforces the abused woman's helplessness. Although, for example, the New York City Police Department¹⁶³ has a pro-arrest policy in domestic abuse cases,¹⁶⁴ the arrest of the batterer may only stop the violence for a short period of time.¹⁶⁵ If the prosecutor and judge fail to accompany the arrest with a strong message of support for the victim, the arrest will have little effect on the overall situation.¹⁶⁶

Even when victims get a judgment against their husbands,

¹⁶⁰ Waits, *supra* note 6, at 281-82.

¹⁶¹ See *supra* note 99.

¹⁶² Waits, *supra* note 6, at 283 ("[A] destructive psychological spiral is established: the beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape; her inability to escape makes her feel even more inadequate and helpless and also leaves her in a relationship which will lead to further beatings, which will further decrease her self-esteem.").

¹⁶³ Although other counties in New York State have pro-arrest policies in domestic violence cases, they are not consistent on a state-wide basis. Thus, women in certain non-arresting counties may feel even more helpless and less able to attempt an escape than women in New York City who have some police support. Conversation with Sonia Nunez, Coordinator, Domestic Violence Intervention and Education Project, Victims Services Agency & New York Housing Police (July 15, 1991).

¹⁶⁴ It is the *policy* of New York City police officers, when responding to a domestic violence call, to arrest the batterer under the following four conditions and with probable cause: (1) if a felony has been committed, (2) if there has been a violation of an order of protection, (3) if there has been a misdemeanor assault and the victim requests arrest, and (4) if there has been a violation in the officer's presence and the victim requests an arrest. *Id.* This does not mean that arrest is mandatory. The officers at the scene have a great deal of discretion in choosing arrest.

¹⁶⁵ Waits, *supra* note 6, at 320 ("Once in custody, batterers need time for the rage of the severe battering phase to subside. The objective of victim safety cannot be achieved if abusers are released too quickly after their arrest."). However, if the violence has not escalated past a certain point, arrest alone can be an effective deterrent to future abuse and will not incite increased violence. *Id.* at 310 (citing Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261, 268-70 (1984)).

¹⁶⁶ Waits, *supra* note 6, at 309. Neither prosecutors, judges, or defense attorneys are given any specialized training or information beyond what they may have learned in law school.

they commonly drop the charges against the batterer or get him released from prison.¹⁶⁷ When this occurs, prosecutors rarely investigate whether a threat caused the woman's change of heart. Prosecutors may feel relieved at having one less case.¹⁶⁸

Judges often can or will do little more than warn the batterer of potential future jail time. Judicial warnings, often in the form of permanent or temporary orders of protection, only work when the batterer chooses to comply. About one-third of all orders of protection given to female victims of domestic violence were violated within the first six months.¹⁶⁹ If a batterer ignores an order of protection, the court or state often does not act until further harm has been done. When a woman is re-victimized, especially after her abuser's arrest or while under an order of protection,¹⁷⁰ her feeling that the system cannot protect her becomes reinforced.

CHAPTER IV INTIMATE HOMICIDE

Although much national attention has been focused on battered women who killed their spouses, the result of lethal violence between partners usually results in the death of the woman.¹⁷¹ In fact, no other person poses a greater risk of death

¹⁶⁷ *Id.* at 323.

¹⁶⁸ *Id.* at 323-24. Waits suggests that the prosecutor should instead "first consider whether the charges can be proved without the victim's testimony. Failing that, the state's attorney should delay dropping charges, perhaps for a period of thirty days or so. During this period, the contrite phase may (unfortunately) pass, and the victim may again be prepared to cooperate." *Id.* at 324. See also Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetrating Violence*, 28 WILL. & MARY L. REV. 263, 287 (1987) ("The state, not the victim, prosecutes criminals; we need hardly reflect upon the fact that if the justice system required the victim to press charges, few prosecutions for murder would ever occur!").

¹⁶⁹ VICTIMS SERVICES AGENCY, ORDERS OF PROTECTION 7 (June 1991) (available from New York City Victims Services Agency). Interestingly, women who obtained orders of protection in Criminal Court following an arrest were more likely to be re-victimized than women who obtained the orders in Family Court or in Criminal Court for non-arrest cases. *Id.* at 6.

¹⁷⁰ In the Victims Services Agency study, 25% of the victims had sought an order of protection against the same abusive partner at least one time in the past. *Id.* at 8. In 1986, New York State husbands and common law husbands were reported to have violated orders of protection in 2,729 cases. This data does not include boyfriends or ex-boyfriends. NEW YORK STATE DEPARTMENT OF CRIMINAL JUSTICE STATISTICS, NEW YORK STATE DOMESTIC VIOLENCE (1986). During the year 1990, there were 1,638 reported violations of protection in New York City alone. NEW YORK CITY POLICE DEPARTMENT, DOMESTIC VIOLENCE REPORT 85 (Dec. 1990).

¹⁷¹ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES (1984) [hereinafter FBI]. From 1976-87, approximately 38,648 people were killed by an intimate partner (defined as married, common-law, ex-married or dating partners). Of this number, approximately 61% were women killed by male partners. AMA Report, *supra* note 85. See also BROWNE, *supra* note 15, at 10 (Browne estimates that

to a woman than her male partner.¹⁷² Between 1976 and 1987, the number of women who killed male partners decreased twenty-six percent;¹⁷³ the male intimate homicide rate did not similarly decline.^{174,175}

The decline in homicide rates by women has been linked to the increased availability of shelters and services for abused women and to domestic violence prevention legislation.¹⁷⁶ Additionally, intervention programs remove women from situations of escalating violence which usually precede the homicide.¹⁷⁷ If a battered woman turns to spousal homicide, it is usually a response to an extreme level of violence, one that exceeds the violence present in non-lethal battering relationships.

A. *The Widening Gender Gap in Intimate Homicide Rates*

Intrafamily homicide accounts for approximately seventeen percent of this nation's homicides; women are the most frequent victims.¹⁷⁸ About half of all intrafamily homicides are spousal murders.¹⁷⁹ This percentage figure translates to eleven husbands or wives killed by a spouse every seven hours.¹⁸⁰

The gap between the intimate homicide rates for men and women has widened dramatically in recent years. Recent studies further indicate that non-marital intimate homicide rates do not reflect the overall trend.¹⁸¹ Homicides of intimate partners com-

of all spousal homicides, two-thirds were wives killed by husbands, and one-third were husbands killed by wives).

¹⁷² AMA Report, *supra* note 88, at 9 (52% of all women murdered in the United States are killed by a current or former male partner.). In contrast, only 14% of all male homicide victims were killed by female partners. ANGELA BROWNE & KIRK R. WILLIAMS, *TRENDS IN PARTNER HOMICIDE: A COMPARISON OF HOMICIDES BETWEEN MARITAL AND NON-MARITAL PARTNERS FROM 1976-1987*, 2 (1991) [hereinafter *TRENDS IN PARTNER HOMICIDE*].

¹⁷³ Angela Browne & Peter Flewelling, *Women as Victims or Perpetrators of Homicide*, Presented at the Annual Meeting of the American Society of Criminology (Oct. 1986) [hereinafter *Women as Victims*]. Homicide rates in general decreased during the twelve year span, but intimate homicide rates declined significantly more. Male-perpetrated homicide rates also declined, but decreased significantly less than female-perpetrated intimate homicide rates.

¹⁷⁴ AMA Report, *supra* note 88, at 9.

¹⁷⁵ *Women as Victims*, *supra* note 173.

¹⁷⁶ See *infra* notes 181-2 and accompanying text.

¹⁷⁷ See BROWNE, *supra* note 15, at 9-12.

¹⁷⁸ A total of 3,317 family murders were reported to the police in 1987, with wives the most frequent victims (1,045 or 31.5%), followed by husbands (543 or 16.4%). U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *DOMESTIC VIOLENCE STATISTICS 12* (1989) [hereinafter *DOMESTIC VIOLENCE STATISTICS*].

¹⁷⁹ FBI, *supra* note 171.

¹⁸⁰ *Id.*

¹⁸¹ *TRENDS IN PARTNER HOMICIDE*, *supra* note 172, at 12. The 26% decrease in female-perpetrated intimate homicide rates reflects a combined total for both marital (including formerly married, common-law and ex-married couples) and non-marital females (in-

mitted by unmarried men have actually increased in these years, while homicides by unmarried females have remained fairly constant.¹⁸²

A recent study by Browne and Williams linked the drastic change in marital homicide rates perpetrated by women to the increased availability of services for abused women (such as shelters and crisis hotlines) and to the presence of domestic violence legislation. States which offered a high number of such services were more likely to see a downward trend in female partner homicides than were states which failed to offer these services.¹⁸³ One possible explanation for the rate of intimate homicide among non-marital couples not being similarly affected is that services (e.g., shelters) are not generally available or structured for individuals in non-marital relationships.¹⁸⁴

1. Female Intimate Homicide Rates Have Declined Because When Women Are Given an Option Other Than Lethal Force, They Will Often Choose to Take It.

Men kill more often than do women,¹⁸⁵ and they tend to kill women more often than women kill men.¹⁸⁶ Furthermore, wo-

cluding individuals who are, or formerly were, dating or living with their partners). Since the percentage of the population that is married has dropped and the percentage of the population that is living together has risen, the opportunity for violence among married partners has decreased, but has increased among non-married couples. *Id.* at 6.

¹⁸² *Id.* at 14. Non-marital couples include those couples who are living together, but not long enough for police to label them "common law" and couples who are dating.

¹⁸³ *Id.* at 87. The presence of domestic violence legislation did not significantly impact upon partner homicides committed by men; similarly, while there was some correlation between services available to women and the decline in intimate homicide, it was more strongly correlated with female-perpetrated homicide than with male-perpetrated homicide.

¹⁸⁴ *Id.* at 17. Analyses linking female intimate homicide rates with available services and domestic violence legislation do not differentiate between marital and non-marital homicide rates. Browne and Williams suggest that there may be a link between the failure of services to impact on non-marital homicide rates and the fact that such services are not primarily targeted to non-marital or dating couples. "Shelters—and much of the domestic violence legislation—address primarily the problems of safety and access for those who are married and who have children. Few, if any, services (except on high school and college campuses) are structured for individuals in assaultive dating relationships; and those services that exist are targeted primarily toward rape between non-marital partners, rather than more general types of abuse and threat." *Id.* at 17-18.

¹⁸⁵ During the years 1980-84, women perpetrated only 14% of all homicides in the United States; men committed 86% of these homicides. Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC. REV. 75, 86 (1989) [hereinafter Browne & Williams]. See also, FBI, *supra* note 171.

¹⁸⁶ According to a 1982 report, male offenders killed 2,511 female victims nationwide; female offenders killed 1,551 male victims nationwide. Crocker, *supra* note 109, at 121 n.3 (1985) (citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 9 (1982)).

men kill for different reasons and under different circumstances than men. Unlike men, women are more likely to kill an intimate partner than to kill any other person.¹⁸⁷ The men that women kill typically precipitated the fatal confrontation¹⁸⁸ and the woman's lethal act was most often committed in self-defense.¹⁸⁹ Studies also show that most female defendants are likely to have been the victims of abuse by their spouses prior to the lethal incident,¹⁹⁰ and most often attempted to get outside help before committing spousal homicide.¹⁹¹

These characteristics of women who kill partially explain why special services for abused women decrease their homicide rates. If abused women successfully escape from the batterer and find long-term shelter or other services, they are not likely to find themselves physically confronting their ex-spouses.¹⁹² After leaving, a woman is not likely to seek out her abuser or provoke an abusive episode; a man, however, is likely to seek out and confront his spouse.

¹⁸⁷ Browne & Williams, *supra* note 185, at 86. 51% of all homicides committed by women were partner homicides, whereas only 14% of all homicides committed by men involved victims who were partners. However, a woman is almost twice as likely to be killed by a man as a man is likely to be killed by a woman. FBI, *supra* note 171.

¹⁸⁸ BROWNE, *supra* note 15, at 10 (generally, a woman committing a homicide is seven times more likely to be acting in self-defense than is a man committing a homicide)(citing NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, CRIMES OF VIOLENCE (1969)). See also Ann Goetting, *Patterns of Marital Homicide: A Comparison of Husbands and Wives*, 20 J. COMP. FAM. STUD. 341 (1989).

¹⁸⁹ In approximately 90% of all nationwide appellate cases in which a battered woman killed or attempted to kill her spouse, the battered woman struck back during a physical confrontation with her spouse. H. MaGuigan, Clinical Professor of Law at New York University, Lecture on the Defense of Battered Women Who Kill (Nov. 13, 1990) (paper to be published) [hereinafter MaGuigan]. See also Marvin E. Wolfgang, *A Sociological Analysis of Criminal Homicide*, in STUDIES IN HOMICIDE (Wolfgang ed. 1967) (60% of husbands killed by wives were the first to use physical force, compared to only 9% of the wife victims); William Wilbanks, *The Female Homicide Offender in Dade County, Florida*, 8 CRIM. JUST. REV. 9 (1983).

¹⁹⁰ See, e.g., J. TOTMAN, *THE MURDERESS: A PSYCHOLOGICAL STUDY OF CRIMINAL HOMICIDE* 7 (1978) (93% of the women incarcerated in a California Prison for homicide reported that they had been assaulted by their male partners); A.E. Daniel & P.W. Harris, *Female Homicide Offenders Referred for Pre-Trial Psychiatric Examination: A Descriptive Study*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 261, 265 (1982) (42.8% of the women studied who were charged with homicide had been physically abused by their husbands prior to the lethal act).

¹⁹¹ Browne & Williams, *supra* note 185, at 78 (citing three studies, one of which revealed that at least 90% of the abused women had called the police at least once before the lethal incident). See also Lindsey, *When Battered Women Strike Back: Murder or Self-Defense*, VIVA (Sept. 1978); POLICE FOUNDATION, DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (1976); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effect of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

¹⁹² But see *supra* Chapter III, notes 124-142 and accompanying text for a discussion of separation violence.

2. Battered Women Who Kill Are Responding to a Level of Violence Not Reported by Battered Women Who Do Not Kill.

Attention often focuses on women who kill their abusers rather than those that don't. This unequal attention fuels the misperception that *the battered woman* is deviant and in need of repair.¹⁹³ Studies have shown that battered women who kill have experienced a greater level of violence than is reported by battered women who do not kill.¹⁹⁴ Conduct and characteristics, in fact, significantly differ from those of abusive men in non-homicidal relationships as opposed to those of abusive men in homicidal relationships.

In Dr. Angela Browne's 1987 study, battered women who killed their abusive spouses exhibited no characteristics that would differentiate them from battered women who did not kill their spouses.¹⁹⁵ The only significant differences between the groups were that women in the homicide group were somewhat older and from a slightly higher socio-economic background than women from the comparison group.¹⁹⁶

However, when the characteristics of the batterers of the two groups were compared, significant differences between the abusive conduct of men in the homicide and non-homicide groups were found.¹⁹⁷ Men in the homicide group tended to use

¹⁹³ "It cannot be emphasized enough that the battered woman's learned helplessness or her other psychological problems are the results of battering and not its cause. In other words, battered women have problems because they have been battered. They are not battered because they have problems." Waits, *supra* note 6, at 283-4 (citing L. WALKER, *THE BATTERED WOMAN*). See also BROWNE, *supra* note 15, at 229.

¹⁹⁴ BROWNE, *supra* note 15, at 185. See *infra* notes 196-202 and accompanying text.

¹⁹⁵ *Id.* at 12-13. Browne's study was based on interviews with 42 women from 15 states who were charged with a crime in the death or serious injury of their mates (the homicide group). One-quarter of the homicide group had been acquitted at trial, one-quarter had received probation or a deferred sentence, and the rest were imprisoned. Browne compared this group's responses to 205 women from six states who were in abusive relationships but did not take lethal action against their mates (the comparison group). Because nearly all of the women in the homicide group were living with their mates at the time of the lethal action, the non-homicide group was limited to women who were still living with their mates or were out of the relationship less than one year.

¹⁹⁶ *Id.* Browne made comparisons between the women's class backgrounds, education, age, length of relationship, and work histories; their experiences of violence as children (both physical and sexual); the onset of violence within the relationship; the women's suicidal thoughts or threats; the rates of occurrence of battering episodes; the number of abusive incidents; the force with which the acts were carried out; the women's abuse of their own children; their drug and alcohol abuse; the rate and force of sexual assaults; the severity of their injuries; the use of weapons by their mates; and, their perception of whether their mate would or could kill them. No significant differences were found except as noted.

¹⁹⁷ *Id.* Browne made comparisons between the men's class, age, education, and work histories; their experiences of violence as children (physical and sexual); their intrusion,

drugs¹⁹⁸ and excessive alcohol¹⁹⁹ more frequently than those in the non-homicide group. Men in the homicide group were also significantly likely to have threatened to kill someone other than themselves,²⁰⁰ and to have abused one or more children.²⁰¹ Finally, the abuse of women in the homicide group was more frequent,²⁰² more injurious,²⁰³ and more likely to include sexual abuse than the abusers in the non-homicide group.²⁰⁴

B. What Type of Service Is Needed

Dr. Browne's findings suggest two things. First, the likelihood of a woman's victimization and her homicidal response can be predicted solely by the characteristics and conduct of her batterer.²⁰⁵

Second, preventative intervention by the police and criminal justice system to prevent a lethal episode should focus on the

isolation, possessiveness, jealousy and proneness to anger; their expressions of regret or remorse after an abusive episode; their threats to kill either the woman, the children, other family members or themselves; their use of psychological abuse (i.e., threats, isolation); their physical or sexual abuse of the children; their drug and alcohol use and frequency of use; and the rates and severity of sexual assaults.

¹⁹⁸ *Id.* at 71. Almost 30% of the men in the homicide group used street drugs every day or almost every day; only 8% of the men in the comparison group used drugs this often.

¹⁹⁹ *Id.* at 71. While 79% of the men in the homicide group became intoxicated every day or almost every day, only 40% of the men in the comparison group became intoxicated this often. Additionally, 10% of the men in the homicide group became intoxicated once a month or less, while 36% of the men in the comparison group became intoxicated at this rate.

²⁰⁰ *Id.* at 65. Eighty-three percent of the men in the homicide group had threatened to kill someone, whereas 59% of the men in the comparison group had made such threats.

²⁰¹ *Id.* at 70. According to the women, 71% of the men in the homicide group had physically and/or sexually abused the children by the end of the relationship; 51% of the men in the comparison group had also abused their children.

²⁰² *Id.* at 68. Forty percent of the women in the homicide group reported that violent incidents occurred more than once a week; only 13% of the women in the comparison group reported the same frequency. Additionally, 80% of the women in the homicide group reported that the physical abuse worsened during the relationship, and 90% reported that psychological abuse worsened; as compared to 58% and 73%, respectively.

²⁰³ *Id.* at 69 ("[A]lthough the number of abusive acts reported by women in the homicide group was not significantly higher than the number of acts perpetrated against comparison-group women, these acts were apparently done with much more force.").

²⁰⁴ *Id.* at 95-96. Although there was a high incidence of rape by both groups of men (76% of the women in the homicide group were raped by their mates as compared to 59% of the women in the comparison group), nearly 40% of the women in the homicide group reported that rape occurred often; only 13% of the women in the comparison group reported this frequency. Additionally, 62% of the women in the homicide group reported that their partners forced or urged them to perform other sexual acts against their will; only 37% of the women in the comparison group reported such activity.

²⁰⁵ *Id.* at 185 ("In light of the repeated finding that characteristics of the male with whom the woman is involved, rather than characteristics of the woman herself, are the best predictors of a woman's chance of victimization, it is imperative that we make a systematic effort to understand more about the aggressors.").

partner whose conduct best predicts a homicidal response: the batterer.²⁰⁶ Intervention should include arrest and mandatory counseling and therapy for the abuser, not just the woman.

The paucity of current domestic violence services which focus on the abuser²⁰⁷ may be the primary reason why men's intimate homicide rates have not decreased to the same extent as women's.²⁰⁸ Services that focus on the woman's situation work because they offer women alternatives to their abusive homes; thus, they are able to get away from the batterer before they resort to lethal violence. However, these services do nothing to break the cycle of or correct the underlying reasons for the batterer's violent behavior. In fact, as is evident from the homicide rates, the available services appear to be saving many more *men's* lives than *women's* lives—a fact that, while positive, gives little comfort to battered women, whether they leave or remain in the abusive home.

CHAPTER V

BATTERED WOMEN WHO KILL AND THE COURTS

Most of the legal advances for battered women who defend themselves against their abusers have taken place in the last ten to fifteen years. I was involved in one of the cases in the first wave of change, although, at the time, I did not understand the historical significance of the change. Prior to that time, a woman who fought back against her abuser commonly used the insanity defense²⁰⁹ or a "heat of passion" mitigating defense²¹⁰ when prosecuted for a crime which a defendant would

²⁰⁶ Approximately 68% of the abused women surveyed sought help one or more times after being assaulted by their spouses. Robert Wauchope, *Help-Seeking Decisions of Battered Women: A Test of Learned Helplessness and Two Stress Theories* (1985) (citing NATIONAL FAMILY VIOLENCE RE-SURVEY).

²⁰⁷ In New York State, for example, where there are over one hundred organizations to aid abused women, there are only five state-funded programs for abusive men. PROFILE OF SERVICES, *supra* note 155.

²⁰⁸ It cannot be emphasized enough, however, that women desperately need not only these services, but many more.

²⁰⁹ N. Y. PENAL LAW § 40.15. Mental disease or defect is an affirmative defense which negates the *mens rea* element required for the offense. The elements are met if the defendant lacked substantial capacity to know or appreciate either the nature and consequences of her conduct, or that such conduct was wrong.

The insanity defense is a theory of excuse: the conduct of the defendant was wrong, but the actor is not morally blameworthy due to her state of mind. DRESSLER, *supra* note 36, § 31.08.

²¹⁰ N. Y. PENAL LAW § 125.25. It is an affirmative defense to murder in the second degree that the defendant acted under the influence of extreme emotional disturbance (EED) for which there was a reasonable explanation. The reasonableness of the defendant's explanation is determined from the viewpoint of a person in defendant's situation under the circumstances as she believed them to be. A successful defense of EED consti-

ordinarily plead self-defense.²¹¹

The case of Francine Hughes, dramatized in the movie "The Burning Bed," signaled the end of that era.²¹² Francine Hughes, a battered woman who killed her abusive husband, was acquitted; she plead temporary insanity. Her acquittal was perceived as a triumph for women who defended themselves against violent mates. However, the real triumph in the defense of battered women was the subsequent switch in defenses from the insanity and like defenses to self-defense.²¹³ A woman could now claim that she acted in self-defense and in a reasonable manner. Women in New York State may now generally plead self-defense²¹⁴ and use evidence of battered woman's syndrome, in the form of expert testimony, to deflate the myths surrounding battered women as well as to establish the reasonableness of their actions.

A. *Battered Women and the Plea of Self-Defense*

When a battered woman kills her abusive partner, the criminal justice system has two available responses: (1) the prosecuting attorney can charge the women with murder or one of its

tutes a mitigating circumstance reducing murder to manslaughter in the first degree. N.Y. PENAL LAW § 125.20. A defense of EED is only available for prosecutions of murder in the first or second degree.

Unlike the common law requirement that the defendant act in the "sudden heat of passion," New York does not require that the defendant act immediately, nor does it require a particular provocation. N.Y. PENAL LAW § 125.25.

²¹¹ Many scholars have written on the reason why the traditional doctrine of self-defense was unavailable to battered women until the 1980s. See, e.g., Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problems of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 196 (1986) [hereinafter *Describing and Changing*] ("Women's self-defense work was conceived of as a way to remedy unequal treatment for women that results from application of the male norms and standards of the criminal justice system. It was developed to assist women in speaking in our own voices in the courtroom, to describe the differences and complexity of our experience, and to expand the legal options available in defending ourselves against charges of homicide or assault beyond the traditional insanity and incapacity pleas."). See *supra* Chapter I notes 36-43 and accompanying text for a discussion of the defenses of insanity and "sudden heat of passion" or extreme emotional disturbance prior to 1979.

²¹² "The Burning Bed," originally broadcasted on NBC on October 8, 1984, was the highest rated television movie ever.

²¹³ *Describing and Changing*, *supra* note 211, at 9 ("By explaining the different circumstances in which women acted to save their own lives, women's acts which had previously been viewed as outside the purview of self-defense, and viewed as appropriate for insanity, heat of passion or manslaughter, could now be viewed as within self-defense.").

²¹⁴ N.Y. PENAL LAW § 35.05. The defendant's conduct, which would otherwise constitute an offense, is justified and not criminal when the conduct was necessary in order to avoid an injury occasioned by a situation not created by the defendant. The desirability and urgency of avoiding the injury must clearly outweigh the injury sought to be prevented by the statute defining the offense. If the defendant offers evidence of justification, the court must rule as a matter of law whether the claimed facts or circumstances would, if established, constitute a defense.

lesser derivative defenses,²¹⁵ or (2) he/she can refuse to press charges.²¹⁶ If charged with a crime, the battered woman may accept a plea bargain²¹⁷ or allow the case to go to trial. Many women never get the chance to present their evidence because they choose to plead guilty in a plea bargain prior to trial. Since pleas are not generally reviewable by the appellate courts, there is no way of knowing whether the woman had a viable self-defense case; whether her attorney knew her battering history or understood the battered woman's syndrome; whether her attorney pushed her into a plea, or whether the victim even thought she was a battered woman. An attempt to raise the ignorance of the lawyer to the new options for victims, introduce evidence of ineffective assistance of counsel on appeal or win a post conviction remedy has a slim or non-existent chance of success. The standard of incompetence that must be met in cases alleging ineffective assistance is very high. Many lawyers defend their decision to plea as a tactical one. The only practical review in these cases is some form of clemency.

Today, many battered women plead self-defense to a homicide charge at trial. In general, to justify using deadly force, a person must: (1) reasonably believe²¹⁸ such force is necessary to defend herself from the use or imminent use of deadly physical force,²¹⁹ or (2) reasonably believe that the batterer was committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.²²⁰ Although the New York Penal Law, for example, imposes a duty to retreat if a person knows she can do

²¹⁵ In New York State, the crime of homicide may be charged by murder in the second degree (N.Y. PENAL LAW § 125.25), manslaughter in the first degree (N.Y. PENAL LAW § 125.20), manslaughter in the second degree (N.Y. PENAL LAW § 125.15), or criminally negligent homicide (N.Y. PENAL LAW § 125.10). Each is a felony.

²¹⁶ Because any felony in New York must be brought to the Grand Jury for indictment, unless indictment is waived, a third possibility for disposition of the case may be refusal by the Grand Jury to indict (N.Y. CRIM. PROC. LAW § 190.60), in which case the charges would be dismissed (N.Y. CRIM. PROC. LAW § 190.75).

²¹⁷ Much of the attention on battered women who kill has been focused on the events at her trial (i.e. whether she will be able to have an expert testify on battered woman's syndrome, and whether the 'reasonableness' standard employed today by the court system is fair to women).

²¹⁸ New York state courts use a subjective, objective reasonable belief standard, which requires a defendant to reasonably believe the force used to be necessary and a reasonable person in the shoes of the defendant would find that belief reasonable. *See People v. Goetz*, 68 N.Y.S.2d 96, 498 N.E.2d 41 (1986) ("[We] have frequently noted that a determination of reasonableness must be based on the 'circumstances' facing a defendant or his 'situation' . . . [T]hese terms include any relevant knowledge the defendant had about that person."). However, it is often impossible for jurors to put themselves in the place of a woman held hostage by a man she knows, especially without the benefit of expert testimony.

²¹⁹ N.Y. PENAL LAW § 35.15(2)(a).

²²⁰ N.Y. PENAL LAW § 35.15(2)(b).

so safely, she is not required to do so in her own dwelling, presuming that she was not the initial aggressor.²²¹

Demonstrating the two main elements of self-defense, the deadly force and the imminent threat rule, have often been, in practice, the most difficult hurdles for a woman to overcome without using expert testimony.²²²

The deadly force rule requires that the force used be proportional to the threat; for example, it usually does not permit the use of a deadly weapon to repel an unarmed assailant.²²³ This poses great difficulty for battered women. They usually defend themselves against their abusers with weapons;²²⁴ unlike a traditional confrontation the issue becomes whether use of a weapon is proportional force to receiving weaponless abuse. After all, the fists of a batterer may be deadly.²²⁵ Similarly, the imminent threat rule presupposes a one-time violent encounter between strangers during which time the defendant acts.²²⁶ However, many women are unable to successfully resist during an actual attack;²²⁷ only once the violence has ceased, even temporarily, can they offer any resistance. A battered woman is similar to a captive or hostage. People can understand the man who kills his sleeping or unsuspecting captor, but still have difficulty with a

²²¹ N.Y. PENAL LAW § 35.15(2)(a)(i). However, prosecutors employ numerous methods designed to effectively strip a woman of her right to not retreat. See *supra* notes 109-19 and accompanying text.

²²² Scholars contend that the primary problem facing women who use a justification defense is the gender bias built into the court system. Specifically, the rule of self-defense rests on an assumption that the actors are two men, of equal size, weight, strength and training. The rule was not designed with the special problems women face when attacked by an intimate male partner in mind, and thus is, at its core, unfair to female defendants. See *Equal Rights to Trial*, *supra* note 21, at 631-5.

²²³ DRESSLER, *supra* note 40, at § 18.02(B)(1). Ordinarily, a man would not be justified in using a weapon to repel a physical attack by another person because it is unlikely that a fist fight would result in great bodily harm or death.

²²⁴ BROWNE, *supra* note 15, at 140. In Browne's study, guns were used in 81% of the homicide or attempted murder cases; knives were used in seven percent. Browne noted that in many cases, the gun used against the batterer was the same one that he had used against the woman earlier.

²²⁵ While women usually resort to a weapon when they strike back at their abuser, men typically beat their partners to death. See BROWNE, *supra* note 15, at 11. Even when partners "trade punches," the number, severity and pattern of injuries men inflict on women, as opposed to those women inflict on men, differ greatly. Women tend to be injured in 94% to 95% of these encounters and their injuries tend to be nearly three times as severe. *Id.* at 8.

²²⁶ *Equal Rights to Trial*, *supra* note 21, at 634.

²²⁷ A woman's size and strength, as compared with that of her abuser, is one reason she is unable to successfully fend off her attacker during the abusive episode. In addition, a battered woman may have learned during the course of the abusive relationship that any attempt to defend herself during an attack only infuriates her abuser and causes more violence and injury. Failure to defend herself during the abuse is therefore a rational attempt to protect herself. See *Equal Rights to Trial*, *supra* note 21, at 632.

woman who kills a spouse; they do not believe that the woman faced imminent danger.

Additionally, a battered woman knows her assailant's history of violence and may be able to predict a life-threatening situation based on the signals he gives her. An outsider may not be able to recognize these signals.²²⁸ The analogy for men is the combat veteran who can accurately estimate the closeness of incoming artillery, while the rookie dives at the sound of every shell.

B. *The Use of Expert Testimony on Battered Woman's Syndrome*

Expert testimony about battered women is offered at trial²²⁹ to explain to the fact-finder: (1) the psychological state of women exposed to long-term intimate violence,²³⁰ (2) the nature of intimate violence,²³¹ and (3) the myths and misperceptions widely held by society.²³² The expert can also explain the peculiar circumstances that made it reasonable for the woman to use deadly force during an encounter with a man not armed with a weapon. Their testimony can also explain why a battered woman can reasonably believe that the threat of imminent great bodily injury or death existed — although the batterer appeared non-threatening to an outsider.²³³ Without such testimony, the jury may be unable to fairly determine whether the woman's belief that her life

²²⁸ Mather, *supra* note 6, at 565-6. See also, *Equal Rights to Trial*, *supra* note 21, at 634 ("Subtle motions or threats that might not signify danger to an outsider or to the trier of fact acquire added meaning for a battered woman whose survival depends on an intimate knowledge of her assailant.").

New York courts permit a jury to take into account the prior violent acts of the attacker, the prior threats whether known or unknown to the defendant, the man's reputation for violence and any other fact which would be relevant to the woman's state of mind. *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976).

²²⁹ New York courts employ a two-fold test to determine whether expert testimony is admissible at trial. The testimony must "depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence." *People v. Torres*, 128 Misc.2d 128, 134 (N.Y. Crim. Ct. 1985) (quoting *Dougherty v. Milliken*, 57 N.E. 757 (N.Y. 1900)) and the state of the knowledge must be "sufficiently developed to permit a reasonable opinion to be even asserted by an expert." *People v. Torres*, 128 Misc.2d at 134; 488 N.Y.S.2d at 362. The admissibility and scope of the testimony is at the discretion of the trial court.

²³⁰ See *supra* notes and accompanying text for a discussion of a battered woman's psychological state.

²³¹ See *supra* notes and accompanying text for a discussion of typical violence.

²³² See *supra* Chapter III for a discussion of why battered women do not leave the abusive household.

²³³ "The purpose of expert testimony has been to educate the judge and jury about the common experiences of battered women, to explain the context in which an individual battered woman acted, so as to lend credibility and provide a context to her explanation of her actions." An expert may not offer an opinion, however, as to whether the defendant was acting reasonably because that is a question for the jury or the trier of fact to determine. *Describing and Changing*, *supra* note 211, at 201.

was in danger was reasonable.²³⁴

Misunderstanding about the use of expert testimony in battered women's cases is widespread. Lawyers and judges mistakenly refer to the woman's use of the self-defense doctrine as the "battered woman's defense." They treat it as if it were a special category of defense like the statute of frauds or collateral estoppel.²³⁵ In fact, it is no more than the self-defense doctrine applied to the special circumstances of a woman subjected to repeated intimate violence.

C. *The Problems with the Standard of Reasonableness*

Despite the wide acceptance of expert testimony on battered women in modern courts and the admission of evidence of the prior violent history of the abusive husband, many scholars still believe that it is difficult for a woman to obtain a fair trial. They believe that the reasonable man standard employed by the American court system is not equally geared to women.²³⁶ Although the law itself purports to treat all people equally,²³⁷ it may actually discriminate against women by ignoring biological and societal gender differences.

In order to correct this gender-bias, some scholars proposed

²³⁴ A common argument against allowing testimony about the victim's prior violent history against the defendant is that any woman who has evidence or who testifies that her husband beat her may "get off," thereby opening the door for any woman who wants to kill her husband. However, merely having a history of violence does not, by itself, justify the attack. The role of the expert is to describe how a woman's violent past may have contributed to her state of mind at the time of the killing, how she may have formed a basis for her belief that she was in imminent danger. See BROWNE, *supra* note 15, at 175.

²³⁵ During the mid-1980s there was disagreement between feminists about what to term the defense of battered women who kill their intimate partners. See Rosen, *supra* note 23, at 33 n.127 (uses the term "battered woman's defense" because the term reflects the difference between the way battered women respond to threats of violence, and the way other women and men respond to threats of violence). But see Crocker, *supra* note 109, at 128-9 (uses the term "battered women's self-defense" because the term reflects the fact that the women are pleading self-defense, and that they are battered women).

²³⁶ "Widespread adherence to the sex-biased 'reasonable man' standard compounds women's problems: 'in all that mass of authorities which bears upon this branch of the law [the reasonableness standard], there is no single mention of the reasonable woman.'" *Equal Rights to Trial*, *supra* note 21, at 635-36 (quoting A. HERBERT, MISLEADING CASES IN THE COMMON LAW 18 (1930)).

²³⁷ Traditionally, the business of law itself has been discriminatory, holding little place for women both before and behind the bench. Harvard Law School did not admit a female student until 1953. In 1950, only 1% of all lawyers were women, only 3% of the bar were women in 1970, and only 20% in 1989. In 1989, only 8% of all partners in the nation's largest 250 law firms were women. In 1988, only 8% of all judges were women. LOUIS G. FORER, UNEQUAL PROTECTION: WOMEN, CHILDREN AND THE ELDERLY IN COURT 108-13 (1991).

the creation of a new standard.²³⁸ There is a difference in opinion, however, on what standard should be adopted.²³⁹

One suggested alternative is the sex-neutral or individualized standard. This standard would account for the circumstances surrounding the actors at the time of the offense, including the individual characteristics and histories of the actors and the perceptions of the defendant. Both lay individuals and experts would testify about the history of individual violence in an attempt to dispel misperceptions about intimate violence.²⁴⁰ Critics of the standard argue that, although purportedly focused on gender neutrality, in actuality it reinforces sexual stereotypes by focusing closely on the defendant as a woman.²⁴¹ Furthermore, critics argue that the sex-neutral standard, even if employed by name, probably still means a male standard by default.²⁴²

A second alternative standard advanced by some scholars is the reasonable woman standard. Advocates argue that because a woman's perceptions of danger, harm and force are different from a man's perceptions, a woman's reactions to spousal threats differ from those of a man in similar circumstances. Thus, women should be judged by a standard which takes into account these differences.²⁴³ Detractors argue that the standard may reinforce sexual stereotypes when defined by the courts because any test must be objective, universal and unbiased.²⁴⁴ Also, any

²³⁸ Many scholars also object to any change in the existing law. They argue that the creation of a new standard, whether one for women in general or for battered women in particular, might lead to an "open season" on husbands by wives. See Mather, *supra* note 6, at 573 (Mather lists a number of objections scholars have had against the adoption of a new standard, but concludes that the trier of fact would still be able to weed out false claims of self-defense when all of the other evidence is compiled). See also BROWNE, *supra* note 15, at 175 ("The issue is not the development of a new standard of self-defense for women, but the adjustment of existing statutes to account for differences in the experiences of women and men—particularly women faced with a male assailant, and women who are the victims of repeated violent assaults by one assailant—so that the same standard can be applied to all victims.").

²³⁹ See Crocker, *supra* note 109, at 121 (Crocker advocates a 'reasonable woman's' standard to account for the differences in a woman's perception of danger, harm and force); Mather, *supra* note 6, at 545 (Reviews and critiques the 'reasonable battered woman standard,' the 'reasonable woman standard,' and the 'reasonable sex-neutral standard').

²⁴⁰ *Equal Rights to Trial*, *supra* note 21, at 639-40.

²⁴¹ Crocker, *supra* note 109, at 151. ("[The female defendant's] experiences as an individual woman and her experiences as a member of the 'battered woman' group are not sex-neutral: they are sex-specific, sex-linked, and sex-charged.").

²⁴² *Id.* at 151 n.134.

²⁴³ *Id.* at 151 (Crocker is the main proponent of a reasonable woman standard, but notes that this standard could lead to sexual stereotyping of the kind women have been working against in the courts). See also, Mather, *supra* note 1, at 573.

²⁴⁴ Mather, *supra* note 6, at 573 ("As an objective test, [the reasonable woman] standard should be universal, unbiased, and completely neutral. In our society and legal

definition of "reasonable woman" will include stereotypical concepts injurious to many female defendants.

A third approach specific to women who offer a defense of justification is the creation of an entirely new self-defense based on the battered woman's syndrome. The standard employed in such a defense would be the reasonable battered woman standard. With this defense, a battered woman's experience would be compared to those of other battered women.²⁴⁵ This approach has suffered a number of criticisms, including a challenge under an equal protection argument.²⁴⁶ It also may substitute one problematic standard for another stereotypical one. The reasonable battered woman standard may likely be implemented by modern courts.²⁴⁷

D. *The Creation of the "Good Battered Woman" Stereotype*

Popular myths regarding battered women flourished in the judicial system, creating a stereotypical version of the battered woman. All women defendants claiming a history of domestic abuse were measured against the "good battered woman."²⁴⁸ A woman may be categorized as a "bad battered woman" if: (1) she repeatedly left and returned to her husband, (2) she defended herself from abuse, (3) she abused drug or alcohol, (4) she physically abused her children or failed to protect them from her husband's violence, or (5) she was educated or held a job outside of the home.²⁴⁹ A "bad battered woman" does not comport with a stereotypical victim.²⁵⁰ The term "battered woman's syndrome,"

system, however, this standard of objectivity has traditionally been the male notion of objectivity. We do not have a working concept of female objectivity untainted by the male viewpoint.").

²⁴⁵ *Id.* at 572.

²⁴⁶ *Id.* at 572 n.220 (citing Michael A. Buda & Teresa L. Butler, *The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence*, 23 J. FAM. L. 359, 379 (1984)). See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (state may not use classifications based on gender if a gender-neutral standard will serve the state's purpose.).

²⁴⁷ Crocker, *supra* note 109, at 144-50. ("Some courts seem to treat battered woman syndrome as a standard to which all battered women must conform rather than as evidence that illuminates the defendant's behavior and perceptions."). *Id.* at 144. See also Mather, *supra* note 6, at 572.

²⁴⁸ *Describing and Changing*, *supra* note 211, at 214 ("[B]attered woman's syndrome" carries with it stereotypes of individual incapacity and inferiority which lawyers and judges may respond to precisely because they correspond to stereotypes of women which the lawyers and judges already hold. Battered woman syndrome does not mean, but may be heard as reinforcing stereotypes of women as passive, sick, powerless and victimized.").

²⁴⁹ MaGuigan, *supra* note 189. See also Crocker, *supra* note 109, at 144-50; Mather, *supra* note 1, at 572; *Describing and Changing*, *supra* note 211, at 211.

²⁵⁰ See, e.g., *People v. Powell*, 102 Misc.2d 775, 424 N.Y.S.2d 626 (Tompkins County Ct. 1980) (State's witness testified to defendant's knowledge and use of guns, indicating

as used by feminists and courts implies that a single set of "symptoms" or criteria define the "syndrome;"²⁵¹ any variation of these criteria has become suspect and may hurt a woman's case.²⁵² The word "syndrome" itself implies an impaired psychological state.²⁵³

Part of this problem may be gender related (stereotypically, psychologically healthy women are passive and do not fight back, while psychologically healthy men are aggressive and dominant).²⁵⁴ However, most of the problem emanates from the legal system, which like most inherently conservative institutions, is slow to mirror changes in scientific and sociological thought. Thus, despite the advances by the justice system, battered women who kill their abusers still may not be judged fairly and objectively by the court system.

AN EXAMPLE OF THE NEXT STEP FORWARD

In my introduction I explained that this paper was based on my own experience and would necessarily reflect my perspective. Here are some suggestions limited by my experience and knowledge, but stimulated by a belief that we can make a difference in the horror of domestic violence that tears at the very fabric of our society: the family.

1. Formation of the Pace University Battered Woman's Justice Center, a unique partnership between government and a private university, including its law school. The Center focuses on educating and training individuals who provide services in the judicial system.

that defendant was not a "helpless" woman. The prosecution also argued that the defendant was a sexual masochist and had acquiesced in the abuse.)

²⁵¹ *Describing and Changing*, *supra* note 211, at 207 ("Regardless of its more complex meaning, the term "battered woman syndrome" has been heard to communicate an implicit but powerful view that battered women are all the same, that they are suffering from a psychological disability and that this disability prevents them from acting normally."); BROWNE, *supra* note 15, at 177 ("Expert witness testimony on the 'battered woman's syndrome'. . . although intended to address damaging myths and misconceptions, also contributes in a subtle way to an image of maladjustment or pathology. Just the use of the term 'syndrome' connotes impairment to most people, including judges and jurors.").

²⁵² Interview with Blackman, *supra* note 15. Dr. Blackman argues that the term "battered woman's syndrome" itself should be retired because it implies an illness to which there are a certain number of specific symptoms. *See supra* note 56.

²⁵³ Rosen, *supra* note 23, at 43 ("The defense [of battered woman's syndrome] relies on persuading the jury that defendant suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person—including a woman who does not suffer from battered woman syndrome.").

²⁵⁴ *Equal Rights to Trial*, *supra* note 21, at 628.

The judicial system failed to respond to many women who were beaten, killed or kill after they had asked for help. Lawyers must be trained to effectively represent the battered woman when she seeks an order of protection, fights for custody or wants a divorce. When she presses charges against her abuser she must have a prosecutor who cares about her and is able to assure her safety through vigorous and effective prosecution. If the battered woman fights back and is herself prosecuted, lawyers must be willing and able to represent her regardless of her ability to pay. The Center has developed and delivered in conjunction with the New York Lawyers for the Public Interest, a public interest consortium of New York law firms, an intensive seven-day trial advocacy training program for civil lawyers. These lawyers received the training without cost in return for a commitment to handle at least one battered woman's case pro bono. One-day programs for criminal defense lawyers have been held in Buffalo, Albany, New York City and White Plains. Programs are being developed for prosecutors relating to the prosecution of abusers and criminal defense lawyers representing women who have fought back against their abusers. All sectors of the legal community are eager for training that improves their ability to respond to the scourge of domestic violence. The legal system is an important piece of the network of services necessary to provide aid to battered women.

2. The heart and soul of the movement to protect battered women have been the advocates who started the hotlines and founded the battered women's shelters. They often informally help a woman through the judicial process. We must consider institutionalizing their role by training them as domestic violence paralegals. They serve as an important link between the social and legal needs of the battered woman.

3. We must increase the focus on the batterer. There are only five state funded programs for batterers to receive guidance in altering their behavior. In a misdemeanor domestic violence case, 99 out of a 100 get dismissed. If an increased number of programs were available, bail, in appropriate cases, could be conditioned on attendance in such programs.

4. Most experts estimate that ten to twenty percent of all the orders of protection issued to protect women are violated. In a few extreme cases the abusive man will kill the woman if he has the opportunity. We have all seen the terrible stories of women being stalked and killed by their abusers. In extreme cases we should consider a "woman's protection program" similar to the

witness protection program. This kind of program is the only thing that will work in some extreme cases. It may only succeed if implemented on a national level but it is the only solution in some extreme cases.

5. Campus awareness programs should be instituted at state and private institutions to educate both men and women about domestic violence. Recent research indicates high levels of violence between young people while dating. This includes the problem of date rape.

6. Incarcerated Battered Women: We cannot forget the women twice failed by society—not protected by the government from the violence in their homes and then prosecuted and convicted when they defended themselves—who languish in jails around the country and in some cases await an appointment with the executioner. The clemency movement for battered women must be a testament to our refusal to ignore past injustices. Currently, clinic students from Pace Law School and CUNY Law School have prepared and filed clemency petitions for four women in New York prisons. Albany Law School is creating a clinic to deal with this issue on a continuing basis.

The suggestions in this article are not alternatives to existing programs. Advocates who founded battered woman's shelters and hotlines have been largely responsible for the advances made on behalf of battered women. For example, each time I represented a battered woman, an advocate was present to help her and to educate me. These people are the essence of the movement. Our current budget crisis impairs their ability to increase much needed services and, in some cases, threatens their very existence. We must keep these organizations alive.

We need a cohesive approach to the problem. Advocates in domestic violence programs struggled to encourage change, as well as lend support and a safe haven to battered women. My suggestions, in part, attempt to provide highly skilled and motivated lawyers to help free battered women from the tyranny of violence they live with every day.