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Resistance to Equality

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RESISTANCE TO EQUALITY

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I. INTRODUCTION

This symposium addresses one of the most important, complex, and vexing issues in criminal legal theory and practice: how the criminal law takes account of the relations of domination in shaping defenses or excuses to explain otherwise criminal conduct. This issue has been highlighted over the last twenty years by the particular circumstances and cases of battered women who kill their assailants, cases which have captured national and international attention,[1] the interest

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1. Cases such as those of Francine Hughes, whose 1977 killing of her abusive husband was made into the television movie, *The Burning Bed*, *see, e.g.*, Pamela Sommers, *"Burning Bed" Evokes Strong Response*, WASH. POST, Oct. 10, 1984, illustrate the broad national interest in this

of many lawyers, and have produced a virtual "cottage industry" of legal scholarship.[2] The issue of legal responsibility for homicide how-

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country in such cases. Clemency efforts on behalf of women who have been convicted of killing their batterers in a number of states has drawn still more attention to such cases, creating national controversy. *See* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38; *see also* Brenda Aris & Gloria Killian, *Justice: One Woman's Perspective*, 2 S. CAL. REV. L. & WOMEN'S STUD. 1 (1992); Mary E. Greenwald & Mary-Ellen Manning, *When Mercy Seasons Justice: Commutation for Battered Women Who Kill*, 38 BOSTON B.J. 3 (1994) (discussing the "Framingham Eight," a nationally recognized group of battered women imprisoned in Massachusetts for killing their batterers); Gloria Killian, *Equal Justice for Some*, 2 S. CAL. REV. L. & WOMEN'S STUD. 5 (1992); *Battered Women, Battered Justice*, N.Y. TIMES, Mar. 13, 1991, at A1; *Double Victory for Feminists: Maryland Governor William D. Schaefer Signs Pro-Abortion Law and Grants Clemency for 8 Women Convicted of Killing Men Who Battered Them*, TIME, Mar. 4, 1991, at 53; Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19; Tamar Lewin, *When Justice Goes Wrong*, N.Y. TIMES, Dec. 31, 1989, at 7(17); David Margolick, *Court Allows Defense to Call Experts on Battered Women*, N.Y. TIMES, July 25, 1984, at A1; David Margolick, *When Battered Wives Kill, Does the Law Treat Them Fairly?*, N.Y. TIMES, Dec. 11, 1983, at 4(8); Andi Rierden, *Citing Abuse, Women Ask for Clemency in Killings*, N.Y. TIMES, May 12, 1991, at A1; Margot Slade, *Justice is Stretched to Allow Wider Self-Defense*, N.Y. TIMES, Nov. 11, 1988, at B5; Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994 (cover story).

These cases have also had broad international interest. For example, in Lavallee v. The Queen, 55 C.C.C.3d 97 (Supreme Court of Canada, 1990), the Canadian Supreme Court held that expert testimony on battering was relevant to a battered woman's self-defense case. *See, e.g.*, Martha Shaffer, R. v. Lavallee—*A Review Essay*, 22 OTTOWA L. REV. 607 (1990). In England, there have been numerous cases. *See* Aileen McColgan, *In Defence of Battered Women Who Kill*, 13 OXFORD J. LEGAL STUD. 508 (1993); Donald Nicolson, *Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill*, 3 FEMINIST LEGAL STUD. 185 (1995); Katherine O'Donovan, *Defences for Battered Women Who Kill*, 18 J.L. & SOC. 219 (1991); Katherine O'Donovan, *Law's Knowledge: The Judge, the Expert, the Battered Woman and Her Syndrome*, 24 J. L. & SOC. 427 (1993). I have also been consulted about cases in Central and Eastern Europe and in Australia and New Zealand.

2. *See, e.g.*, ELIZABETH BOCHNAK, WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE (1981) [hereinafter WOMEN'S SELF-DEFENSE CASES]; CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987); THE PUBLIC NATURE OF PRIVATE VIOLENCE (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 5 WIS. L. REV. 1003 (1995); Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1 (1994); Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. J. GENDER & L. 141 (1995); Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227 (1986); Anne M. Coughlin, *Excusing Women* 82 CAL. L. REV. 1 (1994); Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985); Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1 (1993); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition*, 21 HOFSTRA L. REV. 1191 (1993); Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FL. L. REV. 699 (1994); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Re-*

ever, is not solely of theoretical interest; it affects thousands of women in this country who are battered and who daily face the danger of death because of inadequate social resources and the state's resulting failure to protect them.[3] As evidenced by the enormous public attention

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form Proposals, 140 U. PENN. L. REV. 379 (1991); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Kym C. Miller, *Abused Women Abused By the Law: The Plight of Battered Women in California and a Proposal for Revising the California Self-Defense Law*, 3 REV. L. & WOMEN'S STUD. 303 (1994); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992); Elizabeth M. Schneider, *Describing and Changing: Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex-Bias in the Law of Self-Defense, 15* HARV. C.R.-C.L. REV. 623 (1980); Elizabeth M. Schneider & Susan Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 148 (1978); Symposium, *Reconceptualizing Violence Against Women By Intimate Partners: Critical Issues*, 58 ALBANY L. REV. 1 (1995); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992); Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982); Kent M. Williams, *Using Battered Woman Syndrome Evidence With a Self-Defense Strategy in Minnesota*, 10 LAW & INEQUALITY 107 (1991); *Developments in the Law: Legal Responses to Domestic Violence, Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574 (1993).

3. Battered women's advocates have long noted the inadequacy of legal and medical responses to battering. *See* LARRY L. TIFFT, BATTERING OF WOMEN: THE FAILURE OF INTERVENTION AND THE CASE FOR PREVENTION (1993). In 1993, for example, out of a total of 23,271 murders and nonnegligent homicides, 1531 women were reported by law enforcement agencies as having been killed by their male partners. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994 (Kathleen Maguire & Ann L. Pastor et al. eds.). Conversely, 591 men were killed in the same year by female partners. *Id.* Most scholarly and empirical research indicates that a woman's leaving her abuser is directly related to an escalation of violence by the abuser that can be lethal. *See* Mary Ann Dutton-Douglas & Dorothy Dionne, *Counseling and Shelter Services for Battered Women*, *in* WOMAN BATTERING: POLICY RESPONSES, at 113, 121 (Michael Steinman ed., 1991) (citing studies by Berk, Newton & Berk, 1986; Browne, 1987; and Barnard, Vera, Vera & Newman, 1982); Norman J. Brisson, *Battering Husbands: A Survey of Abusive Men*, 6 VICTIMOLOGY 338 (1983). *See also* Mahoney, *supra* note 2. The chances that a woman will kill her abuser do not similarly increase with her separation from him. Only 9.1% of women who killed a partner were separated from that partner at the time. Brisson, *supra*. *See also No More! Stopping Domestic Violence*, MS. MAGAZINE, Sept./Oct. 1994, at 1 (reporting that every year approximately 1,500 women and girls in the United States are killed by their male partners, and listing the names of all the women and girls killed by male partners in 1990 on the front and back covers of the issue). The statistics gathered from law enforcement agencies obviously do not include unreported homicides, disappearances which are actually homicides, or homicides that are not investigated or in which the investigations are inconclusive. *See, e.g.*, CONSTANCE A. BEAN, WOMEN MURDERED BY THE MEN THEY LOVED, at 2 (1992) (noting that such murders are "seldom placed in the context of a regularly occurring event. Every day, women are beaten to death, strangled, slashed, shot, or sent over a cliff by their mates. We learn about only a few.").

this issue has attracted, it also raises fundamental questions for the society at large.

My involvement with these issues as lawyer, teacher, and scholar for the last twenty years provides the context for this article.[4] I have explored the problem of gender-bias in the criminal law within an equality framework[5] focusing on the need for women's experiences of battering to be presented in the courtroom in order to guarantee their equal rights to trial.[6] I have also examined obstacles to implementation of equality.[7] However, in the many settings in which I have done this work— whether in court, in training defense lawyers to handle these cases, educating judges to hear them, teaching law students, giving presentations to law teachers or others concerned with these issues, reading the scholarly literature, or talking with the media, one theme has been consistent—an extraordinary degree of public misunderstanding concerning cases of battered women who kill their assailants. While public misunderstanding takes different forms, claims made by battered women to explain their actions as shaped by their experiences of abuse are commonly perceived as "special pleading" and are not understood within an equality framework.

This article examines some misconceptions and identifies their source as a deep societal resistance to perceiving the circumstances of battered women, and particularly the circumstances of battered women who kill their assailants, as implicating issues of gender equality.[8] I

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4. I was co-counsel the first case that raised the issue of gender-bias in shaping criminal defenses and excuses, State v. Wanrow, 559 P.2d. 548 (Wash. 1977), and, as *amicus curiae*, argued the need for admissibility of expert testimony on battering, State v. Kelly, 478 A.2d. 364 (N.J. 1984). I have recently testified as an expert in a habeas corpus proceeding raising claims of ineffective assistance of counsel in a homicide case involving a defendant with a history of battering. Foreshaw v. Commissioner of Correction, No. CV94-0530489 (Sup. Ct., New London, Conn.). In addition, I have consulted with many lawyers on these cases in the United States and in other countries. *See supra* note 1.

5. Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.U. L. REV. 387 (1993); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Schneider, *Describing and Changing*, *supra* note 2; Schneider, *Equal Rights*, *supra* note 2; Schneider & Jordan, *Representation of Women*, *supra* note 2.

6. Schneider, *Particularity and Generality*, *supra* note 2; Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan's Getting Civilized and the Complexity of Voice*, 63 FORDHAM L. REV. 33 (1994); Schneider, *Describing and Changing*, *supra* note 2; Schneider, *Equal Rights*, *supra* note 2; Schneider & Jordan, *Representation of Women*, *supra* note 2.

7. Schneider, *Particularity and Generality*, *supra* note 2; Schneider, *Describing and Changing*, *supra* note 2.

8. This symposium and consequently this article focus on heterosexual battering relationships. Although much of this analysis is applicable to situations in which gay men or lesbians are battered and kill their batterers, *see, e.g.*, Carla M. Da Luz, *A Legal and Social Comparison of*

suggest that resistance to equality can be seen in legal representation, judicial treatment, and scholarly analysis. Many lawyers who are handling these admittedly complex and challenging cases are not considering them within an equal rights framework and are consequently not doing a sufficiently thoughtful job of grappling with the legal issues. The severity of the problem of legal representation is manifested in the large number of postconviction ineffective assistance of counsel claims actually asserted by battered women defendants,[9] the even larger number of potential claims that might be asserted, and in the many clem-

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Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response, 4 S. CAL. REV. L. & WOMEN'S STUD. 251 (1994) (noting general similarities in the experience of and response to abuse in gay and heterosexual relationships), there are other dynamics which might also play a role in those cases which deserve greater attention than is possible here. *See generally* BARBARA HART, NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING, at 189 (1984) (listing "homophobic control," i.e., threatening to "out" a partner, among other examples of experiences of battering particular to lesbian relationships, as forms of abusive control); DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE, at 9 (1991) ("The taboo overlay of 'gay' onto already taboo 'domestic violence' explains a basic reason why no useful statistics have ever been gathered on gay men's domestic violence."); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 584 (1990) (arguing that "[d]omestic violence in feminist legal theory is not necessarily applicable to lesbian legal theory because feminist legal theory is often based upon heterosexist assumptions."). For articles dealing with battered gay men and lesbians who kill, *see* Denise Bricker, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993); David S. Dupps, *Battered Lesbians: Are They Entitled to a Battered Woman Defense?*, 29 J. FAM. L. 879 (1991); Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249 (1992).

9. Ineffective assistance of counsel claims have been brought by battered women based on faulty advice regarding plea bargains or the defendant testifying, *see* State v. Scott, 1989 WL 90613 (Del. Super. Ct. 1989); Larson v. State, 766 P.2d 261 (Nev. 1988), attorney failure to present evidence and testimony that could have assisted the jury to understand and eradicate commonly held myths and misconceptions about battering; State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); State v. Gfeller, 1987 WL 14328 (Tenn. Crim. App. 1987), *see* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); *see* State v. Zimmerman, 823 S.W.2d 220; Martin v. State, 501 So. 2d 1313 (Fl. Dist. Ct. App. 1986), failure to offer jury instructions on battering; Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993), *see* Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Commonwealth v. Singh, 539 A.2d 1314 (Pa. Super. Ct. 1988); Commonwealth v. Tyson, 526 A.2d 395 (Pa. Super. Ct. 1987), failure to investigate evidence of battering, *see also* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992), choice and use of available defenses, *see* State v. Felton, 329 N.W.2d 161 (Wis. 1983), opening statements indicating a defense involving evidence of battering which was not followed with any such evidence, *see* State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991), and the attorney's self-interest interfering with the effectiveness of his performance, *see* Larson v. State, 766 P.2d 261 (Nev. 1988). *See generally* Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Battered Spouse Syndrome as Defense to Homicide or Other Criminal Offense*, 18 A.L.R. 5th 871 (1994).

ency petitions for battered women being filed around the country.[10] Many judges have also failed to understand the framework of equality in their application of the law to cases of battered women who kill. Many legal scholars make similar mistakes.

My advocacy and scholarship has been motivated by a deep conviction that gender-bias operates in these cases in both overt and subtle ways, and by a determination to remedy gender-bias by sensitizing lawyers, judges and other scholars to the issues that are presented in these cases. In earlier articles, I examined the problems faced by battered women raising self-defense claims in the context of equal rights to trial[11] and the particular dilemmas posed by expert testimony on battering to implementation of equality.[12] I have also explored broader theoretical issues that are presented by these cases: the dialectical interrelationship of law and social movement practice that has shaped the assertion of battered women's equal rights to trial,[13] the false dichotomy between views of battered women as exclusively victims or agents,[14] and the contradictions of using law to both "describe" the complexity of women's experiences and simultaneously help to change social perceptions of those experiences.[15] Here, I build on these theoretical frameworks and, in light of recent case law, legislation, law reform efforts and legal scholarship, identify continuing obstacles to implementation of battered women's equal rights to trial. This article is part of a larger project in which I explore these issues in greater depth.[16] The circumstances of battered women who kill are critical junctures for the intersection of law and social attitudes because they trigger a national chord of anxiety about "abuse excuse" justice and "feminazi" vigilantism.[17]

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10. *See supra* note 1 and accompanying text. Clemency cases are discussed in greater detail, *infra* part IV.

11. Schneider, *Equal Rights*, *supra* note 2; Schneider, *Describing and Changing*, *supra* note 2; Schneider & Jordan, *Representation of Women*, *supra* note 2.

12. Schneider, *Describing and Changing*, *supra* note 2.

13. *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Schneider, *Describing and Changing*, *supra* note 2.

14. Schneider, *False Dichotomy*, *supra* note 5; Schneider, *Particularity and Generality*, *supra* note 2; Schneider, *Describing and Changing*, *supra* note 2.

15. Schneider, *Describing and Changing*, *supra* note 2.

16. ELIZABETH M. SCHNEIDER, FEMINIST LAWMAKING, SOCIAL CHANGE AND WOMAN-ABUSE (forthcoming).

17. *See, e.g.*, Alan M. Dershowitz, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994). Alan Dershowitz asserts that, while some battered women are legally justified in killing their abusers, it was these cases that first sparked his fear

Most of the other contributions to this symposium focus only on the theoretical aspects of the issue of self-defense and relations of domination presented by the particular circumstances of battered women.[18] This article examines legal and public misunderstandings concerning battered women charged with killing their assailants and the implications of these misunderstandings for both legal theory and legal practice. I explore both theoretical misconceptions and legal practice problems, reflected in legal representation and judicial decisionmaking in cases of battered women who kill and in academic treatment of the subject of battered women who kill.

II. THE CONTEXT OF THE PROBLEM: EQUAL RIGHTS TO TRIAL

The insight that first generated legal work on this issue almost twenty years ago was that, for a variety of different reasons, women who were battered and faced criminal charges for homicide or assault of their assailant were likely to be denied equal rights to trial, that is, equal rights to present the circumstances of their acts in the framework of the criminal law.[19] The equal rights problem in this context flows from an equal rights problem in the criminal law generally: what Stephen Schulhofer has described as the fact that "the criminal justice system is dominated (incontrovertibly so) by a preoccupation with men and male perspectives."[20] The equal rights problem for battered women who kill has many sources: widespread views of women who act vio-

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that the "abuse excuse," a "legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation," *id.* at 3 is "quickly becoming a license to kill and maim." *Id.* According to Professor Dershowitz, acceptance of the "abuse excuse" "is dangerous to the very tenets of democracy, which presuppose personal accountability for choices and actions. It also endangers our collective safety by legitimating a sense of vigilantism that reflects our frustration over the apparent inability of law enforcement to reduce the rampant violence that engulfs us." *Id.* at 4; *see also* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 n.100 (1995) (attributing the popularization of the term "feminazi" to the television and radio commentator, Rush Limbaugh); Maguigan, *supra* note 2, at 384 (noting "dominant portrayal of the typical battered woman homicide defendant as a vigilante").

18. *See, e.g.*, George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996); Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685 (1996).

19. *See* Schneider, *Equal Rights*, *supra* note 2; Schneider & Jordan, *Representation of Women*, *supra* note 2. For a more recent analysis raising related issues concerning denial of battered women's rights to present a defense with respect to expert testimony on "battered woman syndrome," *see* Erich D. Anderson & Anne Read-Anderson, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363 (1992).

20. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2153 (1995).

lently, particularly against intimates, as "monsters,"[21] commonly held myths and misconceptions about battered women (that they ask for or provoke the violence, for example[22]), gender-bias in the concept of rea-

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21. *See, e.g.*, Ayyildiz, *supra* note 2, at 146:

> [The battered woman] is both a law-abiding hero and a law-breaking villain. . . . She has, often for many years, abided by the law, taking abuse without retaliation. She has often turned to the justice system for help, generally to no avail. Yet when she finally strikes and defends herself, it is she who becomes the villain, the pariah disrupting home and hearth. She is the murderous monster.

Id.

The particular horror with which women who dare to behave as law-breaking agents, rather than passive victims of crime are viewed is seen in early criminological research on women. *See* Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses,* 85 J. CRIM. L. & CRIMINOLOGY 80, 86 n.79 (1994) (describing criminology's construction of the female criminal as ". . . a monster. Her normal sister is kept in the paths of virtue by many causes, such as maternity, piety, weakness, and when these counter influences fail, and a woman commits a crime, we may conclude that her wickedness must have been enormous before it could triumph over so many obstacles." (citing CESARE LOMBROSO & WILLIAM FERRERO, THE FEMALE OFFENDER 152 (1895)). Not surprisingly, the law has traditionally viewed husband-killing as a crime that strikes at the root of all civil government, threatening a basic conception of traditional society. Schneider, *Equal Rights, supra* note 2, at 628-9 n.34. Blackstone noted that

> if the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason . . . the sentence of women was to be drawn and burnt alive.

1 WILLIAM BLACKSTONE, COMMENTARIES 418 n. 103 (R. Welsh & Co. ed. 1897).

So clearly has the line between good and evil been drawn for women, that even noncriminal behavior is seen as calculated evil when conducted by women, while the same behavior by a man is viewed as merely the result of immaturity or boyish restlessness. *See, e.g.*, Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities*, 38 UCLA L. REV. 1483, 1509 (1991) (noting that a man who leaves or betrays his family is commonly depicted as an "irresponsible child," while the woman who leaves or betrays her family is "viewed in an entirely different light. She is the psychological equivalent of the mother who abandons; she is a monster."). Indeed, the view of woman as evil has even deeper roots in many religious and cultural traditions. It has been argued that one object of law and other forms of organized power has historically been the subjugation of woman as subjugation of evil in its most "monstrous" and powerful form. *See, e.g.*, Stephen P. Wink & Walter Wink, *Domination, Justice and the Cult of Violence*, 38 ST. LOUIS U. L.J. 341, 357 (1994) (exploring the role of domination violence in the development of human societies and law, and noting that in many creation myths "a war god residing in the sky—Wotan, Zeus, or Indra, for example—fights a decisive battle with a female divine being, usually depicted as a monster or dragon residing in the sea or abyss (representing chaos). Having vanquished the original Enemy by war and murder, the male victor fashions a cosmos from the female monster's corpse. Cosmic order is thus derived from the violent suppression of the feminine and is mirrored in the social order by the subjugation of women to men.").

22. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES, at 124-25 (1988) (offering a historical analysis of battering as a political and social phenomenon with real consequences in individual lives and noting that prior to the women's movement of the 1960s and 1970s, battered

sonableness[23], in societal perceptions of appropriate self-defense, and in application of the elements of self-defense, imminent or immediate danger and proportionality,[24] and deeply held cultural attitudes that pathologize women generally and battered women particularly.[25] Based on the confluence of these factors, the argument was that battered women who killed were more likely to be viewed as crazy than reasonable; thus they were likely to face substantial hurdles in asserting self-defense and to be limited in the range of defense options available at

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women were often pathologized; when women began to speak out about their subordination generally, battered women were characterized as "provoking" the violence); ANGELA BROWNE, BATTERED WOMEN WHO KILL 16 (1983) (noting that "male respondents who assault partners in serious premarital relationships often insist they were 'goaded' into the violence"); SUSAN SCHECHTER: WOMEN AND MALE VIOLENCE: THE VISIONS OF THE BATTERED WOMEN'S MOVEMENT 127 (1983) (noting that researchers' characterization of the dynamics of violence against women have "profoundly disturbing implications. By never condemning the violence, the authors sanction it. The husband's main problem is his weakness, not his assaultiveness. Moreover, the woman not only deserves the violence because of her own aggression and coldness, but also needs and causes it for her psychic well-being. If she only fulfilled her feminine role more adequately and demurely, she would not provoke his rage."); Schneider, *Equal Rights*, *supra* note 2, at 625.

23. A. HERBERT, MISLEADING CASES IN THE COMMON LAW 18 (1930) ("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."); *see also* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (discussing the similar difficulties women face in the legal concept of reasonableness in the areas of rape and sexual harassment); Schneider, *Equal Rights*, *supra* note 2; Maguigan, *supra* note 2, at 413.

24. *See* Maguigan, *supra* note 2, at 382, 414-19 (arguing that gender-disparate application of the rules of self-defense by judges pose a greater problem for women who kill their batterers than do the rules themselves, although these women have a better chance at admitting evidence and jury instructions regarding the context in which the killing occurred in jurisdictions with an "imminent" rather than "immediate" danger proximity requirement, and in jurisdictions that have rejected the "like force" proportionality requirement in favor of a broader consideration of context); Schneider, *Equal Rights*, *supra* note 2 (discussing gender bias in the elements of self-defense).

25. *See* Schneider, *Equal Rights*, *supra* note 2, at 636 n.73 (noting that "women have been viewed as 'disabled' by their lack of logic," and that a number of legal textbooks continue to place problems relating to women in the law in sections devoted to 'idiots and lunatics.'). *See also* TIFFT, *supra* note 3, at 97-102 ("clinicians also 'discovered' that the hospitalized survivors of battering had pathological personality characteristics. Battered women were described as either aggressive, masochistic, and immature or as anxious and depressed. This perspective fostered the assertion that battered women were responsible for their own victimization and that only women with specific pathological characteristics were battered." (citations omitted)); GORDON, *supra* note 22, at 123 ("Where the violence was directly named by the women, social workers sought to probe 'deeper.' . . . These analyses became psychologized, or psychiatric . . . . Masochism was a repeated diagnosis."); SCHECHTER, *supra* note 22, at 127 (noting that researchers have characterized the battered woman as one who "needs and causes [male violence] for her psychic well-being.").

trial.[26] The goal of this work was to expand defense options in order to equalize women's rights to trial and afford women equal opportunity to present an effective defense. There was no claim that all battered women were entitled to self-defense, or that there should be a special defense for battered women, either as self-defense or as a special "battered woman defense." To the contrary, the argument was that battered women, like all criminal defendants, had to be included within the traditional framework of the criminal law, in order to guarantee their equal rights to trial.[27]

Those insights have now generated much legal scholarship,[28] case law[29] and statutory reform.[30] Unfortunately, much subsequent work is

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26. *See, e.g.*, CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 4 (1989) (battered women face bias in presenting a self-defense case); WOMEN'S SELF-DEFENSE CASES, *supra* note 2 at 4 (battered women's defense options have been limited due to bias); Julie Blackman, *Emerging Images of Severely Battered Women and the Criminal Justice System*, 18 BEHAVIORAL SCI. & L. 121, 128 (1990), *reprinted in* DEFENDING BATTERED WOMEN IN CRIMINAL CASES (Section of Criminal Justice and the Division for Professional Education, American Bar Association, 1992), at 28 (noting that "the criminal justice system, with laws that presume stranger-to-stranger violence, is ill-suited to deal with women defendants whose lives are laced through with desperation, fear and violence perpetrated by an intimate."); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L. J. 121, 123, 126 (1985) (critical of the treatment of battered women under the law of self-defense, and calling for the development of a "reasonable woman" standard); Kit Kinports, *Comment, Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988) (critical of the application of self-defense law to battered women and calling for a "reasonable battered woman" standard); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives of Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 37 (calling for evidentiary rules that permit expert testimony on battering); Mahoney, *supra* note 2, at 6 (noting that "[l]egal pressures . . . distort perceptions of violence in ways that create real problems for [battered] women."); Rosen, *supra* note 2 at 376 (calling for a modification of the imminence requirement to permit the jury to determine whether deadly force was "necessary"); Schneider, *Equal Rights, supra* note 2, at 623; Schneider & Jordan, *Representation of Women, supra* note 2 at 149 (arguing that gender stereotypes prevent equal application of the law to battered women who kill); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 116-30 (1990) (discussing assumptions in battered woman homicide cases); Walter Steele & Christine Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 175-6 (1991) (arguing that the "objective" standard of reasonableness in the law of self-defense ignores the experiences of battered women).

27. *See* Schneider, *Describing and Changing, supra* note 2; Schneider, *Equal Rights, supra* note 2; Schneider & Jordan, *Representation of Women, supra* note 2; *see e.g.*, WOMEN'S SELF DEFENSE CASES, *supra* note 2, at 4 ("We do not argue for a separate legal standard for women."); Maguigan *supra* note 2, at 426-27 n. 169 ("By the offer of battered-woman syndrome expert testimony, a defendant does not assert her entitlement to a completely new defense.").

28. *See supra* note 2 and accompanying text.

29. *See, e.g.*, Maguigan, *supra* note 2, at 467 (listing appellate opinions from all fifty states used in an analysis of those opinions, culled from cases cited by authors who proposed redefinition of self-defense jurisprudence, cases cited in law review articles, comments, and notes, books, trea-

premised on a fundamental misunderstanding of the original arguments, and assumes that pleas of self-defense or a special "battered woman defense" were being argued as appropriate in all cases of battered women who kill their assailants.[31] Although some of this scholarship and law reform effort is well-intentioned, it misses the crucial insight that has shaped this work: the particular facts and circumstances of each case must be evaluated in light of the general problem of gender-bias in order to ensure an individual woman's equal rights to trial. This is, as Stephen Schulhofer puts it, a "feminism of process and particulars."[32]

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tises, practice manuals, periodicals, and newsletters addressing issues presented by the homicide trials of battered women, and cases of battered women who killed their batterers based on an independent search); *see also supra* note 9 and accompanying text (listing appeals or postconviction efforts to vacate convictions based on ineffective assistance of counsel).

30. Some reform efforts in the law of self-defense have advocated special legislation addressing the admissibility of expert testimony on battering. *See, e.g.*, CAL. EV. CODE § 1107 (1995) (expert testimony on "battered women's syndrome" admissible by either side in a criminal case); KY. REV. STATS. ANN. § 503.050 (1994) (any evidence of abuse or domestic violence by person against whom defendant is charged with using physical force is admissible); LA. CODE EVID. ANN. art. 404(A)(2)(a) (West 1995) ("expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible" in criminal case); MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (1995) ("battered spouse syndrome" evidence, including expert testimony, admissible to explain defendant's state of mind or motive in perfect or imperfect self-defense); MASS. ANN. LAWS ch. 233, § 23E (Law. Co-op. Supp. 1996) (evidence of battering, including expert testimony, admissible in self-defense, duress, or "accidental harm" defenses); MO. REV. STAT. § 563.033(1) (West Supp. 1994) ("battered spouse syndrome" evidence admissible in self-defense); OHIO REV. CODE ANN. § 2901.06 (Anderson 1993) ("battered woman syndrome" evidence admissible in self-defense as to imminence element); OHIO REV. CODE ANN. § 2945.39.2 (Anderson 1993) ("battered woman syndrome" expert testimony admissible as evidence of impairment of reason in insanity defense); NEV. REV. STAT. § 48.061 (Michie 1996) ("Evidence of domestic violence" admissible to show defendant's state of mind for excuse defense, or toward the establishment of self-defense); TEX. CRIM. PRO. CODE ANN. § 38.36 (b)(1) & (2) (West Supp. 1996) *see also* Banks v. State, 608 A.2d 1249 (Md. Ct. Spec. App. 1992) (applying MD. CODE ANN., CTS. & JUD. PROC. § 10-916, and restricting the definition of battered spouse); State v. Donner, 645 N.E.2d 165 (Ohio Ct. App. 1994) (applying OHIO REV. CODE ANN. § 2901.06, and restricting the definition of "battered woman"); Maguigan, *supra* note 2, at 459 (discussing LA. CODE EVID. ANN. art. 404(A) (West 1990); Sue Osthoff, *Defending Battered Women: Do We Really Need New Laws?* (Fact sheet written in response to proposed state legislation, available from the National Clearinghouse for the Defense of Battered Women, at 215 351-0010).

31. *See, e.g.*, Commonwealth v. Miller, 634 A.2d 614, 620 (Pa. Super. Ct. 1993) (indicating a belief that some jurisdictions have adopted a separate "syndrome" defense for battered women); Commonwealth v. Ely, 578 A.2d 540, 541 (Pa. Super. Ct. 1990) (claiming the existence of a " 'battered woman's syndrome' theory of self-defense."); Coughlin, *supra* note 2, at 6 (arguing that the "defense of battered woman syndrome" does more harm than good for women). *But see* Maguigan, *supra* note 2 (noting fundamental misunderstandings and incorrect assumptions about the law of self-defense with regard to battered women defendants).

32. Schulhofer, *supra* note 20, at 2207.

Gender-bias pervades the entire criminal process with respect to battered women who kill. Gender-bias in perceptions of appropriate self-defense, and the legal standard of self-defense,[33] the broader problem of choice of defense,[34] and the need for expert testimony on battering[35] are all interrelated. Misapprehension of gender-bias in the concept of self-defense, and in judicial application of the law of self-defense, necessarily leads to misunderstanding of the choice of defenses that may be available in any particular case—which may have constitutional implications.[36] And, of course, the substance of the defense necessarily shapes the content of any testimony, particularly expert testimony, that might be proffered in support of that defense.

Scholarship, litigation, and legal reform efforts over the last twenty years should have deepened our understanding of the complexity of these cases and underscored the severity of the problem of battering, the absence of state protection for battered women and the problems of unequal trial that women who are battered face. We now recognize that male physical violence is part of a larger framework of power and coercive control over women,[37] a pattern of physical and psychological abuse, of totalizing subordination which includes restriction of fundamental rights of freedom, choice, and autonomy. This aspect of male violence has been trivialized because of its location in the intimate relationship. Significantly, when this relationship is taken out of its "family" or" private" context, and characterized within a more "public" generic framework such as torture,[38] terrorism in the home,[39]

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33. *See* Schneider, *Describing and Changing*, *supra* note 2, at 227 (arguing that evidence of battering is relevant under both an "objective" and a "subjective" standard of self-defense, and that, regardless of which standard a jurisdiction enunciates, "it has been recognized that these characterizations of subjective and objective are poles on a continuum, since the jury must find that the actor acted reasonably under either approach.")

34. *See infra* part III.

35. *See generally* Schneider, *Describing and Changing*, *supra* note 2, at 197.

36. Battered women may be denied the opportunity to present a defense, and thus denied equal rights to trial.

37. *See, e.g.*, SUSAN SCHECHTER, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987) (first use of the term "coercive control" to describe battering); Dutton, *supra* note 2; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 975 (1995).

38. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 295 (1994) (arguing that domestic violence should be considered violative of international human rights standards condemning torture).

39. Isabel Marcus, *Reframing Domestic Violence: Terrorism in the Home*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 2, at 11 (redefining "domestic violence" as "terrorism within the home" to emphasize the social consequences of battering and its resemblance to political terrorism).

regime of private tyranny,[40] being held hostage,[41] involuntary servitude,[42] hostile domestic environment,[43] or human rights violation,[44] the moral and political dimensions of domestic violence move into sharper focus.[45] We know that women's assertion of independence and separation exacerbates the lethality of male violence,[46] and that many women who leave their abusers are at greater risk of being seriously injured or killed.[47] We know that states that have fewer resources devoted to battered women have a higher rate of homicides committed by battered women.[48] There is wide recognition of the limitations of legal remedies in providing safety to battered women, whether orders of protection, mandatory arrest policies, or antistalking laws, and the general failure of the state to protect battered women.[49] We understand that a history of battering, previously invisible, can now be seen in women's criminal

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40. Jane Maslow Cohen, *Regimes of Private Tyranny*, 57 U. PITT. L. REV. 757 (1996) (placing intimate violence within framework of political tyranny).

41. State v. Stewart, 763 P.2d 572, 584 (Kan. 1988) (Herd, J., dissenting) (arguing that the majority should have accepted a battered woman's claim of self-defense, comparing her situation to that of a hostage, in which case the court would accept the same argument); Anthony J. Sebok, *Does an Objective Theory of Self-Defense Demand Too Much?*, 57 U. PITT. L. REV. 725, 752 (1996).

42. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992) (arguing that extreme domestic violence should be considered involuntary servitude prohibited by the Thirteenth Amendment).

43. Martha Chamallas, *Hostile Domestic Environments*, 57 U. PITT. L. REV. 809 (1996) (placing intimate violence within framework of hostile workplace environment).

44. Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1120 (1995) (arguing that international law should recognize domestic violence as a human rights issue because it violates basic human rights principles of the inherent dignity and equal worth of all human beings, the right to freedom from fear and want, and equal rights of men and women).

45. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976-977 (1986) (arguing that the distinction between "private" and "public" spheres has permitted selective application of the law which has protected male domination in the "private" sphere).

46. *See supra* note 3 and accompanying text; *see also* Mahoney, *supra* note 2.

47. *See supra* note 3 and accompanying text.

48. Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 LAW & SOC. REV. 75 (1989) (availability of legal and extralegal resources is associated with a decline in female-perpetrated homicides; findings suggest that legal and extralegal interventions can provide nonviolent alternatives for victims of male partner abuse).

49. *See, e.g., Developments in the Law: Legal Responses to Domestic Violence III, New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1529 (1993) (discussing the development and the shortcomings of these and other efforts in the law to address battering, and noting that one reason many of these efforts fall short of the goal of ending woman abuse is "because attitudes that endorse the historical subordination of women remain embedded in both the male psyche and the response systems of society.").

conduct in a wide variety of circumstances,[50] and that many women who are in jail on charges that are seemingly unrelated to battering have been battered.[51]

There is also a fuller empirical basis on which to conclude that cases involving battered women who kill fall within traditional frameworks of defenses or excuses,[52] but are nonetheless viewed as different or exceptional by judges who apply the law to these cases,[53] and that battered women of color face particular hurdles in this regard.[54] The constitutional impact of denial of equal rights to trial has been detailed.[55] Recent social and cultural experience continues to confirm

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50. It has been estimated that 80-85% of incarcerated women are incarcerated as a result of their affiliation with an abusive partner. Statistics Packet, National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. (3d ed. 1994); *see also* Russ Immarigeon, *Few Diversion Programs Are Offered Female Offenders*, 11 NAT'L PRISON PROJECT J. 10 (1987) (citing same statistics). Women who behave violently toward men are viewed by society with particular horror and outrage, and this emotional reaction is often reflected in sentencing. *See* Denno, *supra* note 21; *see also* Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, 8(3) CRIM. JUST. 21, 60-62 (1993) (noting that women who are low-level carriers in drug cases are often coerced by boyfriends and husbands into drug activity, and generally receive harsh sentences); *see* generally Dorothy E. Roberts, *The Meaning of Gender Equality in the Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1 13 (1995).

51. There are a range of research results on the number of women in prison who were abused before imprisonment. The lowest estimates, by the Department of Justice, are that 22% of women in federal prisons, and 43% of women in state prisons have been battered. Other researchers have estimated that as many as 85% of incarcerated women have been battered. Karl Rasmussen, Executive Director of the Women's Prison Association in New York, has stated that 85% of the women he has seen would not have gone to prison in the first place, if it were not for their involvement with abusive male criminals. Statistics Packet, National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. (3d ed. 1994).

52. Maguigan, *supra* note 2 at 391-97.

53. *Id.*

54. *See* BETH E. RICHIE, COMPELLED TO CRIME (1996) (describing the experiences of battered African American women incarcerated in New York City and the double-bind in which they find themselves due to societal gender roles, racism, and abuse by their partners); Ammons, *Mules, Madonnas*, *supra* note 2, at 1006 (African American women are less likely to be considered 'real' battered women because of racism and stereotypes about battered women); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) ("Where systems of race, gender, and class domination converge, as they do in the experiences of women of color, intervention strategies based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles."); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1995) (describing particular experiences of Latinas battered by Latinos); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991) (discussing the "cultural defense" asserted by some batterers, which claims that in their own cultures abuse of women is acceptable).

55. *See* Andersen & Read-Andersen, *supra* note 19. Although the authors focus on the

that women who act violently toward men, even in self-defense, whether in the movies (Thelma and Louise) or in life (Lorena Bobbitt), are viewed with particular horror.[56]

Despite these recent developments that support and indeed strengthen the equal rights perspective, there is considerable resistance on the part of legal scholars, lawyers, judges, the media, and the public at large to perceiving the moral and legal circumstances of battered women as implicating issues of equality. Legal arguments in battered women's cases are routinely viewed as a kind of "special pleading" which claim special lenient treatment for battered women. Indeed, some well-intentioned lawyers, legislators, legal scholars and judges have made legal arguments, developed legislation and written articles and judicial opinions that assert "battered women's," or "battered woman syndrome" defenses or claims, whether as the basis for claims of self-defense,[57] admissibility of expert testimony,[58] or for a special cause of action in tort.[59] This dilemma is a familiar one when gender discrim-

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constitutional implications of exclusion of expert witness testimony on "battered woman syndrome," their argument and observations are consistent with the equality framework defined by the early work on women's self-defense in other respects. They argue that the Sixth Amendment of the U.S. Constitution is implicated whenever a battered woman attempts to introduce expert testimony to assist the trier of fact in understanding her experience as a battered woman and the role that experience may have played in the reasonableness of her acts.

56. *See* Susan N. Herman, *Thelma and Louise and Bonnie and Jean: Images of Women as Criminals*, 2 S. CAL. REV. L. & WOMEN'S STUD. 53 (1992); Elizabeth V. Spelman & Martha Minow, *Outlaw Women: An Essay on Thelma and Louise*, 26 New Eng. L. Rev. 1281 (1992) *see also supra* note 21 and accompanying text.

57. *See, e.g.*, State v. Scott, 1989 WL 90613 (Del. Super. July 19, 1989) (defense attorney referred to client's defense as "battered woman's defense."); Larson v. State, 766 P.2d 261 n.4 (Nev. 1988) (defense attorney told expert he had hired to testify in trial the trial of a woman for the shooting death of her abusive husband: "If we won this case, we'd be flying across the country consulting . . . in special cases like this and I'd have all the work I could handle."); State v. Vigil, 794 P.2d 728, 729 (N.M. 1990) (referring to a "battered woman theory of self-defense"); Commonwealth v. Miller, 634 A.2d 614, 619 (Pa. Super. Ct. 1993) (indicating a belief that some jurisdictions have adopted a separate "syndrome" defense for battered women); Commonwealth v. Ely, 578 A.2d 540, 541 (Pa. Super. Ct. 1990) (claiming the existence of a "battered woman's syndrome theory of self-defense."); Commonwealth v. Tyson, 526 A.2d 395, 397 (Pa. Super. Ct. 1987) (referring to the "defense of 'battered woman's syndrome' "); *see also* Coughlin, *supra* note 2, at 6 (arguing that the "defense of battered woman syndrome" does more harm than good for women); *But see* Maguigan, *supra* note 2, at 382 (noting fundamental misunderstandings and incorrect assumptions about the law of self-defense with regard to battered women defendants).

58. *See* sources cited *supra* note 30.

59. *See* Cusseaux v. Pickett, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994) (recognizing a tort of "battered women's syndrome"); Jewett v. Jewett, 93-20-01846-5 (Super. Ct., Spokane Co.) (recognizing a tort of "domestic violence"); *see also "Battered Woman" Tort Gains*, NATIONAL L.J. Aug. 28, 1995, at A6 (reporting on Giovine v. Giovine, A-2134-94T5 (N.J. Sup. Ct. 1995) noting that Giovine marks only the third court, and the highest, in the country to recognize a tort

ination claims are made, for the tension between equal treatment and special treatment is inherent to the problem of equality generally, and particularly endemic in claims of gender equality.[60] But in the context of criminal cases involving battered women as defendants, the mischaracterization of claims of equal treatment as special treatment is especially problematic. Battered women's actions in these cases are widely perceived to be outside the traditional justification framework of the criminal law; consequently, the problem of gender-bias is not only neither addressed nor remedied, but exacerbated.

A. The Legal Framework of the Problem

Homicide is generally divided into first- and second-degree murder, manslaughter, and justifiable or excusable homicide. If a homicide is justifiable or excusable it is because special circumstances exist which the law recognizes as justifying or excusing the defendant's acts from criminal liability.[61] Proof that a killing occurred in a sudden, provoked "heat of passion" upon provocation that would cause a "reasona-

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specific to battered women). *But see* Laughlin v. Breaux, 515 So. 2d 480 (La. Ct. App. 1987) (declining to recognize such a tort).

60. Feminists and other modern and postmodern theorists have long recognized the inherent discord between the need, on the one hand, to identify "differences" that define a political group, for purposes of developing unity within the group and identifying unequal treatment of individual group members within the dominant culture, and, on the other hand, traditional liberal conceptions of equality, which call for universal norms that can be applied to all individuals and groups, regardless of particular social, historical, cultural, gender-based, or other experiences, needs, or values. *See, e.g.*, IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 168-72 (1990) (arguing that fear of stigma now attached to differential treatment of groups flows from understanding "difference" as opposition, deviation, or devaluation, and identifying equality with sameness); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) (noting that "the stigma of difference may be recreated both by ignoring and by focusing on it."); Linda J. Nicholson & Nancy Fraser, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism, in* FEMINISM/POSTMODERNISM 19-38 (Linda J. Nicholson ed., 1990) (arguing that, in an effort to focus on the particular experiences of individuals rather than imposing "neutral" norms on all in the development of theory, much of feminist theory itself has fallen back on essentialist claims about the nature of women or women's "universal" experience); Margaret Jane Radin, *Affirmative Action Rhetoric*, 9 SOC. PHIL. & POLY. 130, 147 (1991) (noting that affirmative action is more likely to succeed if it is not seen as "special" treatment, but rather as a measure to break through unjustified hierarchy based on sex or race); Schneider, *Particularity and Generality*, *supra* note 2, at 527 (noting the "paradox" in feminist theory between the need to "particularly" describe women's individual experiences and the need to locate those experiences within the "general" framework of oppression of women generally).

61. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW ch. 7 (1986). The classifications described in this text are general. Some jurisdictions do not divide murder into degrees; others divide it into three degrees. Some jurisdictions also divide manslaughter into degrees, or into "voluntary" and "involuntary." *Id.*

ble man to lose his self-control"[62] is considered in most jurisdictions to be manslaughter.[63] Manslaughter is an "intermediate" crime between murder and justifiable homicide;[64] it means that the homicidal act is not "justifiable," but, because of the circumstances of the individual, it is "understandable" or "excusable" and therefore deserving of some mitigation in punishment.[65] Alternatively, where a defendant's belief in the need to use force to defend herself is "reasonable," and she is not the initial aggressor, self-defense is a "complete" defense and results in acquittal.[66] Where her belief is honest but "unreasonable," some jurisdictions recognize an "imperfect" self-defense, permitting a reduction from murder to manslaughter.[67]

Although the law of self-defense is argued to be universally applicable, it is widely recognized that social concepts of justification have been shaped by male experience.[68] Consequently, it is now widely rec-

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62. 2 LAFAVE & SCOTT, *supra* note 61, at 252. Most jurisdictions require the emotion causing the "passion" that makes manslaughter "understandable" to be anger (thus requiring that there not have been a "cooling off" period sufficient to make the provocation unreasonable), although a few include fear or "terror." *Id.* at 255.

63. *Id.* at 271-2, *supra* note 61. 1 LAFAVE & SCOTT, *supra* note 61, at 650.

64. 2 LAFAVE & SCOTT, *supra* note 61, at 251.

65. *Id.* at 256.

66. *Id.* at 271.

67. 1 LAFAVE & SCOTT, *supra* note 61, at 663. 2 LAFAVE & SCOTT, *supra* note 61, at 271.

68. Familiar images of self-defense are a soldier, a man protecting his home, family, or the chastity of his wife, or a man fighting off an assailant. Society, through its prosecutors, juries, and judges, has more readily excused a man for killing his wife's lover than a woman for killing a rapist. The acts of men and women are subject to a different set of legal expectations and standards. The man's act, while not always legally condoned, is viewed sympathetically. He is not forgiven, but his motivation is understood by those sitting in judgment. . . . The law, however, has never protected a wife who killed her husband after finding him with another woman. A woman's husband simply does not belong to her in the same way that she belongs to him.

Schneider & Jordan, *supra* note 2, at 153; *see also* 2 LAFAVE & SCOTT, *supra* note 61, at 258-9 (noting that "it is the law practically everywhere" that a husband's discovery of his wife in the act of adultery is sufficient provocation under the law of manslaughter, and, at one time, for a justification defense as well). The man who kills his wife after finding her with another man is "*the* paradigm example of provocation," and his conduct is widely perceived to deserve more lenient treatment than other kinds of killings under the law. Indeed, men's killings of their wives are "seldom recognized as belonging to the universe of 'domestic violence' killings"; conversely, women who have killed their husbands in response to battering have raised considerable controversy and are perceived to deserve harsher treatment under the law. Donna Coker, *Heat of Passion and Wife Killing*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 73 (1992).

In a recent Maryland case involving a man who shot and killed his wife four hours after coming home and finding her in bed with another man, the judge sentenced the man to eighteen months in a work release program, stating that he could imagine nothing that would provoke "an uncontrollable rage greater than this: for someone who is happily married to be betrayed in your personal life, when you're out working to support the spouse. . . . I seriously wonder how many

ognized that women defendants face substantial hurdles in pleading self-defense.[69] Judicial application of the standard of reasonableness and elements of the law of self-defense, the requirement of temporal proximity of the danger perceived by the defendant, the requirement of equal proportionality of force used by the defendant to that used against her by the batterer, and the duty to retreat can be particularly problematic for battered woman defendants.[70]

Alternatives to self-defense are the insanity defense and the range of partial responsibility or impaired mental state defenses, which vary among jurisdictions.[71] If a defendant pleads insanity she claims that, due to her mental condition at the time of the act, she is not guilty because she either did not know what she was doing or that it was wrong.[72] The insanity defense is usually a "complete" defense, in the sense that defendant is not legally responsible for the act committed. However, a finding of not guilty by reason of insanity most often results in institutionalization for an indefinite period of time.[73] Some, but not all, jurisdictions recognize partial responsibility defenses. These include heat-of-passion manslaughter and other forms, such as intoxication.[74] In those jurisdictions that do recognize partial responsibility defenses, a successful defense will mitigate the act and reduce a charge from murder to manslaughter, for example.[75]

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men married five, four years . . . would have the strength to walk away without inflicting some corporal punishment." *See She Strays, He Shoots, Judge Winks*, N.Y. TIMES, Oct. 22, 1994, at A22. For a thoughtful discussion of this case in light of shifting social norms, *see* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 346 nn. 350-56 (1996).

69. *See, e.g.*, Maguigan, *supra* note 2, at 385-86 (analyzing a then-comprehensive group of appellate opinions involving battered women who killed their batterers and noting that more restrictive danger proximity requirements in the law of self-defense, reasonableness requirements that exclude social context evidence, a duty to retreat, or a "like force" requirement can be particularly difficult for battered women, whether imposed by the substantive law of the jurisdiction or gender-biased imposition of the law by trial judges).

70. *Id.*; *see also* Ripstein, *supra* note 18; *supra* notes 26, 55 and accompanying text.

71. Generally, these are intoxication, infancy, automatism, and heat-of-passion manslaughter. 2 LAFAVE & SCOTT, *supra* note 61, at 427.

72. 1 LAFAVE & SCOTT, *supra* note 61, at 427-8.

73. *Id.* at 483.

74. 2 LAFAVE & SCOTT, supra note 61, at 252.

75. 2 LAFAVE & SCOTT, *supra* note 61, at 522-3. An important distinction between insanity and partial responsibility defenses is that, traditionally, psychological expert testimony was only relevant to an insanity defense. A few jurisdictions that recognize partial responsibility defenses have allowed the admission of psychological evidence without the usual insanity defense requirements for such testimony of notice to the prosecution and adverse examination by the prosecution's experts. This has posed particular problems for battered women in recent years. *Id.* at 528.

B. The Goals of Equal Rights to Trial

When the theoretical framework of gender-bias in the law of self-defense was developed almost twenty years ago, far less was known about the problem of domestic violence. The fact that there even were battered women who killed their assailants, much less the nature of the battering experiences of these women, was not widely known. The equal rights framework developed from the experiences of battered women, whose stories, though hardly new, had rarely been told or heard. Lawyers and social scientists who were sensitive to the subtleties of gender-bias listened to the experiences of women who had been battered and who killed their assailants.[76] The particular experiences of women who were battered, the social context of battering, and the broader problems of gender subordination within which the particular problem of battering had to be understood, were essential to the framing of the theory.[77]

Early work on equal rights to trial focused first on choice of defense, because the threshold issue for defense lawyers who represent battered women who kill is interpretation of the facts and law in order to choose a defense. The argument was that lawyers were more likely to rely on partial responsibility and insanity defenses for battered women, rather than self-defense, because they play into stereotypes of women generally, and battered women particularly, as hysterical and irrational.[78] Battered women who kill are likely to be seen as either "bad" or "mad" or both, but as inappropriate claimants of self-defense[79] by defense counsel; these are stereotypes which the judge and jury may share.[80] The crux of self-defense is the concept of reasonable-

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76. For example, the Women's Self-Defense Law Project, founded jointly by the Center for Constitutional Rights and the National Jury Project in 1978, conducted training sessions for lawyers and consulted on and monitored more than 100 cases. For a more detailed description of the Project's work, see WOMEN'S SELF-DEFENSE CASES, *supra* note 2 at xv-xvi.

77. Legal scholars, indeed contributors to this symposium, are still divided on the issue of whether the social context of battering and the "facts" of gender subordination are even relevant to criminal law defenses. *Compare* Fletcher, *supra* note 18, at 553 *with* Benjamin Zipursky, Self-Defense, Domination, and the Social Contract, 57 U. PITT. L. REV. 579, 612 (1996) and Ripstein, *supra* note 18, at 686. Professor Fletcher argues that the social "facts" of abuse and gender subordination are not relevant, while Professors Zipursky and Ripstein say they are.

78. *See* WOMEN'S SELF-DEFENSE CASES, *supra* note 2, at 29; *see also* Maguigan, *supra* note 2; Schneider, *Particularity and Generality*, *supra* note 2; Schneider, *Describing and Changing*, *supra* note 2.

79. Nicolson, *supra* note 1 at 185.

80. *See, e.g.*, Regina Schuller et. al, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony* 24 J. APPLIED SOC. PSYCHOL. 316 (1994)

ness. In order for a defense lawyer to believe that a battered woman has a credible claim of self-defense, the lawyer will first have to overcome sex-based stereotypes of reasonableness, understand enough about the experiences of battered women to be able to fully consider whether the woman's actions are reasonable, and be able to listen to the woman's experiences sensitive to the problems of gender-bias. The point of the early work on gender-bias was to suggest that there might be many cases of women charged with homicide, particularly battered women, where self-defense was likely to be overlooked by defense counsel, but might be appropriate and should be considered.[81] The goal was to ensure that the full range of defenses were available and explored for battered women defendants, just as for all other criminal defendants.

The next step was to make sure that battered women's experiences were heard, first by defense lawyers in the process of representation and choice of defense, and then in the courtroom, regardless of what defense was chosen. Thus the second emphasis of this work was the crucial role of admission of evidence on battering, first from the woman and others who might have observed or known about the violence, and then from experts who might be able to explain those experiences and assist factfinders to overcome myths and misconceptions that might impede their consideration. Admission of evidence at trial concerning battering was deemed crucial, because of the view that the social relations of domination, the history and experience of abuse, were not only relevant but essential to the determination of guilt. In short, the goal was to improve the rationality of the fact-finding process, not to have every battered woman on trial plead self-defense. Nonetheless, the argument

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(jurors who were informed about the dynamics of abuse and those exposed to expert testimony, compared to their respective counterparts, were more believing of the battered woman's account of what occurred in mock jury trial). *See also* Neil Vidmar & Regina A. Schuller, *Is the Jury Competent? Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133 (1989) (reviewing current literature on juror attitudes about battering); EWING, *supra* note 2 (finding that battered women tried for killing their batterers were more likely to receive an acquittal where an expert testified on battering); Regina Schuller, *The Impact of Expert Testimony Pertaining to the "Battered Woman Syndrome" on Jurors' Information Processing and Decisions* (1990) (unpublished Ph.D. dissertation, University of Western Ontario) (finding that jurors were more likely to acquit battered woman defendants where expert testimony linked the defendant to the "battered woman syndrome," and that the more jurors endorsed myths and misconceptions about battered women, the less likely they were to render a not guilty verdict, and that males were more likely to endorse such concepts than females), *cited in* Vidmar & Schuller, *supra*, at 142; Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992).

81. *See, e.g.*, WOMEN'S SELF-DEFENSE CASES, *supra* note 2, at 28-29.

for the relevance of the social context of battering in order to improve the rationality of the fact-finding process has become confused with the notion of a separate defense of battering in the public mind.

III. Common Misconceptions

The equality framework that I have described is truly a framework—a way of analyzing cases of battered women who kill—from a perspective of gender-bias. However, themes which emerge in case law, legal reform efforts and legal scholarship concerning these cases suggest a failure to understand the insights and nuances of this approach. First, the framework of gender-bias is either not considered or misunderstood as a claim for a particular defense or result, rather than a mode of case analysis that must be applied particularly, and differently, based on the facts of each individual case. Second, cases of battered women are viewed in a rigid, totalistic, "all or nothing" way. For example, arguments are made that battered women are or are not, as a class, entitled to claim self-defense as a justification, are or not entitled to assert an excuse, or should all be able to claim "battered woman syndrome" or a "battered woman" or "battered woman syndrome" defense. Either all battered women are entitled or none are; but the common theme is that "they" are all the same. In this part, I offer examples of these common misconceptions in case law, legislation, and legal scholarship.

A. Definition of the "Battered Woman"

In a number of different ways, the term "battered woman" is interpreted by judges, legislators and scholars in a rigid, static, and highly dichotomized fashion. This has serious ramifications for cases of battered women who kill.

First, as I have previously suggested, the term "battered woman" itself is rigid and static, and implies that there is one model, which excludes women with diverse experiences who do not fit a particular mold or stereotype.[82] Second, the phrase "battered woman" connotes

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82. Schneider, *Particularity and Generality*, *supra* note 2. Many women who have been battered resist application of the term "battered woman" to themselves. *Id.* at 530 nn.36, 37. This is in part because it is reductivist in experiential terms and restrictive in definitional terms:

> in contrast with other descriptions of harm to women, "battered woman" describes the victim and focuses on her qualities. A woman is—or is not—a "battered woman. . . . [T]he term "battered woman" conjures up images of helplessness and defeat rather than survival and resistance. Neither the term itself nor the social meaning of the term derived

victimization, perhaps because of its association with the concept of "battered woman syndrome."[83] However, women who are battered are also survivors, active help-seekers who find little help and protection from the state, with extraordinary abilities to strategize in order to keep themselves and their families safe under terrible circumstances.[84] Third, case law and statutes in some jurisdictions limit the "definition" of "battered woman" so that many women will not be recognized in the eyes of the law.[85] Thus, for example, some battered women who kill have been deprived of the opportunity to seek jury instructions at trial,

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from practice, describe the complexity of battered women's experiences.

Id. at 530-31. Holly Maguigan is also critical of the tendency to define the term "battered woman" rigidly and narrowly. She critiques the suggestion that there should be a separate "reasonable battered woman," or "reasonable woman" standard for the following reason: "The creation of a generalized model of the battered woman, to say nothing of the battered woman who kills, invites courts to prevent the fair trials of women who are not 'good' battered women." Maguigan, *supra* note 2, at 444-45; *see also* Dutton, *supra* note 2, at 1195-96 nn.17, 18. Dutton notes that:

> [A woman] may not be thought of as the "typical" battered woman if she has a history of prostitution, for example, or if she has been observed to behave angrily, is known to abuse her children, is trained in the use of a weapon, or is physically larger than her abusive partner. . . .
>
> . . . .
>
> [She] may be thought to have engaged in abusive behavior where she has fought back in an attempt to protect herself against the violence and abuse.

Id. at 1195.

Some courts have been sensitive to the problem of stereotyping of battered women. For example, in Mcmaugh v. State, 612 A.2d 725 (R.I. 1992), the Rhode Island Supreme Court reversed the trial court's denial of a state habeas corpus for a battered woman who had been convicted of first degree murder and conspiracy on several grounds, including the fact that the trial judge had refused to believe that the woman, who appeared assertive at trial, was battered and had been coerced into a defense strategy against her will by her husband. The court observed:

> It is well established that battered women have several common personality traits. These traits include low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions. The presence of these characteristics leads to the stereotype of the battered woman as fragile, haggard, fearful, passive, lacking job skills, and economically dependent on her batterer. *Nevertheless, the existence of this list of traits does not mean that all battered women look and act the same. Although some battered women may have some or all of these characteristics, it is entirely possible for a battered woman not to evidence any of these characteristics.*

McMaugh, 612 A.2d at 731 (citing *Kelly*, 478 A.2d at 372) (emphasis added).

83. Schneider, *Particularity and Generality*, *supra* note 2, at 531.

84. *See, e.g.*, EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11 (1988) (arguing that women, rather than "giving up," "respond to abuse with helpseeking efforts that are largely unmet."); Dutton, *supra* note 2 at 1227-30; Stark, *supra* note 37 at 1000.

85. *See, e.g.*, Banks v. State, 608 A.2d 1249 (Md. Ct. Spec. App. 1992) (restricting the definition of "battered spouse" for evidentiary purposes); State v. Donner, 645 N.E.2d 165 (Ohio Ct. App. 1994) (restricting the definition of "battered woman" for evidentiary purposes).

or to get the issue of self-defense to the jury, because the judge decided that they were not "real" battered women.[86]

This duality can be understood as flowing from the notion of what I have called the victimization-agency dichotomy.[87] Battered women are simplistically viewed as either "victims" or "agents." This significantly contributes to confusion about appropriate legal defense strategies for women in a number of ways. A battered woman cannot be victimized if she is an agent or survivor; nor can she be responsible if she is a victim. Judges and scholars reflect this dichotomized approach in analyses that make claims about the criminal liability of battered women in general in totalistic ways. But women who are battered and particularly battered women who kill, are simultaneously both victims and agents. Indeed it is the very complexity of their situations, the simultaneity of being both victim and agent that makes these cases so difficult from both a moral and legal perspective. It is the more complex and nuanced situation of "situated agency" that the equal rights framework tries to grapple with in the concrete context of individual cases. However, the way that the law has developed in this area tends to make this more complex accommodation difficult.[88]

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86. *See supra* note 80; *see also* Andersen & Read-Andersen, *supra* note 19, at 376; Maguigan, *supra* note 2, at 381. A recent California case that has drawn some media attention illustrates the tendency to see battered women as completely helpless victims, and the difficulty some have in reconciling the image of a physically or emotionally strong woman with that of the helpless victim. One news story notes that the defendant, "a bodybuilder, wrestler, and occasional boxer—is on trial for the shotgun slaying of her husband," and that the killing was "either the act of a habitually violent and enraged woman or the justifiable response of a brutally battered wife." Greg Moran, *Jury Hears Scenarios of Violent Last Hours of a Stormy Marriage*, SAN DIEGO UNION-TRIBUNE, Feb. 27, 1996, at B2; *see also* McMaugh v. State, 612 A.2d 725 (R.I. 1992) (noting problem of stereotyping battered women).

87. I have described this dichotomy previously in Schneider, *Describing and Changing*, *supra* note 2; Schneider, *Particularity and Generality*, *supra* note 2; and Schneider, *False Dichotomy*, *supra* note 5.

88. For example, confusion about whether expert testimony is admissible as part of a partial responsibility defense has caused particular problems for battered women defendants who do not fall neatly into either the insanity or partial responsibility categories. When expert testimony on battering is proffered, courts are split on whether notice and adverse examination requirements apply—and, implicitly, on whether the defense being offered is really insanity, partial responsibility, or a completely separate "battered woman syndrome" defense. Some jurisdictions require notice and adverse examination in partial responsibility defenses proffering expert testimony on battering, others do not, and still others limit the subject matter of the expert's testimony in these cases. *Id.*; *see also* 1 LAFAVE & SCOTT, *supra* note 61, at 524-5. Illustrating this confusion about what legal "slot" battered women who kill fit into, in California, where "battered woman syndrome" evidence is admissible by statute, CAL. EVID. CODE § 1107 (West 1995), the partial responsibility defense has been abolished. CAL. PENAL CODE § 25 (West 1986); *see also* 1 LAFAVE & SCOTT, *supra* note 61, at 527 n.36.

Holly Maguigan's empirical analysis of judicial treatment of cases of battered women who kill reveals this dichotomized thinking and suggests the tenacity of the widespread misperception that battered women who kill their batterers are per se inappropriate claimants of self-defense.[89] Her review of appellate opinions in cases of battered women who killed,[90] published in 1991, suggested that this misperception flows from two flawed assumptions about cases involving battered women who kill as "special." First, it is assumed that these women kill sleeping or otherwise nonconfrontational men and then claim "domestic violence made them do it," although at least 75% of these cases involved situations where battered women killed during an ongoing attack or under an imminent threat.[91] Second, it is assumed that the existing law of self-defense cannot accommodate cases of battered women who kill their batterers or any other cases where the fact finder must understand the context of the killing in order to apply the law rationally. Professor Maguigan concludes that the problem facing battered woman defendants is not the law of self-defense as it currently exists, but rather the disparate application of that law to battered women at trial.[92] Trial judges misapplied the law of self-defense primarily by making rulings that kept evidence of the social context of battering from the jury and by failing to instruct the jury, either adequately or at all, on the law of self-defense and were frequently reversed on appeal.[93] They seemed to make these errors in application of the law of self-defense because of their stereotypical views of battered women as either "vigilantes" ('bad'), or as otherwise incapable of acting reasonably ('mad').[94]

B. Reasonableness and Choice of Defense

In considering whether a battered woman charged with homicide

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89. Maguigan, *supra* note 2, at 381. One fact Professor Maguigan cites as support for her conclusions is that the women in her study had a 40% reversal rate on their convictions, a figure significantly higher than the national average for homicide appeals, 8.5%, according to the National Center for State Courts. *Id.* at 432-33 (citing JOY A. CHAPPER & ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT 38 (1990)).

90. *Id.* at 396.

91. *Id.* at 397 (in five percent of the cases, there was insufficient discussion of the facts to determine whether a confrontation was occurring at the time of the killing or not).

92. *Id.* at 432.

93. *Id.* at 434-47.

94. *Id.* at 434-36; *see also infra* note 183 (discussing the "bad/mad" paradigm in Nicolson, *supra* note 1, at 185).

has a credible claim of self-defense, defense lawyers who must assist battered women to choose a defense, and judges who rule on these cases, confront the threshold issue of reasonableness. If the determination is that the woman's actions were not reasonable, self-defense cannot be asserted.[95] Thus, the issue of reasonableness has a critical impact on the choice of defense.

Serious problems in legal representation shape the analysis and presentation of these cases and necessarily make the determination of reasonableness extraordinarily complex. Many lawyers representing battered women do not understand the problems of domestic violence and therefore cannot understand how the law applies to battered women who kill. Defense lawyers may be misinformed about domestic violence or lack experience in representing women who have been battered. Stereotypical thinking about available defenses may also impede them from asking questions or from processing the information they receive in a way which permits a full consideration of the range of defenses which may be appropriate to the case.[96] Since women who have killed their partners frequently suffer memory lapse and confusion following the incident,[97] an attorney representing a battered woman

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95. I argue here that reasonableness is the threshold and encompassing judgment made by lawyers and judges in these cases. Of course, a defense lawyer or judge might decide that a battered woman was reasonable, but that the specific elements of self-defense were not met. However, if a defense lawyer believed that the woman was acting reasonably, he or she might be more creative in arguing how the battered woman met the problematic elements of self-defense. As a practical matter, I suspect that a judge who determined that a battered woman was acting reasonably, even if some of the elements of self-defense presented in the defense case were problematic, would also decide to give a self-defense instruction to the jury.

96. *See, e.g.*, Brooks v. State, 630 So. 2d 160, 162 (Ala. Crim. App. 1993) *cert. denied*, 115 S. Ct. 1316 (1995) (defense attorney failed to object to court's instruction on whether battering was sufficient provocation for reduction of murder to manslaughter, and thus failed to preserve the issue for appeal); Neelley v. State, 642 So. 2d 494 (Ala. Crim. App. 1993) *cert. denied*, 115 S. Ct. 1316 (1995) (defense counsel's failure to present expert testimony on domestic violence and publicity contract with defendant in high-profile case did not constitute ineffective assistance of counsel); People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992) (defendant was prejudiced at trial by defense counsel's failure to present evidence of battering); People v. Rollock, 577 N.Y.S.2d. 90 (App. Div. 1991) (defense lawyer claimed that he didn't know that defendant was a battered woman, so his failure to introduce expert testimony on battering did not constitute ineffective assistance of counsel); State v. Donner, 645 N.E.2d 165 (Ohio Ct. App. 1994) (defense attorney told battered woman defendant she "had no defense.").

97. *See, e.g.*, State v. Koss, 551 N.E.2d 970, 971 (Ohio 1990) (battered woman defendant testified that she did not remember anything from the time her husband hit her to the time she heard what she believed was him "gurgling" blood after she shot him); State v. Felton, 329 N.W.2d 161, 164-5 (Wis. 1983) (battered woman defendant did not remember firing the shot that killed her batterer); *see also* WOMEN'S SELF-DEFENSE CASES, *supra* note 2 at 53; Kim L. Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of*

who kills may have difficulty in obtaining adequate information necessary to develop an effective defense from the defendant alone. As a result, an attorney may perceive the woman as "difficult" or may ask questions in a way that causes the woman to mistrust him or her because he or she seems not to believe or understand the woman's battering experience, or to blame her for it.[98] In some cases, defense lawyers avoid the issue of domestic violence completely by failing to offer evidence of battering,[99] indicating their lack of knowledge or discomfort with this threatening subject.

Thoughtful determination of choice of defense for battered women defendants requires lawyers to understand the framework of inequality that shapes these cases. Because the law has developed with a male norm in mind, and because stereotypes about women, and about battered women in particular, persist in the minds of judges, juries, and lawyers themselves, lawyers need to be self-critical about their own assumptions, seek assistance from experts in the field, and recognize and point out gender bias in the law where it occurs.[100] They must use the

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Truth, 37 N.Y.L. SCH. L. REV. 123, 126-8 (1992). Memory loss, or inability to adequately express the experience of having been battered, can be one result of trauma women experience in a battering relationship—one of the many survival tactics with which women may respond to abuse. This phenomenon, like other aspects of battering, has been characterized recently by an expert in the field as arising "as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma." Stark, *supra* note 37, at 986.

98. Lawyers and others to whom battered women may attempt to relate the events as they recall them may not want to hear a woman describe the kind of aggressive behavior that would be taken for granted as "self-defense" were it related by a man. *See supra* notes 19-26 and accompanying text.

99. *See* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993); State v. Donner, 645 N.E.2d 165 (Ohio Ct. App. 1994).

100. *See supra* note 80 and accompanying text. Gender bias is an issue in a variety of legal contexts for battered women. While this article focuses on the self-defense context, there are a large number of cases in which battered women choose a defense of duress, and have similar problems to those encountered when they claim self-defense. *See* Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992) ("battered woman syndrome" evidence admissible to rebut inference of intent where defendant was charged with aiding and abetting her batterer); United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) supplemented on denial of reh'g sub nom. United States v. Emelio, 969 F.2d 849 (9th Cir. 1992) (evidence of battering relative to downward departure at sentencing, but not to a "complete" duress defense).

Sentencing is another area where gender bias may come into play. Although in some contexts women may receive more lenient treatment than men in criminal sentencing proceedings, *see* Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 182 (1994); Victor Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 878 (1990), women who behave violently toward men are viewed with particular horror and outrage, *see* WOMEN'S SELF-DEFENSE CASES, *supra* note 2, at 7, or, conversely, with greater "private" forms of control; Denno, *supra* note 21,

resources available to them to educate judges and juries about myths and misconceptions about battering that may impede fair trials.[101]

The determination of reasonableness is also where we see the greatest resistance on the part of judges in these cases. As I have discussed elsewhere, resistance to reasonableness can be seen in a variety of different contexts where feminist lawyering has sought to expand the contours of understanding about the meaning of legal harms.[102] For example, in the sexual harassment context, the struggle over the legal standard by which sexual harassment is judged is crucial, whether the standard is reasonableness generally or "reasonable woman." But in cases of battered women who have killed, the resistance is profound. It is simply impossible for many lawyers, judges, legal scholars, and the

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at 161, 164 (noting that families and communities are more likely to see females in need of intervention and control); BARBARA M. BRENZEL, *From Punishment to Moral Therapy, in* DAUGHTERS OF THE STATE: A SOCIAL PORTRAIT OF THE FIRST REFORM SCHOOL FOR GIRLS IN NORTH AMERICA, 1856-1905 (1983) (discussing the historical reconceptualization of women's crime as "waywardness," requiring "treatment" or "education" in less "masculine" environments than prisons, such as reform schools, asylums, religious and other institutions). For a discussion of gender under the new federal sentencing guidelines, *see* Raeder, *supra* note 50. At least one scholar has documented the role that gender-bias plays in mental competency proceedings. *See* Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIAMI L. REV. 763 (1993).

101. *See supra* note 80 and accompanying text. Adequate representation requires insight into common misunderstandings about battering and about battered women, about gender and other inequalities in the criminal law as applied to these women, and of the pitfalls into which many lawyers—experienced and inexperienced—and judges have fallen. Adequate representation also requires a clear legal understanding of the available defenses under the *applicable statutes and case law* in each particular jurisdiction. Defense counsel must thoroughly search cases in the particular jurisdiction involving battered women, not only to see how the law is applied in these cases and what particular legal dilemmas arise, but also for indications of courts' and legislators' conceptual misunderstandings or biases about battered women that may require education. For example, a search should include not only criminal cases or homicide or other cases involving battered women as defendants, but family law cases, an investigation of protective order policies and how well those are carried out, legislation specifically aimed at addressing battering and the underlying policies such legislation may indicate, and so on. Even in a jurisdiction that appears to have some sensitivity to battering as a social problem, this understanding may be limited to certain members of the judiciary, or only to legislators or a particular executive officer. Moreover, such sensitivity may only be extended to the "good" battered woman. Women of color, women who have expressed rage or asserted themselves in other ways, women who have been unable to protect children from the batterer or who have committed child abuse themselves, may not fall into the category of the "good" battered woman who may receive the benefit of increased sensitivity to the problem of battering. *See, e.g.*, DONILEEN LOSEKE, THE BATTERED WOMAN AND SHELTERS 171 (1992) (describing the definition of "the battered woman" by shelter workers as the "appropriate client."); SCHECHTER, *supra* note 22, at 128 ("women who attempt to assert their humanity and equality by negotiating with their husbands or demanding what they need are labeled provocative.").

102. Schneider, *Particularity and Generality*, *supra* note 2.

public at large to imagine that women are acting reasonably when they kill their intimate partners. These cases evoke more profound discomfort than cases when the reverse is true—like the O.J. Simpson case, for example.[103]

One of the most significant procedural manifestations of this discomfort can be seen on the question of whether reasonableness for purposes of self-defense must be "objective" or "subjective." While there has been much debate within the criminal law literature on this issue, it is clear that the standard of self-defense in most jurisdictions has both a "subjective" and "objective" component to it and that "subjective" and "objective" must be understood as interrelated.[104] But some legal scholars,[105] and many judges[106] have manifested their discomfort

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103. *See* Elizabeth M. Schneider, *What Happened to Public Education About Domestic Violence, in* POST-MORTEM: THE O.J. SIMPSON CASE (Jeffrey Abramson ed., 1996).

104. *See* Maguigan, *supra* note 2, at 391; Schneider, *Describing and Changing*, *supra* note 2, at 218.

105. For example, George Fletcher argues that only an objective standard should govern the determination of self-defense, and that there is a clear difference between the woman's "reasonable belief" and "interaction in the real world." Fletcher, *supra* note 18, at 553.

106. Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993), is an example of the complex impact gendered assumptions about reasonableness continue to have on the cases of battered women who kill. Ardella Miller appealed her conviction in a bench trial for third-degree murder for the stabbing death of her common-law husband. During the incident in question, Mr. Smith had been threatening and beating Ms. Miller. When he asked her whether she wanted to "join" her dead brother, a knife fell from his pocket, and they both reached for it. Ms. Miller stabbed Mr. Smith with the knife and he died. 634 A.2d at 616. At trial, Ms. Miller's defense was self-defense. In her appeal, she asserted a claim of ineffective assistance of counsel based on her trial attorney's failure to present evidence, including evidence of battering, that would have supported her self-defense claim. Because "the use of a deadly instrument on a vital part of the body is sufficient to establish the specific intent to kill," the *Miller* court determined that the ineffectiveness claim had no merit. 634 A.2d at 617.

One reading of this case is that the Superior Court determined that the trial court had properly held Ms. Miller to a "like force" proportionality requirement in its application of the law of self-defense. The Superior Court's description of the issue Ms. Miller was raising suggests that the court may have labored under the same misconceptions or biases as the jury at trial: "Does the Commonwealth disprove self defense by speculating that the victim was unarmed, and by arguing that his previous violence had not caused serious bodily injury and that the defendant has remained in the abusive relationship?" 634 A.2d at 616. The assumptions implicit in this formulation of the issue are that (i) women and men are always equals in physically aggressive situations and fight in a substantially similar manner, such that using a weapon on an unarmed attacker is "unsportsmanlike" (the proportionality problem); (ii) that "bodily injury" is the end-all and be-all of battering in the intimate relationship (which negates battered women's commonly heightened sensibilities regarding their batterers' potential for violence, and thereby narrows the imminence requirement's applicability to battered women), and (iii) that women are somehow more culpable for whatever consequences may arise for themselves, their children, and the batterer when they "fail" to escape from the batterer's abuse (expansion of a duty to retreat requirement for battered women).

with the notion that battered women can claim that their actions are "objectively" reasonable. In several cases, despite the holding in *State v. Kelly*,[107] judges have prevented battered women from going to the jury with self-defense claims on the theory that they only meet the "subjective" and not the "objective" prong of the self-defense standard.[108] As I have argued, evidence of battering is relevant under both an "objective" and a "subjective" standard of self-defense. Regardless of which standard a jurisdiction enunciates, "it has been recognized that these characterizations of subjective and objective are poles on a continuum, since the jury must find that the actor acted reasonably under either approach."[109]

C. *"Battered Woman Syndrome"*

The common and undifferentiated use of the term "battered woman syndrome" has heightened general confusion about domestic violence and battered women and the likelihood of misapplication of the law to these women.[110] Battering relationships share characteristics which arise from the common cultural and historical roots of male violence against women, as well as from the subordination of women both in intimate relationships and in the world. However, the experiences of battered women are highly diverse and complex, and battered women

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107. 478 A.2d 364 (N.J. 1984) (expert testimony on battering relevant under an "objective" standard of self-defense); *see also* Schneider, *Describing and Changing*, *supra* note 2, at 208-210 (discussing the implications of standards of objectivity and subjectivity reflected in the court's analysis in *Kelly*).

108. People v. Humphrey, No. S045985 (Cal. 1996) (appealing voluntary manslaughter conviction of battered woman who killed her batterer on grounds that jury instruction precluding consideration of expert testimony on battering in determining objective reasonableness of defendant's belief she was in imminent danger); People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992) ("battered woman syndrome" expert testimony irrelevant to objective reasonableness of defendant's belief she was in imminent danger); People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989) ("battered woman syndrome" irrelevant to objectively reasonable belief defendant was in imminent danger); State v. Guess, No. A-2837-94T2 (N.J. Sup. Ct. 1996) (appealing reckless manslaughter conviction of battered woman who killed her batterer on the grounds that the trial court erred in charging the jury that expert testimony on battering was relevant to the subjective, but not the objective prong of reasonable belief in imminent danger); *see also* Scott Graham, *Justices Weigh Battered Woman's Self-Defense Claim; Court Sounds Troubled by Limit on Expert Testimony*, AM. LAW., June 7, 1996, at 1 (reporting on oral argument in the California Supreme Court in the *Humphrey* case).

109. Schneider, *Describing and Changing*, *supra* note 2.

110. *See, e.g.*, Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U.J. GENDER & L. 117 (1994); Dutton, *supra* note 2 at 1193; Sheehy, Stubbs & Tolmie, *Defending Battered Women on Trial: Battered Woman Syndrome and its Limitations*, 16 CRIM. L.J. 369 (1992).

defendants do not all fit into the same legal mold.[111] The term "battered woman syndrome" also tends to shift the focus of—and the blame for—intimate violence to the woman away from the perpetrator. Its widespread use, even in common parlance, has tended to reinforce traditional attitudes about women's responsibility for their own abuse.

There are many descriptions of the battering relationship and battered women's experiences which emphasize a wide range of dynamics and behavior.[112] "Battered woman syndrome," a term originally coined by psychologist Lenore Walker,[113] is one particular description of battered women's experiences, one which carries a connotation of psychological impairment of the woman. However, because the term is fre-

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111. For a discussion of the diverse experiences of battered women, *see* RICHIE, *supra* note 54 (describing the experiences of battered African American women incarcerated in New York City and the double-bind in which they find themselves due to societal gender roles, racism, and abuse by their partners); NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991) (calling for expert testimony on battering that takes into account women's different cultural experiences); Ammons, *Mules, Madonnas, supra* note 2; Crenshaw, *supra* note 54, at 1244; Dutton, *supra* note 2 at 1194; Beverly Horsburgh, *Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171 (1995); Mahoney, *supra* note 2; Rimonte, *supra* note 54; Rivera, *supra* note 54.

112. *See, e.g.*, Stark, *supra* note 37, at 975. Stark argues that "battered woman's syndrome" and "Post-Traumatic Stress Disorder,"

> the "traumatization model," provide an inaccurate, reductionist, and potentially demeaning representation of woman battering, and particularly of its two most perplexing facets: that the situation is typically ongoing and that it can elicit hostage-like levels of fear, isolation, entrapment, and retaliatory violence. Drawn from our experience of what is most salient for battered women, the alternative framework . . . emphasizes the batterer's pattern of coercion and control rather than his violent acts of their effect on victim psychology. The coercive control framework shifts the basis of women's justice claims from stigmatizing psychological assessments of traumatization to the links between structural inequality, the systemic nature of women's oppression in a particular relationship, and the harms associated with domination and resistance as it has been lived.

See also Allard, *supra* note 111 (calling for expert testimony on battering that takes into account women's different cultural experiences); Dutton, *supra* note 2 (noting that battered women have diverse experiences and responses to battering and cannot be limited to a single psychological profile); Mahoney, *supra* note 2 at 9-10 (noting that battering is "a struggle for power and control and show[ing] how legal analysis can help reveal the control issue by naming separation assault and building litigation strategies to redefine the issue of separation."); Schneider, *Describing and Changing supra* note 2, at 216 (noting that "[t]he notion of battered woman syndrome contains the seeds of old stereotypes of women in new form . . . [and] this perspective is potentially counterproductive in that it explains why the woman did not leave but not why she acted. . . . It also does not describe the complex experiences of battered women. . . . [and] has the potential to exclude battered women whose circumstances depart from the model and force them once again into pleas of insanity or manslaughter rather than expanding our understandings of reasonableness.").

113. LENORE E. WALKER, THE BATTERED WOMAN'S SYNDROME, at 1 (1994).

quently used as shorthand for "evidence of a battering relationship" by judges, legislators, and legal scholars, it is not clear in any particular context what is actually meant by use of the term "battered woman syndrome." "Battered woman syndrome" was originally a clinical description of certain psychological effects produced by the trauma of battering, most notably "learned helplessness" resulting from the cyclical nature of woman abuse,[114] but it has been used in courtrooms to describe a range of issues. Expert testimony on "battered woman syndrome" may be used to describe a woman's prior responses to violence, and the context in which those responses occurred[115] or to describe the dynamics of the abusive relationship.[116] Other experts have claimed "battered woman syndrome" as a subcategory of posttraumatic stress disorder.[117] "Battered woman syndrome" may also include a description of woman abuse as a larger social problem.[118]

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114. *See generally* WALKER, *supra* note 113; *see also* WALKER, TERRIFYING LOVE 35-37 (1989). Walker's pioneering work pointed out the typical cycle of violence in the violent relationship, consisting of a tension-building period, a violent episode, and a "honeymoon" period. The cycle of violence, according to Walker, tends to give an appearance of randomness to the abuse, contributing to the development of "learned helplessness" in some women. Quoting her own testimony as an expert, Walker describes "learned helplessness" as a theory that

> explains how people lose the ability to predict whether their natural responses will protect them after they experience inescapable pain in what appear to be random and variable situations.
>
> The process of learned helplessness results in a state with deficits in three specific areas: in the area where battered women think, in how they feel, and in the way they behave. People who suffer from learned helplessness restrict the number of responses that they make to those with the highest probability of success. When a battered woman perceives she is in danger, if she has developed learned helplessness, she is likely to respond using the most predictable method of protecting herself. Sometimes that means using deadly force.

Indeed, even the "symptoms" that have been "clustered under the heading of 'battered woman's syndrome'" are themselves diverse, and do not all occur in any one woman: "major depressive, sexual, and dissociative disorders; cognitive changes in how one views oneself and understands the world . . . the 'Stockholm syndrome' or 'traumatic bonding'. . . .".

115. *Id.* at 1196.

116. *Id.* at note 14 ("it is not uncommon to see the term 'battered woman syndrome' used to refer to both [psychological effects of abuse and dynamics of abusive relationships].").

117. *See* WALKER, *supra* note 114, at 48; Dutton, *supra* note 2, at 1198; Stark, *supra* note 37, at 974.

118. *See* Dutton, *supra* note 2, at 1195. Dutton notes that:

> Typically, the testimony offered in forensic cases is not limited to the psychological reactions or sequelae of domestic violence victims, and this has led to confusion about what is encompassed by the term "battered woman syndrome." Expert witness testimony may also be offered to explain the nature of domestic violence in general, to explain what may appear to be puzzling behavior on the part of the victim, or to explain a background or behavior that may be interpreted to suggest that the victim is not the "typical" battered woman or that she herself is the abuser.

The use of expert testimony on "battered woman syndrome" highlights this confusion. It can be admitted in court to demonstrate the reasonableness of women's acts in support of claims of self-defense[119] and to demonstrate their "irrationality" in support of insanity defenses.[120] It has been used by courts for many different purposes, to explain why a woman stayed in an abusive relationship,[121] to rebut common myths and misconceptions about battered women,[122] to describe battered women's responses to violence in a general way,[123] and to explain why a specific battered woman responded in the way that she did.[124] However, the term and its interpretive framework have been widely criticized.[125] Significantly, other interpretive frameworks to describe battering that have been proposed, such as "coercive control,"[126] do not focus exclusively on the woman who has been battered, but on the batterer or the relationship.

Many lawyers who represent battered women know little about battering and are not knowledgeable about the range of different psychological and psychosocial theories of battering. They use the term "battered woman syndrome" and rely on a "battered woman syndrome" framework because it is what they have heard. Frequently they use the term as shorthand when what they really mean is "evidence of battering." But reliance on "battered woman syndrome" as an explanatory framework in case analysis is problematic. It may not only be inaccurate in describing the experiences of many women who are battered, but will inevitably shape and limit lawyers' views of available choice of defenses.[127] Because "battered woman syndrome" sounds like

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Id. Dutton argues that "descriptive references should be made to 'expert testimony concerning battered women's experiences,' " instead of the term "battered woman syndrome." *Id.* at 1201.

119. *See, e.g.*, OHIO REV. CODE ANN. § 2901.06 (Anderson 1993) (expert testimony on "battered woman syndrome" admissible in self-defense).

120. *See, e.g.*, OHIO REV. CODE ANN. § 2945.39.2 (Anderson 1993) (making expert testimony on "battered woman syndrome" admissible in insanity defenses), *see also* Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995).

121. *See, e.g.*, State v. Kelly, 478 A.2d 364, 375-377 (N.J. 1984).

122. *See, e.g.*, Commonwealth v. Dillon, 598 A.2d 963, 969 (Pa. 1991).

123. *See, e.g.*, People v. Aris, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989).

124. *See, e.g.*, People v. Minnis, 455 N.E.2d 209, 217-218 (Ill. App. Ct. 1983).

125. *See* Dutton, *supra* note 2, at 1193; Stark, *supra* note 37, at 1000. Stark notes that: "At best, [battered woman syndrome and post traumatic stress disorder] remain psychiatric designations which possess the attendant risks of misuse and stigma and which diminish, but do not eliminate, the burden of insanity attached to battered women in the past." *Id; see also supra* notes 82, 84, 86 and 87 and accompanying text.

126. *Id.*

127. Schneider, *Describing and Changing*, *supra* note 2. Lawyers need to educate them-

a form of "mental disease or defect," lawyers relying on this framework are more likely to view the case through an impaired mental state lens.

D. "Battered Woman" or "Battered Woman Syndrome" Defense

Some lawyers,[128] legislators[129] judges[130]and legal scholars[131] have

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selves on the range of experiences of battered women and on the dynamics of abuse so that they can better hear and understand their clients' stories and educate judges and jurors on the context of abuse.

128. *See, e.g.*, United States v. Shepard, No. 95-2433, 1995 U.S. App. LEXIS 35931 (8th Cir. Dec. 20, 1995) (defense attorney found not ineffective for not relying on a "battered-woman syndrome" expert or "battered woman syndrome" defense); Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984) (defense attorney decided to pursue claim of self- defense rather than a "battered wife defense" which he thought was more applicable to "non-confrontation cases); State v. Scott, 1989 WL 90613 (Del. Super. July 19, 1989) (defense attorney referred to client's defense as "battered woman's defense."); Larson v. State, 766 P.2d 261 n.4 (Nev. 1988) (defense attorney told expert he had hired to testify at trial of a woman for the shooting death of her abusive husband, "If we won this case, we'd be flying across the country consulting . . . in special cases like this and I'd have all the work I could handle."); *see also* Maguigan, *supra* note 2, at 426-27 n. 169.

129. *See* Osthoff, *supra* note 30 (Fact sheet written in response to proposed state legislation, available from the National Clearinghouse for the Defense of Battered Women). The issue of "special" legislation regarding the admissibility of evidence of battering in criminal cases is discussed in greater detail in part IV, *infra.*

130. *See, e.g.*, Moran v. Ohio, 105 S. Ct. 350, 351 (1984). (Brennan, J., dissenting) (In their dissent from a denial of certiorari of an appeal of a battered woman's homicide case, Justices Brennan and Marshall claim that "battered woman's syndrome [is] a self-defense theory that has gained increasing support in recent years."); State v. Vigil, 794 P.2d 728, 729 (N.M. 1990) (referring to a "battered woman theory of self-defense"); Commonwealth v. Tyson, 526 A.2d 395 (Pa. Super. Ct. 1987) (referring to the "defense of 'battered woman's syndrome' ".).

Some jurisdictions recognize "battered woman syndrome" as a separate tortious harm. In *Cusseaux v. Pickett*, 652 A.2d 789 (N.J. Super. Ct. 1994) a recent tort case, plaintiff brought a cause of action against her former live-in lover for "allegedly causing her to suffer from battered woman's syndrome." The court noted that the New Jersey legislature recognized domestic violence as a crime, that the legislature had recognized the seriousness of the problem of domestic violence when it passed the Prevention of Domestic Violence Act, and that New Jersey recognized "battered-woman's syndrome" as an element of self-defense and permitted expert testimony on battering in such cases. Consequently, the court denied defendant's motion to dismiss for failure to state a cause of action. In doing so, the court held that domestic violence is a continuing tort, so that the statute of limitations was not tolled for each individual assault, which would have precluded the plaintiff from pursuing a cause of action. However, by naming the tort "battered-woman's syndrome," the focus is once again placed on some ambiguous pathology, either preexisting or caused by the violence, with its locus in the woman, which kept her from "just leaving":

> As is the case with the domestic violence statute where existing criminal statutes were inadequate, so too are the civil laws of assault and battery insufficient to redress the harms suffered as a result of domestic violence. Domestic violence is a plague on our social structure and a frontal assault on the institution of the family. The battered woman's syndrome is but one of the pernicious symptoms of that plague. Though the courts would be hard-pressed to prescribe a panacea for all domestic violence, they are entrusted with the power to fashion a palliative when necessary. . . . Thus, this court will recognize the battered-

suggested that there is or should be a special battered woman or "battered woman syndrome" defense. Not only is there no separate defense, but evidence of battering experiences and a history of battering, whether explained as "battered woman syndrome" or battering generally, may be relevant to a range of defenses. Problems of gender-bias shape the application of all defenses and excuses, and the history of battering may be relevant to all, in different ways.

Judicial opinions in a number of recent battered woman self-defense cases correctly remind us that there is no separate "battered woman syndrome" defense.[132] In Pennsylvania, for example, courts have expressed different views on the admissibility of evidence of battering in both self-defense and duress cases.[133] This is due in part to differing

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woman's syndrome as an affirmative cause of action under the laws of New Jersey, 652 A.2d at 793. For a discussion of *Cusseaux*, see Chamallas, *supra* note 43, at 816-17.

131. *See* Coughlin, *supra* note 2 ("battered woman syndrome defense"); Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 631 (1996) ("excuse of battered woman syndrome"); Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1280 (1987) ("battered woman syndrome defense" should be diminished capacity); Elizabeth Vaughan & Maureen L. Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L. REV. 399 (1983) ("battered woman defense" is emerging "as akin to, but separate from, the more familiar and established defenses of self-defense and diminished capacity").

Anne Coughlin has recently argued that there is a battered woman syndrome defense, and that it "institutionalizes within the criminal law negative stereotypes of women." Coughlin, *supra* note 2, at 4-5. In support of this proposition she cites my article, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering.* However, my article focused on expert testimony on battering, and did not advocate or claim that there was any separate "battered woman syndrome defense," or that one has ever been promoted by feminist lawyers. Rather, as Professor Coughlin correctly observes, I critique the *syndrome* as the exclusive characterization of battered women's experiences, because of its tendency to pathologize all battered women. It is precisely because the use of clinical language, such as "battered woman syndrome," to describe battered women's experiences makes it *sound* as if the defense being offered in every case of a battered woman who kills her abuser is a "special" or separate defense for battered women that it is problematic. In contrast, Professor Coughlin asserts that "[t]he *defense* itself defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the *defense* is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates." Coughlin, *supra* note 2, at 7 (emphasis added).

132. *See, e.g.*, State v. Coleman, 870 P.2d 695, 697 (Kan. 1994) ("Evidence of battered woman syndrome is not a defense to a murder charge."); State v. Koss, 551 N.E.2d 970, 974 (Ohio, 1990) (admission of expert testimony on battering does not establish a new defense or justification); Commonwealth v. Miller, 634 A.2d 614, 619 (Pa. Super. Ct. 1993) (stating that "this syndrome has not been adopted as a separate defense in Pennsylvania."); *see also* WOMEN'S SELF-DEFENSE CASES, *supra* note 2, at 43; Maguigan, *supra* note 2.

133. Commonwealth v. Miller, 634 A.2d 614 (Pa. Super Ct. 1993) (rejecting a "battered woman syndrome theory of self-defense"); Commonwealth v. Ely, 578 A.2d 540, 541 (Pa. Super Ct. 1990) (discussing implications of "battered woman syndrome theory of self-defense" for

views among judges about whether and how "battered woman syndrome" evidence is relevant to defenses of self-defense or duress and a fear on the part of some judges that admission of this evidence indicates an entirely separate defense available only to battered women.[134] Evidence of battering[135] is crucial in dispelling myths and misconceptions commonly held by jurors about battered women, and helping jurors to understand the experiences of battered women as they are relevant to women's understanding of the level of danger they are in and their reactions to the perceived danger.[136] In other words, evidence of battering in a self-defense case is not relevant insofar as it attempts to justify killing in and of itself. It is relevant because it helps the jury to understand the woman's particular experiences with her batterer. It gives the jury insight about the development of her heightened ability to sense that she was in grave danger at the time of the killing. It provides the jury with the appropriate context in which to decide whether her apprehension of imminent danger of death or great bodily harm was reasonable.

Although some trial and appellate courts articulate the relevance of evidence of battering correctly, many judges are confused.[137] Some

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duress).

134. Graham, *supra* note 108, at 1 (quoting a justice on the California Supreme Court who heard oral argument in the *Humphrey* case as saying, "Should we be concerned that if we agree with the defense, that we will be giving rise to the 'reasonable gang member's syndrome?' "); *Miller*, 634 A.2d at 619 (stating that "this syndrome has not been adopted as a separate defense in Pennsylvania," and implying that it has been elsewhere); Commonwealth v. Ely, 578 A.2d at 541 (discussing implications of "the battered woman's syndrome theory of self-defense" for duress; Witt v. State, 892 P.2d 132, 135 (Wyo. 1995) (using phrase "Battered Woman syndrome defense").

135. *See* State v. Kelly, 478 A.2d 364, 378 (N.J. 1984); WOMEN'S SELF-DEFENSE CASES, *supra* note 2; Schneider, *Equal Rights*, *supra* note 5.

136. *See, e.g.*, State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (expert testimony on battering admissible in the case of a battered woman who killed her batterer because "[i]t is aimed at an area where the purported common knowledge of the jury may be very much mistaken"); *see also* EWING, *supra* note 2 (finding that battered women tried for killing their batterers were more likely to receive an acquittal where an expert testified on battering); Schuller, *supra* note 80 (finding that jurors were more likely to acquit battered woman defendants where expert testimony linked the defendant to the "battered woman syndrome," and that the more jurors endorsed myths and misconceptions about battered women, the less likely they were to render a not guilty verdict, and that males were more likely to endorse such concepts than females, *cited in* Vidmar & Schuller, *supra* note 80, at 142); Vidmar & Schuller, *supra* note 80 (reviewing current literature on juror attitudes about battering).

137. In Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995), the Eighth Circuit denied post-conviction relief to a battered woman, where the trial judge had allowed reference to the syndrome during voir dire and trial "only as evidence of *diminished mental capacity*" despite the fact that the Missouri statute on "Battered Spouse Law" provided that "evidence that the actor was

courts employ a "hybrid" defense.[138] Other courts express confusion about defense strategy or "specialized" application of traditional self-defense law to battered women, indicating that, in practice, there may well be a "battered woman syndrome defense."[139] There should not be. Neither a "special" defense nor "special" rules for battered women are consistent with an "equal rights" framework, or likely to remedy gender-bias.

E. The Impact of "Special" Legislation

Since this work has brought public attention to cases involving battered women who kill, state legislation has been proposed and enacted which seeks to remedy perceived inequities in treatment of battered women at trial by addressing the "special" problems of battered women. Statutes which focus exclusively on battered women,[140] largely around admissibility of expert testimony, are problematic for several reasons. First, they tend to single out problems of battered women as though they are "special" and should not be understood within the general framework of the criminal law. For example, a statute which makes evidence of "battered woman syndrome" admissible suggests that this evidence would not otherwise be admissible. Second, it is debatable whether legislative reforms are the best solution to the problem of unequal treatment of battered woman defendants. Third, the statutory language may be too limiting and will restrict its utility.

Two examples are a Maryland statute which permits evidence of abuse of the defendant and expert testimony on "battered spouse syndrome,"[141] and two Ohio statutes which authorize expert testimony on

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suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another," MO. REV. STAT. § 563.033(1) (West Supp. 1996), 44 F.3d at 680 (emphasis added).

138. *See, e.g.*, Banks v. State, 608 A.2d 1249, 1252 (Md. Ct. Spec. App. 1992) (defense at trial was "an amalgam of self-defense, hot-blooded response to provocation, and battered spouse syndrome").

139. *Id.*; *see also supra* note 57 and accompanying text. Battered women's advocates have not asked for or claimed any "special" or separate defense for battered women defendants. Legislation and application of what may appear to be a separate defense are the result of well-intentioned but misguided attempts by legislators, judges, and attorneys to grapple with the problem of women's unequal access to justice.

140. *See* sources cited *supra* note 30.

141. MD. CODE ANN., CTS. & JUD. PROC. § 10-916 (1991 Supp.). The use of the term "battered spouse syndrome" is even more problematic because it is questionable whether there is such a phenomenon. The statute appears to recognize this as it defines "battered spouse syndrome" as the "psychological condition of the victim [of battering] recognized in the medical and scientific community as the battered woman syndrome."

"battered-woman syndrome" in self-defense[142] and insanity defenses.[143] The Ohio statutes permit the introduction of expert testimony only to support either the imminence element of a self-defense claim or "to establish the requisite impairment of the Defendant's reason necessary for a finding that the Defendant is not guilty by reason of insanity."[144] Both the Ohio statutes and the Maryland statute assume that this evidence would not be otherwise admissible. This assumption can create the impression that a separate defense for battered women has been codified.[145]

There are serious questions about the need for special legislation concerning battering in these cases. Depending on the particular state, it may be the legal standard of self-defense or the law governing the admissibility of evidence of battering which are problematic and need reform, or it may be simply that judges apply these laws in a gender-biased fashion.[146] In many states, special legislation was developed as a "quick fix" effort to appear to do something about domestic violence and was not grounded on careful analysis of the particular state's statutory scheme and case law in the criminal law area on procedural issues such as burden of proof on self-defense.[147] However, if special legislation to admit expert testimony is developed, it is important that the statutory language be as inclusive as possible to admit evidence of bat-

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142. OHIO REV. CODE ANN. § 2901.06 (Anderson Supp. 1993).

143. OHIO REV. CODE ANN. § 2945.39.2 (Anderson Supp. 1993).

144. OHIO REV. CODE ANN. § 2945.39.2 (Anderson Supp. 1993).

145. This is not to say that the statutes discussed herein intend to do this. Indeed, the Maryland statute specifically states that the statute "does not create a new defense to murder." MD. CODE ANN., CTS. & JUD. PROC. § 10-916 at 2. However, the presence of a separate statute with regard to some cases cannot help but create the impression that a separate defense or other "special" treatment has been created for those cases alone. The presence of language to the contrary within the statute, like that quoted above, seems to speak to those who are fearful that justice may be thrown to the wind to "make up for" past discrimination. *See* Fletcher, *supra* note 18 at 576. In fact, these statutes attempt to deal with the acknowledged present unequal treatment that battered women face in the justice system. Recognition of unequal treatment by thoughtful legislators is welcome, and efforts to remedy that treatment may be well-intentioned. However, I am concerned with the impact these statutes may have on particular women's cases.

146. *See, e.g.*, Maguigan, *supra* note 2; Osthoff, *supra* note 30 (fact sheet written in response to proposed state legislation, available from the National Clearinghouse for the Defense of Battered Women (on file with the author)).

147. Maguigan, *supra* note 2 at 451-55. Professor Maguigan carefully separates out the procedural strands of substantive self-defense standards (identified as reasonableness, imminence, proportionality of force, and duty to retreat) from evidentiary rules (history of abuse and expert testimony). She discusses the ways in which these aspects of the problem are interrelated and emphasizes that they must be analyzed together in assessing how a state's criminal law and procedural rules impact on battered women charged with homicide.

tering generally. One example is a Texas statute, which states that in all prosecutions for murder, the defendant shall be permitted to offer "relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased and relevant expert testimony regarding the condition of [her] mind . . . [including] relevant facts and circumstances relating to family violence that are the basis of experts' opinions."[148] Similarly, in Louisiana, the relevant statute does not refer at all to "battered woman syndrome," but provides simply, "an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible."[149] A recent Massachusetts statute provides for admissibility of evidence "that the defendant is or has been the victim of acts of physical, sexual or psychological harm or abuse" in a wide range of circumstances, including self-defense, defense of another, duress or coercion, or "accidental harm."[150]

IV. IMPACTS OF RESISTANCE TO EQUALITY

Misconceptions about battered women who kill have led to considerable confusion in judicial opinions, legal scholarship and in more "public" sources of information, such as the media.[151] Issues of admissibility of evidence and expert testimony on battering are confused with "special" defenses for battered women; the term "battered woman syndrome" becomes the shorthand for both. Not surprisingly, it appears that battered women homicide cases have a substantially higher appellate reversal rate than other comparable cases.[152] Here, I focus on two areas which highlight these problems: ineffective assistance of counsel claims which have been litigated and the host of clemency cases—which may involve potential ineffective assistance of counsel claims as well as other trial errors—that have surfaced around the country.[153]

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148. TEX. CRIM. PRO. CODE ANN. § 38.36 (Vernon Supp. 1996).

149. LA. CODE EVID. ANN. art. 404 (A)(2)(a) (West 1995).

150. MASS. ANN. LAWS ch. 233, § 23E (Law. Co-op. Supp. 1996).

151. *See supra* note 1 and accompanying text.

152. *See supra* note 89 and accompanying text.

153. *See supra* note 1 and accompanying text. Precise statistics and even anecdotal data regarding clemency petitions are difficult to document. Clemency proceeding transcripts are rarely published. Organizations which assist battered women with their clemency petitions are a patchwork of attorney-led organizations, battered women's lay advocacy groups, and other community organizations that do not always network with one another or share data on a regular basis. However, in a recent telephone conversation, Holly White of the National Clearinghouse for the Defense of Battered Women, Philadelphia, reported that the number of clemency petitions filed by battered women does not appear to have significantly decreased, while the number of cases in

There have been many ineffective assistance of counsel claims brought by battered women defendants.[154] These cases are notoriously difficult to win.[155] The standard for ineffectiveness set by the Supreme Court in *Strickland v. Washington*[156] is egregious error resulting in prejudice to the defendant. The defendant has the burden of proof to show such error at trial, and anything that may be characterized as a tactical decision by the trial attorney is nonreviewable.

There are many ineffective assistance of counsel claims that have been brought by battered women who have been convicted at trial.[157] However, ineffective assistance of counsel cases brought by battered women tend to fall into the category of claimed attorney error which courts rarely review, particularly attorney failure to interview possible defense witnesses or otherwise investigate sources of information which could possibly be helpful to the defense.[158] Among cases involving bat-

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which clemency is granted to battered women seems to have "tapered off." Telephone conversation with Holly White, National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. (November 20, 1995).

154. *See supra* note 9 and accompanying text.

155. Courts are strict about what kinds of claimed attorney error they will review. When they do, the standard of review is so high, few defendants can prove ineffective assistance. Even a breach of an ethical standard "does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165 (1986).

156. 466 U.S. 668 (1984).

157. *See supra* note 9 and accompanying text.

158. *See* Burger v. Kemp, 483 U.S. 776 (1987). Other areas where attorney incompetence is difficult to challenge because they require "hindsight," are (1) claims based largely on the attorney's decision to pursue a particular line of defense over other possibilities, where the attorney appears to have investigated other defenses; (2) failure to call a witness who offers to give favorable testimony; (3) the attorney's decision to relinquish a certain defense right where he or she had exercised various other rights; and (4) failure to advance additional supporting arguments or rebut counterarguments to a legal objection the attorney has made and developed previously.

Indeed, the difficulty of meeting the burden of proof to show ineffective assistance of counsel for defendants generally, and battered women particularly, is illustrated by the fact that, of twenty-six reported cases from fourteen states and one federal jurisdiction in which ineffective assistance of counsel claims had been raised by battered women as of 1994, *see* cases annotated at 18 A.L.R. 5th 871 (1994), twice as many of the claims were denied as were successful. Battered women face particular difficulties related to their unique experiences and widespread ignorance about the phenomenon of intimate violence in proving ineffective assistance of counsel. For example, in *Strickland* the Supreme Court noted that claims based on attorney failure to investigate must focus on the "information supplied [to counsel] by the defendant." Strickland, *supra* note 156, at 691.

Claims of ineffective assistance of counsel by battered women defendants collected in 18 A.L.R. 5th are divided into seven categories: (1) failure to investigate adequately; (2) improper legal advice (generally regarding plea bargaining or whether or not defendant should testify); (3) choice and application of defenses (frequently a focus on or misunderstanding of the law of self-defense that eclipses the attorney's exploration of provocation, heat of passion, or other available defenses); (4) faulty opening statements (often promising evidence of battering that is not ade-

tered women defendants where ineffective assistance of counsel claims have been successful, the most common ground appears to be faulty advice (either in the plea bargaining process or regarding whether the defendant should testify).[159] Courts have also found ineffective assistance based on the attorney's failure to adduce evidence or examine witnesses at trial.[160] Generally, the attorney's failure in either of these areas has resulted in no evidence of battering offered at trial from

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quately delivered); (5) failure to adduce evidence or examine witnesses at trial (almost always including a failure to present expert testimony on battering, and often a failure to present medical records, witnesses, and the defendant's own testimony that could have demonstrated the existence of domestic violence and its impact on the defendant); (6) failure to request jury instructions about battering (particularly in terms of how it is relevant to the law of self-defense); and (7) other acts or omissions (including failure to obtain exculpatory reports regarding battering, failure to object to prosecution's closing remarks, and advancing the interests of counsel over the client's interests in making tactical decisions). All but the last two categories of attorney ineffectiveness complained of by battered women are in areas where courts are loathe to find incompetence because investigation into and analysis of these actions or omissions by attorneys requires the "hindsight" discouraged in *Strickland.*

159. *See* State v. Scott, 1989 WL 90613 (Del. Super. Ct. July 19, 1989); Larson v. State, 766 P.2d 261 (Nev. 1988); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); State v. Gfeller, 1987 WL 14328 (Tenn. Crim. App. 1987).

160. *See* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); Martin v. State, 501 So. 2d 1313 (Fl. Dist. Ct. App. 1986); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989).

Cases where ineffective assistance of counsel has also been found also include complaints over the attorney's failure to investigate evidence of battering, *see* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992), the attorney's choice and use of available defenses; *see* State v. Felton, 329 N.W.2d 161 (Wis. 1983), the attorney's opening statements indicating a defense involving evidence of battering which was not followed with any such evidence; *see* State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991), and the attorney's self-interest interfering with the effectiveness of his or her performance; *see* Larson v. State, 766 P.2d 261 (Nev. 1988).

In cases where claims of ineffective assistance have been rejected, the most common area complained of appears to be the attorney's failure to adduce evidence or examine witnesses regarding battering at trial. *See* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); Martin v. State, 501 So. 2d 1313 (Fl. Dist. Ct. App. 1986); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993). Other areas complained of include the attorney's choice and use of available defenses, *see, e.g.*, State v. Scott, 1989 WL 90613 (Del. Super. 1989); Larson v. State, 766 P.2d 261 (Nev. 1988); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); State v. Gfeller, 1987 WL 14328 (Tenn. Crim. App. 1987); State v. Felton, 329 N.W.2d 161 (Wis. 1983), the attorney's failure to investigate adequately, *see* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992), the attorney's failure to request jury instructions, *see* Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Commonwealth v. Singh, 539 A.2d 1314 (Pa. Super. Ct. 1988); Commonwealth v. Tyson, 526 A.2d 395 (Pa. Super. Ct. 1987), and other acts or omissions by the attorney; *see* State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991) (attorney stated in opening remarks that he would produce evidence of battering, but never presented any such evidence); Larson v. State, 766 P.2d 261 (Nev. 1988) (attorney's self-interest interfered with the effectiveness of his performance).

sources such as medical reports, lay witnesses, family members, or the defendant's own testimony, or no expert testimony on battering being offered.

It is apparent that attorneys are susceptible to misconceptions about battered women from the number of claims of ineffective assistance of counsel based on faulty advice regarding plea bargains or the defendant testifying,[161] and on attorney failure to present evidence and testimony that could have assisted the jury to understand and eradicate the very same misconceptions apparently held by counsel.[162] Cases involving claims of ineffective assistance based on counsel's failure to offer jury instructions on battering suggest that many attorneys lack knowledge about the particular complexities of representing battered women.[163] However, because many judges who rule on ineffective assistance of counsel claims also lack knowledge about domestic violence, and are not sensitive to the complex issues of choice of defense and admission of evidence, they may not be particularly thoughtful or rigorous in evaluating these claims.[164]

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161. *See* State v. Scott, 1989 WL 90613 (Del. Super. 1989); Larson v. State, 766 P.2d 261 (Nev. 1988); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991); State v. Gfeller, 1987 WL 14328 (Tenn. Crim. App. 1987).

162. *See* People v. Day, 2 Cal. Rptr. 2d 916 (Cal. Ct. App. 1992); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); Martin v. State, 501 So. 2d 1313 (Fl. Dist. Ct. App. 1986); Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993); State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991). In *Stonehouse*, for example, Ms. Stonehouse was convicted of third-degree murder for shooting her ex-boyfriend and fellow police officer with her police revolver after he repeatedly stalked and harassed her. She was sentenced to seven to fourteen years imprisonment. On appeal, *amici curiae* argued that there had been ineffective assistance of counsel because trial counsel had failed to request jury instructions that would require the jury to consider the cumulative effects of psychological and physical abuse when assessing the reasonableness of her fear of imminent danger and had failed to present expert testimony on battering.

The Pennsylvania Supreme Court reversed Ms. Stonehouse's conviction and remanded the case for a new trial, holding that trial counsel was ineffective for failing to request the jury instruction, that trial counsel was ineffective in failing to present expert testimony on "battered woman syndrome," and that "expert testimony regarding battered women is admissible as the basis for proving justification in the use of deadly force where the defendant has been shown to be a victim of psychological and physical abuse." *Id.* at 783. The court in *Stonehouse* concluded that expert testimony on battering was necessary to rebut myths concerning the reasonableness of her claimed act of self-defense, rebutting myths that would alternately blame her for staying in the relationship as long as she did, constructing her as helpless or crazy, or hold her to a higher standard because she was a trained police officer who "should have known better," or at least, "fought like a man."

163. *See, e.g.*, Commonwealth v. Singh, 539 A.2d 1314 (Pa. Super. Ct. 1988); Commonwealth v. Tyson, 526 A.2d 395 (Pa. Super. Ct. 1987).

164. *See, e.g.*, Maguigan, *supra* note 2; *see also supra* notes 100, 105-09 and accompanying text.

Clemency efforts for battered women in many states across the country suggest that there is national recognition of the problems that battered women charged with homicide have faced at trial.[165] One of the major arguments advanced by proponents of clemency for battered women has been that clemency is necessary so long as individual battered women are denied their rights to present an adequate defense at trial and until society, including the criminal justice system that may have failed to protect them from violence and then prosecuted them, is able to respond adequately to the problem of woman abuse.[166] National

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165. Executive clemency is at the discretion of the governor or president. The executive may choose to grant a pardon, doing away with the conviction, or commute a sentence. *See* Greenwald & Manning, *supra* note 1, at 13. An advisory board, usually the parole board, may be authorized to advise and make recommendations to the executive officer. Typically, executive officers follow the recommendations of their advisory boards. Therefore, appeals to this body are an important part of the clemency process. Usually, the clemency process involves several levels. First, the petition must meet basic requirements or be changed to comply with such requirements. Second, an investigation is conducted into the petitioner's criminal, social, and institutional histories. Third, the advisory or parole board makes a recommendation to the executive officer, based upon which the officer makes a determination. Finally, where commutation is granted, there is usually a review conducted under the auspices of the executive officer, sometimes including another hearing. Because executive officers, as well as many executive advisory or parole board members, are elected to office, they are particularly susceptible to public opinion. Community education about battering and identifying support by the community are therefore also very important parts of the clemency process.

Cookie Ridolfi, who has assisted many battered women and contributed to women's self-defense work for the last two decades, has identified three situations in which clemency is appropriate: (1) situations where the convicted person is factually innocent; (2) situations in which the convicted person is technically guilty, but mitigating factors exist which argue for leniency; and (3) situations in which the convicted person is technically guilty, but morally innocent. She suggests that the third case is often hardest to argue, and frequently the most accurate description of what has happened to a battered woman who fought back against her batterer. Essentially, the argument is that, but for imperfections in the law as it currently exists, or trial factors such as jury bias or improper jury instructions, the woman would have not have been convicted. *See* comments of Cookie Ridolfi in *Courtroom, Code and Clemency: Reform in Self Defense Jurisprudence for Battered Women* (panel discussion), 23 GOLDEN GATE U. L. REV. 829, 833 (1994).

Two Massachusetts practitioners have observed:

> [Clemency] is no substitute for a criminal justice system that provides a battered woman defendant meaningful access to a claim to self-defense. . . . However, the importance of executive clemency for battered women who kill their batterers cannot be overemphasized. The successful petitioner gains official forgiveness and a sense of personal vindication. Moreover, the public nature of commutations focuses attention on the victims of extreme domestic violence, educates society about their plight, and acts as an impetus for legislative and social change.

Greenwald & Manning, *supra* note 1, at 14-15.

166. *See* Ammons, *Discretionary Justice*, *supra* note 2, at 5; Christine N. Becker, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297, 299 (1995); Greenwald, *supra* note 1, at 14-15; Krause, *supra* note 2, at 771-772; Sue Osthoff, *Clemency for Battered Women*, *reprinted in* DEFENDING BATTERED WOMEN, *supra* note 26, at 5-6;

recognition of what has been called the "clemency movement" occurred in October 1990, when the former Governor of Ohio, Richard Celeste, issued a mass clemency of twenty-five battered women who had been convicted of killing or assaulting their batterers, just before he left office.[167] Very shortly after this highly publicized act, Governor William Schaefer of Maryland granted clemency to eight battered women incarcerated in that state for killing their batterers. By 1993, governors in seven states, including Jim Edgar of Illinois, Lawton Chiles of Florida, and Pete Wilson of California,[168] had granted clemency to thirty-eight formerly battered women convicted of killing or assaulting their batterers.[169] At least twenty-six states have since set up committees to review the cases of incarcerated battered women.[170] In recent years, however, the trend toward granting clemency to battered women appears to have slowed. Most of the clemency petitions that have been granted were granted in the 1980s and early 1990s.[171] Since 1978, a total of 88 battered women from 21 states have received clemency.[172]

There are nearly 40,000 women in prison in the United States. Of

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Developments in the Law, *supra* note 2, at 1591.

167. *See* Ammons, *Discretionary Justice, supra* note 2; Leslie F. Goldstein, *Contemporary Cases in Women's Rights* 276 (1994).

168. Goldstein, *supra* note 167, at 276.

169. Ammons, *Discretionary Justice, supra* note 2, at 4.

170. Gibbs, *supra* note 1, at 41. A recently enacted California statute permits the Board of Prison Terms to report to the Governor "from time to time" the names of prisoners they determine ought to be considered for clemency on the basis of several criteria, including, "evidence of battered woman syndrome." This statute, although well-intentioned, also raises the "special legislation" problem, discussed above. CAL. PENAL CODE § 4801 (West Supp. 1996).

171. Data gathered by National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. There may also be a connection between the decline in the granting of clemency and the rise of "special" legislation. For example, policy makers often think that legislation which makes expert testimony admissible in the trials of battered women who kill their batterers is the key to battered women staying out of prison. Such measures can obstruct the possibility of clemency for women by creating the illusion that clemency is no longer necessary. "A statute allowing Battered Woman Syndrome evidence is not necessarily going to prevent convictions, but policy makers may feel that there is no longer a problem." Comments of Rebecca Isaacs in *Courtroom, Code and Clemency*, *supra* note 165, at 833. Moreover, the absence of "special" statutes is often cited in support of clemency. In Ohio, for example, Governor Celeste justified clemency for battered women by the fact that a state Supreme Court decision specifically barred such testimony until 1990 (when a statute permitting expert testimony on "battered woman syndrome" was passed). In Maryland, clemency activism was also based on the inadmissibility of evidence of battering; *see also* Rita Thaemert, *Till Violence Do Us Part*, State Legislatures, March 1993, at 26 (noting that Florida's parole board has adopted a rule making "Battered Women's Syndrome" one of the criteria that may be considered in determining whether to grant clemency).

172. Telephone conversation with Holly White, National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa., November 20, 1995.

these, roughly 2,000 women are incarcerated for killing a husband, ex-husband, or boyfriend—roughly one-third of all women in prison for a homicide offense.[173] Of incarcerated women who killed a partner, a number of studies have concluded that at least forty-five percent and perhaps as many as ninety-seven percent were abused by the person they killed.[174] It is not known exactly how many of these women may not have even gone to trial, consenting to plea bargain arrangements on the advice of attorneys who were unaware of the fact that their clients were battered and the role battering may have played in their cases, or who were ignorant of the possible legal significance of evidence of battering.[175] Of those who did go to trial, many may have received unfair trials, either because of attorney ineffectiveness or judicial error in applying the law where evidence of battering was present. Since clemency petitions can be based on many different grounds, including attorney error or ineffectiveness, or judicial error that was not appealed or affirmed on appeal, one can only speculate about the number of cases in which clemency might be sought. Nonetheless, the number of cases of women in prison for killing their batterers in which clemency has been sought, and the number in which clemency might be sought, suggests that the impact of resistance to equality, manifested in attorney and

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173. Statistics gathered by the National Clearinghouse for the Defense of Battered Women, Philadelphia, Pa. (on file with author). It appears that only a small percentage of women accused of killing their batterers are acquitted at trial. Seventy-two to 80% are convicted or accept a plea. Osthoff, *supra* note 166. Women who kill generally receive longer sentences, serving an average of 16-17 years. Battered women who kill tend to receive even longer ones. One statewide survey showed that 83.7% of these women received sentences ranging from 25 years to life. Linda L. Ammons, *Parole: Post Conviction Relief For Battered Women Who Kill Their Abusers*, at 5, *reprinted in* DEFENDING BATTERED WOMEN, *supra* note 26 (citations omitted).

174. *Id.* For example, the Georgia Department of Corrections in 1992 released a report indicating that 45% of the women incarcerated there for killing a husband or lover had been abused by that person. A 1989 Missouri study showed that of men and women incarcerated there for murdering partners, 89% of the women and 57% of the men reported that the relationship was violent prior to the partner's death. Jane Totman, surveying women in a California state prison found that of the 30 women there who had murdered partners, 29 had been abused. *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 10 (1987). The National Clearinghouse for the Defense of Battered Women is currently gathering statistics on this issue from around the country.

175. *See, e.g.*, Gibbs, *supra* note 1, at 44 (quoting New Jersey psychologist Julie Blackman as saying, "I've worked [with] battered women who have talked only briefly to their lawyers in the courtroom for 15 or 20 minutes and then they take a plea and do 15 to life . . . women who . . . don't speak English well, or women who are very quickly moved through the system, who take pleas and do substantial chunks of time, often without getting any real attention paid to the circumstances of their case."). *See also* Osthoff, *supra* note 166 (estimating that 72-80% of battered women who kill are convicted or accept a plea).

judicial conduct, has a substantial impact on women's lives and on the criminal justice system.

V. Resistance to Equality: Reflection and Dialogue

The misconceptions about battered women and self-defense that I have described flow from a failure to address the complexity of these cases with a sensitivity to the problem of gender-bias. As we have seen, resistance to equality can take many forms and can have many dimensions. Reviewing the impact of this work on gender bias over many years has provided an opportunity to reflect on these problems and consider their implications for larger issues of equality. Thoughtful comments in response to this article by Jody Armour[176] and Iris Young[177], which follow, have also stimulated my thinking on the broader meaning of this resistance.

The premise of the work seeking to ensure battered women equal rights to trial has been the radical idea that battered women's experiences had to be articulated, heard, and listened to. Recognition of social context, women's experiences of battering and societal response to battering, was crucial, because without understanding the social context, and the social circumstances of battering, the facts of a particular case could not be understood. As in all legal cases, the critical struggle is who gets to define the facts. Without first listening to women's experiences, and without then understanding the social framework and experience of battering, it was simply not possible for lawyers to fairly represent battered women in these circumstances. But listening to women, women who have been hurt and traumatized, who may not have words to express their pain, who may not trust that anyone will listen, who may be viewed as "difficult" because they are angry, or whose gender, racial, cultural, or class experiences may be different from the lawyer's, judge's or juror's, is not easy.[178] As Jody Armour observes, the telling of these experiences, the "narrative," to use his phrase, is crucial.[179] Narrative in these cases is not only subversive, but

176. Jody Armour, *Just Deserts: Narrative, Perspective, Choice, and Blame*, 57 U. Pitt. L. Rev. 525 (1996).

177. Iris Marion Young, *The Generality of Law and the Specifics of Cases: A Comment on Elizabeth Schneider*, 57 U. Pitt. L. Rev. 549 (1996).

178. *See* Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 Hofstra L. Rev. 1243 (1993); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990).

179. Armour, *supra* note 176; *see generally* Murphy, *supra* note 178.

it can mean the difference between life and death. For battered women who kill, this narrative, whether told to defense lawyers, in court, on clemency petitions, or in other contexts "is their social reality, constitute[s] their social identity, and vindicate[s] their social existence."[180] I agree that the stakes attached to the telling of this narrative are high, and that this "explains much of the stubborn resistance to this work."[181]

But there are many different forms of resistance. First, there is the resistance of lawyers—who may find it hard to listen to the voices and experiences of battered women, even when they can be surfaced and articulated, and then must thoughtfully consider the implications of these stories for the defenses that may be available within an equal rights framework. Resistance to hearing these experiences as complex and nuanced is explicit in the crude characterization of "abuse excuse" which has become so popular.[182] Judges' resistance to the story that they have heard may lead them to engage in a process of gender construction in which women's experiences are considered, "but in the form of sexist stereotypes (of women as "bad" or "mad") which reinforce the oppression and control of women in general."[183] Finally, because this work argues for affirmative recognition of the significance of social context, and the necessary interrelationship between individual action, social context and social responsibility, it challenges fundamental assumptions about "free will" in the criminal law, and triggers considerable resistance for some criminal law scholars.[184]

The theoretical challenge of this work has been the recognition of what Jody Armour calls "constrained choice"[185] and Iris Young calls "situated agency."[186] The dichotomy of victimization and agency, presented in these cases, presents a simplistic formulation of battered

180. Armour, *supra* note 176, at 525.

181. *Id.*

182. *See supra* note 17 and accompanying text. *See also* Fletcher *supra* note 18, at 571-576 (discussing the *Menendez* case).

183. Nicolson, *supra* note 1. In this article, Professor Nicolson details how English judges interpreted the cases of two battered women who killed their assailants in similar factual contexts very differently. In one case, the case of Kiranjit Ahluwalia, the defendant was seen as passive and consequently treated by the court as mentally impaired. In the case of Sara Thornton, the defendant was treated as a "bad" woman and found guilty. Nicolson concludes that battered women who kill face the choice of being seen as "mad" or "bad" but their actions are not understood as rational.

184. *See* Fletcher, *supra* note 18; Finkelstein, *supra* note 131.

185. Armour, *supra* note 176, at 525.

186. Young, *supra* note 177, at 550.

woman as either victim or agent. But these cases challenge that dichotomy in fundamental ways, because they require us to understand a more complex version of social reality—reality where choice is constrained by social experience, failure of state responsibility, and allocation of social resources. Traditional notions of individual agency and free will must be tempered by recognition of social circumstance, of situation, of the moral relations of domination.

I have argued that victimization and agency are understood as though they are in opposition to each other—as if women must be pure victim or pure agent—when in fact they are profoundly interrelated.[187] A more textured and contextual analysis of the interrelationship between women's oppression and women's acts of resistance is crucial, for we must understand both the social context of women's victimization, or oppression, which shapes women's choices and constrains women's agency and resistance, and also recognize women's agency and resistance in a more nuanced way. The implications of this insight for the criminal law's treatment of battered women who kill is considerable. It means that the framework of equality, and the consequent challenge of gender-bias have to shape the consideration of each of these cases differently, based on the facts. While some lawyers, judges and scholars have "gotten it," the resistance of others is profound.

As Iris Young has suggested, I seek both the general and the particular: application of the general framework of the criminal law to the specific circumstances of battered women so as to ensure that individual battered women have equal rights to trial.[188] I want to make sure that every case is heard on its own merits, with full deliberation and careful review of the facts, presented in a meaningful process of individualization. I want to make sure that lawyers who represent battered women and judges who decide their cases are sufficiently knowledgeable about the particular circumstances of battering and the particular experiences of the women involved to understand the facts of their cases and the legal significance of those facts.

For that to happen, lawyers and judges who deal with these cases,

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187. *See* Schneider, *Describing and Changing*, *supra* note 2; Schneider, *False Dichotomy*, *supra* note 5.

188. *See* Schneider, *Particularity and Generality*, *supra* note 2. Young notes:

> Schneider's argument thus suggests that the best solution to problems of exceptionalism and stereotyping in cases of battered women who kill is to increase the generality of law while attending to the specifics of cases. Such a conclusion is not specific to issues of battered women, or even women's issues, but bespeaks the nature of law itself.

Young, *supra* note 177, at 551.

and legal scholars who write about them, must be sufficiently self-reflective to challenge our own resistance to the complex and nuanced insights of equality. In hearing battered women's stories, and seeking to understand their experiences, we must be sensitive to the problem of gender construction in our interpretation of these experiences, consideration of their legal implications, and translation of these experiences into law.