

**NINTH ANNUAL WOMEN AND THE LAW  
CONFERENCE AND 2009 RUTH BADER  
GINSBURG LECTURE**

**CONFRONTING DOMESTIC VIOLENCE  
HEAD ON: THE ROLE OF POWER IN  
DOMESTIC RELATIONSHIPS**

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INTRODUCTION

The U.S. legal system's treatment of domestic violence has evolved a long way from the "rule of thumb"<sup>1</sup> and the principle that children are always the exclusive property of the father upon the dissolution of a marriage, regardless of the reason for the dissolution.<sup>2</sup> In the 1994 Violence Against Women Act ("VAWA"),<sup>3</sup> the U.S. Congress made the act of crossing state lines to physically injure an intimate partner a felony carrying a prison term of five years to life.<sup>4</sup> In addition, every state today treats the physical assault of a spouse or intimate partner as a criminal offense<sup>5</sup> and a number of states' family

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1. The rule of thumb refers to the fact that early U.S. courts tended to follow the British common law, which provided that a man could chastise his wife "in moderation"—like one might a servant or child—and at least tolerated the custom that a man could beat his wife so long as he used a switch no thicker than his thumb. *See, e.g.*, James Gillray, *Judge Thumb, or Patent Sticks for Family Correction: Warranted Lawful!* (Nov. 27, 1782), *available at* <http://memory.loc.gov/service/pnp/cph/3c10000/3c14000/3c14300/3c14396v.jpg>

2. Marian Bussey & Jean Biesecker, *Protecting the Rights of Children in Disputed Custody Cases: Mental Health and Legal Considerations*, 16 *FAMILY ATTORNEY* 34, 34, *available at* <http://www.familyatty.com/article4.pdf> (citing R.A. Gardner, *Family Evaluation in Child Custody Litigation*, Creskill, N.J.: Creative Therapies (1982)).

3. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended at 42 U.S.C. §§ 13925-14045d (2006)).

4. 18 U.S.C. § 2261(a)(1) (2006).

5. The National Center for Victims of Crime, *Domestic Violence*, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32347>

law contains a rebuttable presumption against granting sole or joint custody of a minor child to a party who has perpetrated domestic violence in recent years.<sup>6</sup> Still, many myths regarding domestic violence continue to be believed and the legal system's treatment of domestic violence remains grossly inadequate. At the Ninth Annual Women and the Law Conference and Ruth Bader Ginsburg Lecture held at Thomas Jefferson School of Law on February 27, 2009, legal scholars, prosecutors, police, defense counsel, custody mediators, domestic violence victims, psychologists, and domestic violence victims' advocacy groups from all across the U.S. came together to discuss domestic violence. They attempted to dispel the above-referenced myths, gain a more comprehensive understanding of domestic violence themselves, and suggest new legal approaches for both perpetrators and victims of domestic violence. The toll of over 1,500 deaths,<sup>7</sup> approximately 8 million physical assaults and rapes,<sup>8</sup> approximately 2.6 million physical injuries,<sup>9</sup> at least \$4.1 billion in medical expenses,<sup>10</sup> \$727.8 million in decreased productivity,<sup>11</sup>

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(last visited Jan. 27, 2010).

6. Twenty-five states stipulate in their custody statutes that a party's prior commission of domestic violence creates a rebuttable presumption that awarding sole or joint custody of a child to such a parent would not be "in the best interest of the child." See, e.g., AMERICAN BAR ASSOCIATION, CUSTODY DECISIONS IN CASES WITH DOMESTIC VIOLENCE ALLEGATIONS (2009), [http://www.abanet.org/legalservices/probono/childcustody/domestic\\_violence\\_chart1.pdf](http://www.abanet.org/legalservices/probono/childcustody/domestic_violence_chart1.pdf). However, at least seven of these twenty-five states likewise recognize a rebuttable presumption that it is in the best interest of a child to grant joint custody to both parents, and this latter presumption can effectively counter the presumption against awarding custody to a party who has committed domestic violence. *Id.*

7. In 2005 alone, the CDC reported that 1,510 people died as a result of domestic violence incidents. Centers for Disease Control and Prevention, Intimate Partner Violence Can Lead to Serious Injury, <http://www.cdc.gov/Features/IntimatePartnerViolence> (last visited Jan. 27, 2010); see also SHANNAN CATALANO, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES 6 (2007) (chart entitled "Homicides of Intimates by Gender of Victim," 1976–2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipvus.pdf>. In 2004, this figure was 1,544, according to the CDC., CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, UNDERSTANDING INTIMATE PARTNER VIOLENCE (2009), [http://www.cdc.gov/ncipc/dvp/ipv\\_factsheet.pdf](http://www.cdc.gov/ncipc/dvp/ipv_factsheet.pdf).

8. CENTERS FOR DISEASE CONTROL AND PREVENTION, CENTER FOR INJURY CONTROL AND PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE (2009), [http://www.cdc.gov/ncipc/dvp/ipv\\_factsheet.pdf](http://www.cdc.gov/ncipc/dvp/ipv_factsheet.pdf).

9. *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence—United States, 2005*, 57 MORBIDITY AND MORTALITY WEEKLY REPORT 113, 113 (2008), available at <http://www.cdc.gov/MMWR/PDF/wk/mm5705.pdf>.

10. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE

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similarly costly job losses,<sup>12</sup> approximately \$67 billion in law enforcement costs, a staggering number of divorces and family disintegrations,<sup>13</sup> the addition of a new wave of people added to the rolls of the homeless<sup>14</sup> and the impoverished,<sup>15</sup> and an overwhelming

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CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 29–30 (2003), <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>.

11. See, e.g., *id.* “A 2005 national telephone survey by the Corporate Alliance to End Partner Violence found that 21% of full-time employed adults were victims of domestic violence and 64% of them indicated their work performance was significantly impacted.” Corporate Alliance To End Partner Violence, Workplace Statistics, [http://www.caepv.org/getinfo/facts\\_stats.php?factsec=3](http://www.caepv.org/getinfo/facts_stats.php?factsec=3) (last visited Aug. 21, 2009). For a good summary of workplace losses associated with domestic violence see Wade Overgaard & Brigid McCaw, *Domestic Violence: The Hidden Workplace Cost for Employers*, CALIFORNIA BROKER MAGAZINE, December 2008, available at [http://www.calbrokermag.com/Magazine/story/DEc08/overgarrd\\_McCaw.htm](http://www.calbrokermag.com/Magazine/story/DEc08/overgarrd_McCaw.htm).

12. Twenty-four to fifty-two percent of employees who suffer from domestic abuse lose their jobs as a result. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 19 (1998). In a 2005 study of domestic violence survivors conducted in Maine, “[n]inety-six (96%) percent reported that domestic abuse affected their ability to perform their job duties.” ELLEN RIDLEY, JOHN RIOUX, KIM C. LIM, DESIRAE MASON, KATE F. HOUGHTON, FAYE LUPPI, & TRACEY MELODY, DOMESTIC VIOLENCE SURVIVORS AT WORK: HOW PERPETRATORS IMPACT EMPLOYMENT, MAINE DEPARTMENT OF LABOR & FAMILY CRISIS SERVICES (2005), [http://www.maine.gov/labor/labor\\_stats/publications/dvreports/survivor\\_study.pdf](http://www.maine.gov/labor/labor_stats/publications/dvreports/survivor_study.pdf).

13. A 2003 study of 115 psychologists assigned to recommend a child custody arrangement in contested cases found that 37% of the cases involved allegations of domestic violence. J. Bow & P. Boxer, *Assessing Allegations of Domestic Violence in Child Custody Evaluations*, 18 J. OF INTERPERSONAL VIOLENCE 1394 (2003). Another study found that 50% of contested child custody cases involved allegations of domestic violence. See Nancy Johnson, Dennis Saccuzzo, & Wendy Koen, *Child Custody Mediation in Cases of Domestic Violence: Empirical Evidence of a Failure to Protect*, 11 VIOLENCE AGAINST WOMEN 1022 (2005). Moreover, a report prepared for the National Center for State Courts (“NCSC”) documented in the court records domestic violence in 24% to 55% of contested custody cases depending on the state. Susan Keilitz et al., *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*, National Center for State Courts, State Justice Institute, NCSC Publication Number R-202, at 5. Sadly, the author of this report noted that a screening process (utilized by a mediation program) “revealed a much higher incidence of domestic violence than a review of court records alone would have indicated.” *Id.* at 7.

14. See, e.g., U.S. CONFERENCE OF MAYORS, 2003 HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES 72, (2003).

15. Richard Tolman & Jody Raphael, *A Review of the Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655 (2000); SHARMILA LAWRENCE, NATIONAL CENTER FOR CHILDREN IN POVERTY, DOMESTIC VIOLENCE AND WELFARE POLICY:

amount of emotional and psychological trauma<sup>16</sup> caused by domestic violence in the U.S. each year simply is unacceptable.

The title of this conference was *Confronting Domestic Violence Head On*, and this title was intended to convey that if we, as members of U.S. society, wish to diminish domestic violence to an appreciable extent, we must first confront all of the many challenging aspects of this terrible scourge. We must confront the numerous misleading myths about domestic violence as well as the many hard truths about it. We must also confront the warring camps of victims' advocates, scholars, and legal professionals, as they all have failed the domestic violence victims in this country.

Some of the many counterproductive myths regarding domestic violence include the following:

"Domestic violence is the unfortunate result of a failed relationship."

"An educated, professional, or wealthy adult rarely is abused."

"A victim must enjoy the abuse or otherwise the victim would escape it."

"A victim must do something to provoke his or her abuser into a rage."

"Just because someone abused an intimate partner, there is no reason to believe that he or she would abuse his or her children."

These are all examples of backwards thinking perpetuated by abusers to deny, minimize, and justify domestic abuse. Domestic violence does not occur as the result of a failed relationship; rather, a relationship fails as a result of domestic violence. The independence possessed by an educated, professional, or wealthy person does not prevent his or her abuse; his or her independence threatens the

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RESEARCH FINDINGS THAT CAN INFORM POLICIES ON MARRIAGE AND CHILD WELL-BEING 5 (2002).

16. See, e.g., U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 29–30 (2003), [http://www.cdc.gov/ncipc/pub-res/ipv\\_cost/ipvbook-final-feb18.pdf](http://www.cdc.gov/ncipc/pub-res/ipv_cost/ipvbook-final-feb18.pdf). The damage caused to the psyches and brain structures of children who are directly or indirectly exposed to domestic violence is particularly severe. See, e.g., LAWRENCE, *supra* note 15, at 5; MARK I. SINGER, ET AL., HEALTH RESEARCH INSTITUTE, THE MENTAL HEALTH CONSEQUENCES OF CHILDREN'S EXPOSURE TO VIOLENCE (1998); Mary A. Kermis et al., *Behavioral Problems Among Children Whose Mothers are Abused by an Intimate Partner*, 27 CHILD ABUSE & NEGLECT 1231, 1239 (2003).

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perpetrator's fragile ego and leads to his or her abuse. Similarly, a victim does not stay in an abusive relationship because he or she yearns for an abusive relationship; a victim stays in an abusive relationship because the perpetrator promises that the relationship will not be abusive in the future and because the victim fears that his or her abandonment of the perpetrator will result in an escalation of the abuse.<sup>17</sup> A victim does not provoke his or her abuser into a rage; an abuser flies into a rage and then claims that the victim provoked him or her. Finally, the abuser's proclivity for abusive behavior is not dependent on the victim's character traits but rather on the abuser's character traits. Sadly, neither a child's minority nor his or her possible blood relation to a perpetrator shields a child from an abusive parent or other guardian, as abusive partners often abuse their children in a post-separation setting. Therefore, there is every reason to be concerned that any abusive partner might abuse his or her children post-separation.

As indicated, the hard truths about domestic violence in this country must also be confronted before we can rein in this epidemic. One such hard truth is the asymmetrical male-on-female incidence of domestic violence.<sup>18</sup> Another is the fact that domestic violence inflicts severe physical and psychological injury not only on the intended victim but on "the spectators" as well, as the latter often suffer "vicarious trauma" as a result of having witnessed the abuse.<sup>19</sup> One of the most difficult hard truths to confront is that females in heterosexual couples are not the only segment of society that suffers abuse. In fact, members of all types of domestic relationships, including males in heterosexual relationships, members of same-sex couples, and juvenile and elderly members in various family arrangements also are routinely abused by their own family members.<sup>20</sup>

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17. Carol Penner, *Healing Waters: Churches Working to End Violence Against Women, Why Can't She Leave?* (2004), available at <http://www.wicc.org/resources/documents/HW3-WhyCantSheLeave.doc>.

18. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii-v (2000), <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

19. BRUCE D. PERRY, THE COST OF CARING 2 (2003), [http://www.childtrauma.org/ctamaterials/SecTrma2\\_03\\_v2.pdf](http://www.childtrauma.org/ctamaterials/SecTrma2_03_v2.pdf).

20. See, e.g., INTIMATE PARTNER ABUSE AND RELATIONSHIP VIOLENCE 3, 8 (2002), <http://www.apa.org/about/division/activities/partner-abuse.pdf>.

Polarized groups of victims' advocates must confront the fact that their inability to work together is paralyzing their common goal of eradicating domestic violence. Scholars must confront the fact that the two main theories of domestic violence that have been proposed to date—the feminist theory<sup>21</sup> and the family systems theory<sup>22</sup>—are both incomplete. That is, the feminist theory fails to explain a female's abuse of a male partner in a heterosexual relationship as well as the fact that abuse occurs in same-sex relationships and many other types of domestic relationships. The family systems theory, on the other hand, fails to explain why all families do not experience domestic violence when all families experience stressful situations, such as insufficient financial resources, conflicting goals, and extramarital affairs. Moreover, scholars must confront the disconnect between our legal system, which refuses to intervene to prevent most forms of mental abuse,<sup>23</sup> and the fact that domestic violence victims consistently report that their mental wounds are much more severe and take much longer to heal than their physical wounds.<sup>24</sup>

Judges, juries, prosecutors, defense counsel, mental health experts, and custody mediators all must confront the fact that very few treatment programs or legal actions implemented to date have actually decreased domestic violence to a noticeable degree. Finally, members of U.S. society in general must confront the fact that we are permitting many of our children to be exposed to domestic violence during their youth when their psyches and physical brain structures

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21. Diane L. Zosky, *The Application of Object Relations Theory to Domestic Violence*, 27 *CLINICAL SOC. WORK J.* 55, 55 ("Treatment theory [regarding domestic violence] has rapidly evolved with feminist theory and family systems theory becoming the dominant theoretical perspectives.").

22. In general, the feminist theory maintains that violence in domestic relationships is an outgrowth of patriarchal systems of male dominance in heterosexual relationships, while the family systems theory holds that domestic violence occurs as the result of the stresses of family life and the occasional violent expression of those stresses by one or another party to that relationship. *Id.*

23. Jan Elizabeth Brown, *Debunking the Myths: Anyone Can Be an Abuser or Victim*, *Hartford Courant*, Sept. 3, 2009, [http://blogs.courant.com/overcoming\\_battered\\_lives/2009/09/debunking-the-myths-anyone-can.html](http://blogs.courant.com/overcoming_battered_lives/2009/09/debunking-the-myths-anyone-can.html).

24. See, e.g., Lundy Bancroft, *Why Does He Do That?: Inside the Minds of Angry and Controlling Men* 230 (Berkley Trade 2003); see also Jan Elizabeth Brown, *Debunking the Myths: Anyone Can Be an Abuser or Victim*, *Hartford Courant*, Sept. 3, 2009, [http://blogs.courant.com/overcoming\\_battered\\_lives/2009/09/debunking-the-myths-anyone-can.html](http://blogs.courant.com/overcoming_battered_lives/2009/09/debunking-the-myths-anyone-can.html) ("[Abused] [m]en will often say: 'I can take the physical abuse, it's the emotional and psychological abuse that scares the hell out of me.' Our current laws and procedures on handling domestic disputes do not address these 'fears' that abused men have unfortunately.").

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are still developing,<sup>25</sup> and, in so doing, appear to be predisposing them to later be abusive in their own adult relationships.<sup>26</sup>

The legal scholars whose papers appear in this volume have each made a major contribution to the effort to stop the counterproductive cycle in which “abuse begets abuse.” Each of them squarely confronts outmoded theories, non-working systems, and inconvenient facts. Emily Sack, in her article *From the Rule of Thumb to the Battered Spouse Defense: The Evolution of Domestic Abuse in the Criminal Law*, exposes the ability of legal theorists over the centuries to justify the tolerance of domestic violence on countless creative grounds. These include the principle of coverture, which held a man legally responsible for his wife’s actions, to the rationale that states should limit their intervention in “domestics” lest they disturb “domestic harmony” (the ultimate irony of ironies), to the inadmissibility (under the Sixth Amendment right to confront one’s accusers) of evidence of abuse compiled by disinterested third parties unless the victim is willing to appear before the defendant and personally corroborate that evidence. After reading Emily’s piece, I was reminded of the aphorism that when you receive multiple answers to a question that can be answered with a single honest answer, you know that you are listening to a lie.

In her article *Giving Immigrants a Leg to Stand On: The Remedies for Immigrant Victims of Domestic Abuse*, Ilene Durst documents how, prior to enactment of VAWA, abusers for years were able to rely on the U.S. immigration laws to silence immigrant victims with threats of deportation and separation from their children. She also explains that a new provision in VAWA permits an immigrant who is married to a U.S. citizen or permanent resident to petition for legal immigrant status in his or her own name. While conceding that this provision is a move in the right direction, she does not flinch to point out that there are a number of loopholes that must be closed and problems in the administration of this law that must be fixed before the above threats truly are removed from an abuser’s arsenal. In essence, her article challenges all U.S. citizens’ to admit their own role in permitting perpetrators of domestic violence to treat the badge of U.S. citizenship as a license to abuse.

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25. Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST, Feb. 1, 2005, at A1.

26. LAWRENCE, *supra* note 15, at 5.

Finally, Cheryl Hanna, the Ruth Bader Ginsburg Lecturer at the Women and the Law Conference, in her article *Behind the Castle Walls: Balancing Privacy and Security in Domestic Abuse Cases*, confronts head on what many commentators claim is the central dilemma regarding the legal system's treatment of domestic violence today: Where should society draw the line between the right to privacy in domestic relationships and the right to be free from mental and physical harm in those same relationships? Harvard Law Professor Jeannie Suk, in her new book *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (Yale University Press 2009), for example, argues that recent amendments to the domestic violence laws have gone too far and now are interfering with the right to privacy in one's home as well as women's autonomy. In this regard, Professor Suk primarily takes issue with new mandatory arrest and no-drop prosecution rules, which she suggests are unique to domestic violence cases. In her paper, Cheryl explains that these rules are not special to domestic violence cases; to the contrary, the adoption of these rules simply brought domestic violence cases into conformity with the criminal law generally. That is, victims of other crimes cannot force the police not to arrest an alleged perpetrator if probable cause of the crime exists. Similarly, victims of other crimes cannot force the prosecutor drop the case against the defendant. By definition, a crime is an offense against the state, not against any particular individual, and therefore no individual, including the immediate victim, possesses the right to unilaterally exonerate or excuse the defendant.

Moreover, Cheryl's article addresses the issues of privacy and autonomy in convincing detail. She points out that even fundamental constitutional rights are not absolute, and when the right to privacy and the right to security conflict, as they do in the case of domestic violence, the former must yield to the latter. Otherwise, society becomes complicit in allowing a family member to abuse others in the family so long as he or she commits such abuse in the privacy of his or her home. Once it is conceded that the state's treatment of domestic violence crimes is not unique, the claim that the domestic violence laws are interfering with women's right to choose how to handle their domestic relationships evaporates. Cheryl nonetheless goes on to explain how a victim's autonomy is eroded by domestic violence and points out that many writers, mental health professionals, legal actors, and even domestic victims themselves fail to understand or acknowledge this self-perpetuating feature of

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domestic violence. This erosion of a victim's autonomy, Cheryl relays, is one of the most important reasons why states must vigorously enforce the enhanced domestic violence laws that have been enacted as well as continue to devise more effective legal strategies to ensure that no one is permitted to turn his or her castle into a private haven for abuse.

It has been said that insanity is defined as doing the same thing over and over again and expecting different results,<sup>27</sup> and it is difficult to imagine a situation that is more insane than the phenomenon of domestic violence in this country. The words of Emily Sack, Ilene Durst, and Cheryl Hanna published here will continue to provoke other scholars, legal practitioners, government officials, domestic violence victims, victims advocates, and mental health professionals to challenge the insane reality of domestic violence. Hopefully, effective legal remedies for domestic violence victims finally will be implemented and the automatic creation of succeeding generations of abusers and victims will be halted.

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27. This quote is most often attributed to Albert Einstein. *See, e.g.*, Michael Moncur, Quotations By Author: Albert Einstein, The Quotations Page (2010) [http://www.quotationspage.com/quotes/Albert\\_Einstein/31](http://www.quotationspage.com/quotes/Albert_Einstein/31) (last visited Jan. 28, 2010). However, it also has been attributed to Benjamin Franklin, Mark Twain, and Rita Mae Brown. *See, e.g.*, Ryan Howes, The Definition of Insanity is . . . , <http://www.psychologytoday.com/print/31301> (last visited Jan. 29, 2010). Rita Mae Brown actually used the cliché in her book *Sudden Death* on page 68 (Bantam Books 1983), but it is not clear that she was the first person to have used the phrase.

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