

FROM THE RIGHT OF CHASTISEMENT TO THE CRIMINALIZATION OF DOMESTIC VIOLENCE: A STUDY IN RESISTANCE TO EFFECTIVE POLICY REFORM

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INTRODUCTION

It is now over thirty-five years since the first shelters for battered women opened in the United States.¹ The following decades have seen enormous expansion of services for victims of domestic violence, significant reforms in the legal system, and changes in societal attitudes toward such violence. It is beyond question that there has been substantial progress in efforts to address domestic violence. However, as in any significant social change movement, policy choices and the implementation of those decisions have raised several concerns. Some commentators have questioned the effectiveness of using criminal law to address domestic violence, and argued that arrest and incarceration of the perpetrators is not the outcome desired by many battered women.² Therefore,

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1. One of the first shelters, Haven House, was opened in California in 1964, prior to the modern battered women's movement by women from Al-Anon to focus on victims of alcohol-related violence. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 55 (1982). In 1974, one of the first shelters that grew out of the modern feminist and battered women's movement opened in St. Paul, Minnesota. ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 189 (1987). The number of battered women's shelters burgeoned throughout the late 1970s and early 1980s. *Id.* at 188–91.

2. See, e.g., Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence*

criminalization may not promote the empowerment of battered women. This issue deserves serious attention and continues to be the subject of discussion among those concerned with addressing domestic violence and supporting its victims.

However, in reflecting on domestic violence policies and law over the past several decades, this Article focuses on a different but equally important problem: the stalling of progress that has come from deep resistance among those in our society to comprehending the dynamics of domestic violence and addressing its consequences. Whether from the public as a whole—as represented by our juries—or from our legislatures or the highest ranks of the judiciary, this resistance is difficult to name and to address. However, it has had an enormously negative impact on our ability to achieve effective domestic violence reform.

After a brief discussion of the history of the treatment of domestic violence in our criminal law, I will discuss three areas in which I believe this resistance is demonstrated: the use and effectiveness of battered women's syndrome expert testimony in cases where battered women are criminal defendants, the prosecution of marital rape, and recent Supreme Court case law impacting domestic violence criminal justice policy. This Article is a preliminary examination of the problem and concentrates primarily on its identification and description. However, in the concluding section, I offer some thoughts on addressing this intractable problem.

I. THE HISTORY OF THE TREATMENT OF DOMESTIC VIOLENCE IN THE CRIMINAL LAW

A husband's use of physical violence to exert power and control over his wife was not conceptualized as domestic violence for most of our country's history. Rather, it was an integral part of a legal system which provided men with a variety of rights and responsibilities that were denied to women. When this formal system was dismantled, domestic violence continued to be tolerated by a society which considered it to be a private matter between marital partners. It was the women's movement of the 1970s that brought public attention to

Law: A Critical Review, 4 BUFF. CRIM. L. REV. 801 (2001). See generally Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 [hereinafter *Battered Women and the State*] (providing an extensive discussion of the conflicts in domestic violence criminalization policy).

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the prevalence of domestic violence, and which initiated dramatic reforms in civil and criminal justice policy to address such violence. Within twenty years, there were significant changes in arrest and prosecution policies to criminalize domestic violence, an increase in services for battered women, and a notable shift in the public's attitude against domestic violence. By the mid-1990s, the country seemed poised to institutionalize these reforms, which would effectively reduce this public problem.

A. *From the Right of "Correction" to Protection of Family Privacy*

From the country's founding, American law recognized the legal right of a husband to "chastise" his wife.³ This right derived from the concept of coverture, which American law inherited from English jurisprudence. Upon marriage, a woman's legal identity was merged into that of her husband.⁴ She was unable to enter into contracts, own property or otherwise maintain legal rights. In addition, any obligations she assumed were the legal responsibility of her husband. Because he bore the burdens of his wife's conduct, a husband was therefore entitled to correct her behavior as he would that of a servant or child.⁵ This "correction" included physical discipline when necessary.

Although somewhat curtailed or moderated, the law recognized this right until well into the 19th century when Married Women's Property Acts, which gave married women the right to own property and incur legal obligations in their own names, slowly unraveled the system of coverture.⁶ As the laws of coverture disappeared, so too did the rationale for recognizing the husband's "right of

3. Reva B. Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," 105 YALE L.J. 2117, 2122–23 (1996).

4. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *430 (1765) ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."); ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13–14 (2000).

5. BLACKSTONE, *supra* note 4, at *432 ("The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.").

6. The first Married Women's Property Act was enacted in Mississippi in 1839 and, within fifty years, every state had adopted some form of such an act. *See Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1257 n.16 (1986).

chastisement.” Though no longer officially approved, however, domestic violence continued to be condoned under a new rationale. This view held that preservation of the family unit and promotion of domestic harmony required that the law not interfere in spousal relations.⁷ Intervention by the legal system would disrupt this harmony and invade the privacy of the family. As one court put it: “If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”⁸ Rather than overstep its bounds, under this new rationale the law should permit the family to manage its own relations.

From the late 19th century through the 1970s, this view permeated community attitudes and shaped the policies of public agencies. Official policy guiding law enforcement protocol at the scene of “domestics” called for non-intervention.⁹ Police officers were instructed to treat the incident as a non-criminal matter, rather than arrest the perpetrator. Most frequently, they would separate the parties and tell the husband to cool off and take a walk around the block.¹⁰

B. The Feminist Movement for Reform of Domestic Violence Law

It was the women’s movement of the 1970s that first drew attention to domestic violence. The advocacy movement on behalf of battered women began when volunteers—often survivors of domestic violence themselves—offered and found safe homes for women fleeing their abusers.¹¹ As the movement continued, advocates recognized that they must move from assisting individual women to seeking broader policy changes. They focused first on civil protection order legislation, which permitted women to obtain no-contact orders. In many jurisdictions, such orders could also include

7. See Siegel, *supra* note 3, at 2168–69.

8. *State v. Oliver*, 70 N.C. 60, 61–62 (1874). See also *State v. Rhodes*, 61 N.C. 453, 457 (N.C. 1868) (“However great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.”).

9. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992).

10. *Id.* at 47–48.

11. PLECK, *supra* note 1, at 188.

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temporary child custody and child support terms.¹² Every state and the District of Columbia now have a protection order statute.¹³

Advocates also brought lawsuits against police departments for failures to make arrests in domestic violence cases.¹⁴ Successes in that area, together with research demonstrating that arrests reduced offender recidivism, brought change to the criminal justice system's treatment of domestic violence.¹⁵ From the mid-1980s onward, states began enacting mandatory and pro-arrest laws in domestic violence cases. These laws were designed to curb police discretion that historically had resulted in the failure to pursue charges in these cases.¹⁶ The resulting dramatic rise in arrests led to more aggressive prosecution of domestic violence, as well as the development of specialized bureaus in larger jurisdictions with trial and investigative expertise.¹⁷ Instead of dropping a case if the victim did not wish to testify, prosecutors and law enforcement began to explore alternative types of evidence. Focusing on what has been termed "evidence-based prosecution," police and prosecutors made more imaginative use of hearsay exceptions and utilized 911 tapes, documentation of injuries, prior bad acts of the defendant, and statements from other witnesses.¹⁸ Marital rape, which long had been exempt from prosecution, began to be recognized as a crime, either through court decision or legislation.¹⁹ At the same time, expert testimony on battered women's syndrome began to be accepted in cases where

12. See Sack, *Battered Women and the State*, *supra* note 2, at 1667.

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

14. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Sorichetti v. City of New York*, 482 N.E.2d 70 (N.Y. 1985).

15. Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Police Implications of New Police Domestic Violence Studies*, 28 NEW ENG. L. REV. 929, 935 (1994); Sack, *Battered Women and the State*, *supra* note 2, at 1668–70.

16. Sack, *Battered Women and the State*, *supra* note 2, at 1670–71.

17. Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1520 n.52 (1998); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 856 (1994); Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 346 n.26 (1995).

18. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1898–1906 (1996); Tonya McCormick, Comment, *Convicting Domestic Violence Abusers When the Victim Remains Silent*, 13 BYU J. PUB. L. 427, 438–47 (1999).

19. See *infra* text accompanying notes 79–80.

victims of domestic violence were defendants.²⁰ Advocates believed this change would lead the way to achieving justice for victims who had fought back against abuse perpetrated by intimate partners.

These developments, together with extensive training in all parts of the criminal justice system and focus on a “coordinated community response” to domestic violence, seemed to demonstrate a profound shift in domestic violence policy.²¹ The Violence Against Women Act of 1994 (“VAWA”) appeared to be both a culmination of this change and the beginning of its institutionalization.²² Passed by Congress after several years of efforts by advocates and others, VAWA brought both resources and legal changes to the problem of domestic violence on a national level. The legislation included funding for each state to provide domestic violence training and expansion of services for law enforcement, prosecution, and victim advocates, and established a national domestic violence hotline.²³ Additionally, VAWA made crossing state lines with the intent to commit domestic violence or violate a protection order federal crimes.²⁴ VAWA also required that every state and territory, including tribal lands, give full faith and credit to valid protection orders from other jurisdictions.²⁵ The passage of this legislation was both a recognition of significant change as well as an initiation of further policy shifts in domestic violence so that making additional progress seemed inevitable.

20. See *infra* text accompanying notes 34–36.

21. Sack, *Battered Women and the State*, *supra* note 2, at 1725–31.

22. Violence Against Women Act of 1994, Pub. L. No. 103–322, 108 Stat. 1902–55 (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

23. *Id.*; see also 42 U.S.C. §§ 3796gg–3796hh (2006) (describing grant programs authorized under VAWA to strengthen domestic violence law enforcement, prosecution and victim services programs).

24. 18 U.S.C. §§ 2261–2262 (2006). The Gun Control Act of 1994 included a provision that people subject to qualifying state protection orders may not possess firearms or ammunition as long as the protection order is in effect. 18 U.S.C. § 922(g)(8) (2006). Subsequent legislation expanded the firearm prohibition to persons previously convicted of a qualifying misdemeanor crime of domestic violence, 18 U.S.C. § 922(g)(9), and created a federal crime for interstate stalking, 18 U.S.C. § 2261A.

25. 18 U.S.C. § 2265 (2006). VAWA also created a civil cause of action for victims of gender-motivated violence, which was struck down as unconstitutional by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). All other sections of VAWA remain intact.

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C. The Effect of Legal Reform

In many ways, the changes in the justice system's response to domestic violence have had enormous impact. The attitudes as well as the policies of law enforcement, prosecution, and judges have changed dramatically in the past 25 years, reflecting far greater understanding of the dynamics of domestic violence. It is no longer the norm for the police to minimize a domestic violence incident and fail to arrest the offender. Prosecutors do not routinely dismiss domestic violence cases as unimportant matters, or fail to proceed if they lack victim testimony. Judges are better trained and more sensitive to the complexities in domestic violence cases, and take the risks to victim safety more seriously.

There is also a more sophisticated understanding of victim needs than there was just a decade ago. While an effective criminal justice response is critical, it is but one component of a larger array of services necessary to promote victim safety and empowerment. Expansion of VAWA funding beyond a primarily criminal justice focus reflects the government's understanding of this need for broader services. While victim services always received some portion of VAWA funding, re-authorizations of VAWA have also included financial and technical support for programs addressing civil legal assistance, transitional housing, supervised visitation, dating violence, battered immigrant women and elder abuse.²⁶ Moreover, there has been increased emphasis on recognizing sexual assault as part of domestic violence.²⁷ In addition, the federal government has supported the development of Family Justice Centers around the country, which offer co-location and coordination of services for victims of domestic violence.²⁸

Perhaps due to highly-publicized incidents of domestic violence like the O.J. Simpson case, there also has been wider public

26. See Sack, *Battered Women and the State*, *supra* note 2, at 1729–30.

27. See NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, VIOLENCE AGAINST WOMEN ACT OF 2005: SELECT SEXUAL ASSAULT-RELATED PROVISIONS, <http://www.naesv.org/News/VAWA2005ReauthProv.pdf>.

28. In October 2003, President George W. Bush announced the Family Justice Center Initiative to award \$20 million dollars to 15 jurisdictions around the country to develop pilot Family Justice Center projects. These Centers bring together victim advocates, attorneys, law enforcement, health professionals, and representatives from community agencies to offer a wide array of services to domestic violence victims in one location. The goal is to provide easy and effective access to coordinated services. See Family Justice Center Initiative, Office on Violence Against Women, U.S. Dep't of Justice, <http://www.ovw.usdoj.gov/pfjci.htm> (last visited Sept. 7, 2009).

discussion and condemnation of domestic violence. For example, the recent criminal case involving Rihanna and Chris Brown is noteworthy. Unlike past cases involving celebrities, the tone from the media and public response—though still mixed—has been more critical of Brown’s actions.²⁹

But, in other ways, the successful implementation of progressive domestic violence policy that seemed inevitable in 1994 has not yet been achieved. Part II next examines one such area where greater focus on domestic violence has not resulted in positive change: the impact of expert testimony in cases where battered women are criminal defendants.

II. THE USE AND EFFECTIVENESS OF EXPERT TESTIMONY ON BATTERING IN INTIMATE RELATIONSHIPS

As the public focused greater attention on domestic violence, researchers began to study the psychology of battered women and the dynamics of relationships where violence exists. The concept of battered women’s syndrome developed from this study and legal

29. However, this case may be different because the victim, Rihanna, is also a celebrity. Brown accepted a plea deal in June 2009, where he pled guilty to felony assault, receiving community service and probation, with no jail time. Kelley L. Carter, *Chris Brown Pleads Guilty to Assault*, USA TODAY, June 22, 2009, http://www.usatoday.com/life/people/2009-06-22-brown-plea_N.htm. At least some commentators believe the incident will significantly impact Brown’s career. Shaheem Reid, *Chris Brown’s Sentence: What Effect Will It Have on His Career?*, MTV NEWS, June 23, 2009, <http://www.mtv.com/news/articles/1614517/20090623/brownchris18.jhtml> (noting Brown’s loss of major endorsements, and quoting one publicist’s view that Brown will have a “difficult and long road ahead,” and that he has a “tarnished reputation, something that he will forever be linked to”). However, others quoted in the article noted that he will be able to rebound if he is successful musically. *Id.* And, some commentators thought Rihanna’s image would suffer due to the incident. See Harriet Ryan and Richard Winton, *Chris Brown, Rihanna and the Image Problem*, L.A. TIMES, Feb. 16, 2009, <http://articles.latimes.com/2009/feb/16/entertainment/et-chrisbrown16> (quoting marketing executive that it will be difficult for Brown to get product endorsement deals, but that some companies may also shun Rihanna because “the reason why she has been used as a celebrity endorser is that she represents something very positive and in particular a strong female role model, and when she is associated with a situation like this it can have an impact”); Shaheem Reid, *Career: What Impact Will Chris Brown’s Plea Deal Have?*, MTV NEWS, June 23, 2009, <http://www.mtv.com/news/articles/1614518/20090623/rhianna.jhtml> (quoting one record marketing executive as saying that because Rihanna is so closely linked with Brown, “marketers who may be looking to use a fresh, young face to target a young, teeny-bopper audience (a.k.a. tweens) will think twice about aligning their brand with an artist who has publicly experienced a ‘loss of innocence’ by way of domestic assault”).

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advocates began to press for admission of expert testimony when battered women were on trial as defendants, to explain their behavior and perceptions to the jury. Within 15 years, these efforts were widely successful. However, due to misconceptions about the testimony and persistent stereotypes about battered women, the admission of such evidence has not had the positive impact that once was anticipated.

A. *Battered Women's Syndrome*

In the early years of the battered women's movement, psychologist Lenore Walker coined the concept of battered women's syndrome to help answer the question always asked of domestic violence victims: if things were so bad, why didn't she just leave?³⁰ Without further explanation, most laypeople, including juries, would believe that the violence must not in fact have been as bad as the victim reported. This misconception was most critical in cases where the battered woman was the defendant, on trial for killing or harming her abuser.

Battered women's syndrome is related to two other psychological concepts developed by Walker to explain the state of mind of domestic violence victims: the cycle of violence and learned helplessness.³¹ Based on interviews with domestic violence victims, Walker posited that most battering relationships did not involve continuous violence. Rather, such relationships went through a series of three phases that repeated themselves over time. First, in the tension-building phase, a battered woman knows that the abuser is going to use violence against her. Second, in the acute battering phase, the actual incident of violence occurs. Third, in the "loving contrition" or honeymoon phase, the batterer apologizes profusely

30. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter *BATTERED WOMAN*]. As the Ohio Supreme Court stated in holding that expert testimony on battered women's syndrome was admissible:

Expert testimony on the battered woman syndrome would help dispel the ordinary layperson's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any "common sense" conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.

State v. Koss, 551 N.E.2d 970, 973 (Ohio 1990).

31. WALKER, *BATTERED WOMAN*, *supra* note 30, at 42–70.

and promises not to become violent again.³² Because a woman in an intimate relationship wants to believe the abuser's promises, this honeymoon phase keeps her psychologically locked in to the relationship, hoping each time that the violence will end. Thus, she becomes trapped in this cycle of violence.

Moreover, the dynamic of power and control in a domestic violence relationship creates a situation that greatly undermines the battered woman's self-esteem and her sense of efficacy in being able to change her situation. In addition to constant undermining and humiliation, as well as restrictions on her freedom and movement, the unpredictability of the batterer's behavior conditions a battered woman into thinking she cannot escape—even when an opportunity presents itself. Walker used the term “learned helplessness” to describe this condition.³³

Battered women's syndrome was a broad concept meant to describe a series of symptoms exhibited by victims of abuse by an intimate partner, including learned helplessness, low self-esteem and a narrowed sense of the options available to escape or stop the violence. Walker's terminology and the concept of battered women's syndrome proved to be very influential, and defense attorneys representing domestic violence victims began to seek introduction of expert testimony on the syndrome in their cases. The first case to admit expert testimony on battered women's syndrome was *Ibn-Tamas v. United States* in 1979.³⁴ By the mid-1990s, most jurisdictions allowed its use for at least some purposes, most commonly to support a defense of self-defense by providing evidence on the reasonableness and imminence of the defendant's perceived threat to her safety.³⁵ This ability to provide information to the jury that was not intuitive and that helped to explain the behavior of

32. *Id.* at 65–70; LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); see LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989).

33. WALKER, *BATTERED WOMAN*, *supra* note 30, at 48.

34. *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

35. Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 WIS. WOMEN'S L.J. 75, 81–83 (1996). See, e.g., *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 277 S.E.2d 678 (Ga. 1981); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Allery*, 682 P.2d 312 (Wash. 1984); *People v. Torres*, 488 N.Y.S.2d 358 (N.Y. Sup. Ct. 1985); *State v. Hodges*, 716 P.2d 563 (Kan. 1986); *State v. Koss*, 551 N.E.2d 970 (Ohio 1990); *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992).

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battered women was considered a significant victory in the representation of domestic violence victims.³⁶

B. The Impact of Battered Women's Syndrome Expert Testimony

Despite the acceptance of this expert testimony, its impact in strengthening the cases of battered women defendants has been mixed at best. This is explained in part by the history of the use of expert testimony related to battered women's syndrome. Initial efforts to defend battered women who had harmed their abusers often relied on a theory of temporary insanity, diminished capacity or other mental defect.³⁷ In this context, it is easy to see how battered women's syndrome would be viewed as a mental disorder, since it was introduced to help establish such a mental defect. Moreover, the most common definition of the term "syndrome" is "a group of signs and symptoms that collectively indicate or characterize a disease, psychological disorder, or other abnormal condition."³⁸ Therefore, this term encouraged the layperson to associate battered women's syndrome with a type of mental illness.³⁹

36. Battered women's syndrome has been used primarily to support a defense of self-defense, but in more recent years, the prosecution has also sought to introduce such evidence to explain why a victim may not have left the defendant, why she may minimize or delay reporting the abuse, or why she may have recanted earlier testimony. *See* Arcoren v. United States, 929 F.2d 1235 (8th Cir. 1991); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Borelli, 629 A.2d 1105 (Conn. 1993); State v. Clark, 926 P.2d 194 (Haw. 1996); State v. Searles, 680 A.2d 612 (N.H. 1996); State v. Griffin, 564 N.W.2d 370 (Iowa 1997). Some battered women defendants have also attempted to introduce syndrome testimony to support a defense of duress, but with only limited success. *See, e.g.*, United States v. Willis, 38 F.3d 170 (5th Cir. 1994) (evidence of battered women's syndrome not relevant to claim of duress); *see also* Kelly Grace Monacella, Comment, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699 (1997); Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 221–24 (2005).

37. An example of such a case is that of Francine Hughes, who in 1977 was acquitted by reason of insanity on first degree murder charges for the killing of her abusive husband. *See* Assoc. Press, *Michigan Woman Acquitted in Ex-Husband's Slaying*, N.Y. TIMES, November 4, 1977, at 14. Hughes had been subject to severe domestic violence at the hands of her husband for years. *Id.* Interestingly, Hughes had also claimed self-defense, but the jury did not acquit her on that basis. *See*, AP, *Woman Acquitted in "Landmark" Case*, EUGENE REGISTER-GUARD, November 4, 1977, at 5. Her story later became well known when it was told by author Faith McNulty in *THE BURNING BED* (1980), and made into a television movie starring Farrah Fawcett as Hughes in 1984.

38. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1233 (2d college ed. 1985).

39. *See* SCHNEIDER, *supra* note 4, at 81.

However, the term “syndrome” also can mean only a “distinctive or characteristic pattern of behavior.”⁴⁰ In this sense, it does not connote abnormality but simply a normal reaction to a traumatic or extraordinary event. This definition is best suited to the true meaning of battered women’s syndrome.⁴¹ This is illustrated by studies that have shown that there are no characteristics specific to battered women that predispose them to become victims of violence.⁴² The only characteristics common to battered women are those caused by the violence.

This distinction between a mental illness and a syndrome became critical when defense strategies in battered women’s cases began to focus on theories of self-defense. Unlike a mental incapacity defense, self-defense requires that a defendant act as a reasonable person would have in those circumstances. Due to the misconception that battered women’s syndrome describes a mental illness, introduction of expert testimony on this subject can be complicated and confusing for a jury that must determine whether the defendant acted reasonably.⁴³ Battered women’s advocates also critiqued the use of the term “syndrome” since it appeared to pathologize battered

40. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1233 (2d college ed. 1985).

41. See Martha Shaffer, *The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after R. v. Lavalle*, 47 U. TORONTO L.J. 1, 8 n.25 (1997).

42. See ANN JONES, *NEXT TIME, SHE’LL BE DEAD: BATTERING & HOW TO STOP IT* 162–63 (rev. and updated ed. 2000) (“The studies show that all battered women have only one significant characteristic in common: they are all female. Some battered women were abused as children; others were not. Some battered women never got past grade school; others hold advanced degrees. Some battered women have never held a job; others have worked all their lives. Some battered women were married very young, others in middle age, and others not at all. Many battered women are very poor; many are well-to-do. Many battered women have ‘too many’ children, others none at all. Many battered women are passive introverts; others are active extroverts. Some battered women drink too much or use drugs; others never touch the stuff. . . . Many battered women are Catholic; many others are Protestant, Jewish, Hindu, Muslim, agnostic, atheist, Buddhist, Mormon. In short, there is no typical battered woman. Or to put in another way, any girl or woman might be battered.”).

43. Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL’Y 617, 673–74 (2006) (explaining the apparent contradiction between syndrome and ability to reason which is necessary to self-defense claim); DONALD DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY AND THE LAW* 226 (1996) (noting that though battered women’s syndrome “speaks the language of justification,” it is “at heart . . . based on incapacity excuses”). See also Shana Wallace, Comment, *Beyond Imminence: Evolving International Law and Battered Women’s Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1758 (2004).

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women.⁴⁴ Moreover, it painted battered women as passive and helpless victims, rendering allegations of abuse made by women who did not fit this stereotype less credible.⁴⁵

As a result of these problems, many experts prefer to term their testimony as information on the effects of battering, or the dynamics of a battering relationship.⁴⁶ In addition to explaining some of the psychological reactions that may be caused by intimate partner abuse, experts frequently testify about the economic and social obstacles to leaving an abusive relationship. Experts may also provide evidence demonstrating that domestic violence victims are at greater risk of violence when they leave or attempt to leave the relationship.⁴⁷

The “battered women’s syndrome” term and the misconceptions surrounding it, however, have proven remarkably resilient. At the same time, critics have complained that battered women are trying to employ an “abuse excuse” to get special treatment from the law.⁴⁸

44. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 40–42 (1991); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C.L. REV. 211, 218 (2002).

45. See, e.g., Joan S. Meier, *Notes from the Underground: Integrating Psychological Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1306 (1993) (critiquing the “narrow stereotype” created by the battered women’s syndrome); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (noting how African-Americans tend to be stereotyped as aggressive, which makes it difficult to fit into the “learned helplessness” depiction of battered women); EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO LEARNED HELPLESSNESS* (1988) (arguing that battered women engage in many active help-seeking behaviors, and are not helpless, passive victims).

46. See, e.g., *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996) (“We use the term ‘battered women’s syndrome’ because [the Evidence Code] and the cases use that term. We note, however, that according to amici curiae California Alliance Against Domestic Violence et al., the preferred term among many experts today is ‘expert testimony on battering and its effects’ or ‘expert testimony on battered women’s experiences.’”). See also *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*, REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT NCJ-160972, (May 1996), at vii [hereinafter *Validity and Use of Evidence*] (federal government report raising concern with use of the term “battered woman syndrome,” and urging adoption of terminology such as “evidence or expert testimony ‘on battering and its effects.’”).

47. See Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW 19 (1999); Mahoney, *supra* note 44, at 65–66.

48. See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES AND EVASIONS OF RESPONSIBILITY* (1994); JAMES Q. WILSON, *MORAL*

These critics charge that allowing women to use this type of evidence encourages vigilante justice, as women can now “get away” with killing their husbands. Not surprisingly, the media and even attorneys often refer to a “battered women’s defense,” though no such defense exists; rather, in these cases the defendant is simply trying to establish self-defense through introduction of evidence to explain her circumstances, just like any other defendant.⁴⁹

Battered women and their attorneys could easily have tolerated these critiques if use of the expert testimony did in fact significantly increase their chances of success. In reality, however, there has been little meaningful change in the response of the legal system to self-defense claims by battered women. A 1996 federal government study analyzed 152 state court appellate cases involving battered women defendants and found that 63% of the convictions or sentences were affirmed, even though expert testimony was admitted or found admissible in 71% of the cases.⁵⁰ Several years after the Supreme Court of Canada recognized the use of expert battered women’s syndrome testimony in self-defense cases, a study found that the decision had not led to a dramatic increase in successful self-defense claims.⁵¹ Such testimony also does not appear to have affected

JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM? 62–66 (1997); see also David L. Faigman, *The Battered Women Syndrome and Self-Defense: A Legal & Empirical Dissent*, 72 VA. L. REV. 619 (1986) (arguing that battered women’s syndrome should not be accepted as expert testimony because it does not meet the standards for scientifically acceptable research).

49. Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 970–71 (2000) (though battered women’s syndrome evidence has been widely accepted by the courts, commentators have implied that this evidence gives battered women special treatment and a “special defense”). As Nourse explains, “As a legal matter, this is not correct; there is no separate ‘battered women’s’ defense and courts routinely insist that they are not changing the law.” *Id.*

50. *Validity and Use of Evidence*, *supra* note 46, at xi. The study concluded that “these findings are considered strong evidence that the defense’s use of, or the court’s awareness of, expert testimony on battering and its effects in no way equates to an acquittal on the criminal charges lodged against a battered woman defendant.” *Id.*

51. See Shaffer, *supra* note 41, at 17, 33 (1997). The Supreme Court of Canada accepted the use of expert testimony on battered women’s syndrome in self-defense cases in 1990. *R. v. Lavalle*, [1990] 1 S.C.R. 852 (Can.). See also SCHNEIDER, *supra* note 4, at 280–81 nn.114–15 (2000) (noting that only a small percentage of women charged with killing their abusers are acquitted); Regina A. Schuller, *Expert Evidence and Its Impact on Jurors’ Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J. GENDER L. & POL’Y 225, 245–46 (2003) (studies of impact of battered women’s syndrome expert testimony on mock juries show mixed results, but where testimony did lead to more lenient verdicts, jurors viewed their decision as jury

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sentencing of such defendants. Women who kill their batterers generally receive longer sentences than men who kill intimates.⁵²

The failure of battered women's syndrome expert testimony to impact the results of these cases is particularly significant because the vast majority of women who are in prison for first or second degree murder are incarcerated for killing an abusive partner.⁵³ At the same time, intimate partners pose the greatest threat of homicide to women. According to the latest data from the Department of Justice, approximately one-third of all female murder victims were killed by an intimate partner, whereas about 3% of male murder victims were killed by an intimate partner.⁵⁴ Since 1976, the number of homicides by intimates has declined for victims of both genders, but the decrease is more marked for male victims, with a decline of 75% from 1976-2005.⁵⁵ Moreover, the proportion of homicides of male victims that are perpetrated by intimates has declined quite steadily since 2000, reaching its lowest point at 2.5% in 2005—the last year for which data are available.⁵⁶ By comparison, the proportion of female homicides perpetrated by intimates has fluctuated during the same period and then risen since 2003 to 33.3% in 2005.⁵⁷ Although women have the greatest risk of being killed by abusive partners, efforts to establish a claim of self-defense if they fight back against such abuse are rarely successful.⁵⁸

The causes for the limited success of battered women's self-defense claims are multiple and difficult to untangle. As explained above, there is confusion about the meaning and relevance of the term

nullification, rather than as falling within existing law of self-defense).

52. *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1574, 1574 n.3 (1993) (citing estimates that women who kill an intimate partner on average receive sentences of fifteen to twenty years, while men who kill an intimate partner on average receive sentences of two to six years); see also Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN'S STUD. 255, 255 (1996) (citing same statistics); SCHNEIDER, *supra* note 4, at 280–81 nn.114–15 (citing one survey finding that 83.7% of battered women convicted of homicide received sentences ranging from 25 years to life).

53. ELIZABETH LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN* 37–38 (2002).

54. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE*, (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf> (review of data from 1976–2005).

55. *Id.*

56. See *id.* at 53.

57. *Id.*

58. Wallace, *supra* note 43, at 1760.

battered women's syndrome and, despite efforts to rename expert testimony, the term "syndrome" persists.⁵⁹ Furthermore, commentators and the public mischaracterize the use of expert testimony as an attempt to provide "special treatment" to battered women who are using an "abuse excuse." Thus, the misperception that these defendants are twisting the elements of self-defense while getting away with killing their sleeping, or otherwise defenseless, husbands endures.⁶⁰

The fact remains that though they may face imminent threats of death or serious bodily injury, most battered women defendants do not fit society's stereotypical view of a classic self-defense case, where two strangers face off in a street or barroom brawl.⁶¹ Although most of these defendants can meet the legal requirements of self-defense, they cannot satisfy what for many in the public is a rigid understanding of an appropriate self-defense situation. This inability to fit battered women into the framework of self-defense stands in stark contrast to the readiness of many legislatures to broaden the law of self-defense to benefit those individuals who defend their homes or property.⁶² States such as Florida and Texas have eliminated the longstanding duty to retreat in these situations, before using deadly force in self-defense.⁶³ One wonders what lies deep in our collective psyche that seizes the opportunity to provide a legal defense in such

59. See *supra* text accompanying notes 37–49.

60. Despite this misperception, the reality is that most self-defense claims of battered women defendants do not involve a "sleeping husband" or similar scenario. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384 (1991) (finding from study of 223 homicide cases involving battered women defendants who claimed self-defense that over 70% of the women killed when faced with either ongoing attack or an imminent threat of death or serious bodily injury, and that figure may be closer to 90%).

61. See Nourse, *supra* note 49, at 972–75. Nourse argues that the law of self-defense works well for strangers but not for those in intimate relationships because "the relationship between the parties provides the norms." *Id.* These social norms create an extra burden for defendants in such relationships, by imposing a "pre-retreat rule," requiring women to leave dangerous relationships simply because they are dangerous in order to meet the standard of self-defense. *Id.*

62. See generally Koons, *supra* note 43 (contrasting the expanded legal protections given use of deadly force against strangers, which primarily benefit men, with the "inhospitable legal doctrines" for battered women who act in self-defense against their abusers).

63. See, e.g., FLA. STAT. § 776.013(3) (2005) (no duty to retreat outside of a dwelling, residence or automobile); 2007 Tex. Gen. Laws 1 (eliminating retreat requirement when using deadly force in self-defense inside home, car and workplace).

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situations, while resisting attempts to provide battered women with a chance to establish the same defense.

Like domestic violence itself, the harsh treatment of women who kill their abusers can be traced back to principles of coverture. As Blackstone explained, when a wife kills her husband, she has violated basic laws of hierarchy. Just as a subject who kills his king, she has overturned the natural deference owed to her husband:

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.⁶⁴

The historical roots of the ongoing refusal to accept battered women's self-defense claims are also present in society's treatment of marital rape.

III. MARITAL RAPE

Husbands were exempted from prosecution for the rape of their wives for most of our history. The dismantling of this exemption began in the 1980s and, within a decade, no state fully excepted a husband from such liability. However, the remnants of the marital exemption remain visible today in differential treatment of spousal and intimate partner rape in many jurisdictions. Moreover, even where the crime of marital rape exists in theory, its successful prosecution continues to be problematic. As with the use of expert testimony on battering, despite significant reform in the area of intimate partner rape, there is deep resistance to successful implementation of the new policies.

A. *The Incidence and Prevalence of Intimate Partner Rape*

Despite our common image of the rapist as a weapon-wielding stranger who attacks his victim in a dark alley, in reality a majority of sexual assault victims know their assailants.⁶⁵ A significant

64. BLACKSTONE, *supra* note 4, at *444 n.35 (emphasis added).

65. According to data from the National Crime Victimization Survey, 54% of all rapes or threats of rape in 2006 were committed by someone well known to or a

percentage of these non-stranger rapes are committed by an intimate partner.⁶⁶ The National Violence Against Women Survey, a study conducted in 1995 and 1996, found that 7.7% of women will be raped by their current or former partner at some time in their lifetime.⁶⁷ Approximately half of those raped by an intimate were victimized multiple times by the same partner, with an average of 4.5 rapes by the same partner.⁶⁸ Of those women victimized more than once, 62.6% said that the victimization lasted one year or more.⁶⁹

However, the limited involvement of the criminal justice system does not comport with the prevalence or the significance of the problem. Less than 1/5 (17.2%) of those women raped by an intimate partner said that they reported the most recent rape to police.⁷⁰ Ultimately, only about 7.5% of all intimate partner rapes are prosecuted and, of those, 58.1% do not result in a conviction.⁷¹ What causes this disparity between the incidence of intimate partner rape

casual acquaintance of the victim, as compared to 34% committed or threatened by strangers. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, NATIONAL CRIME VICTIMIZATION SURVEY, TABLE 34, FAMILY VIOLENCE, PERCENT DISTRIBUTION OF VICTIMIZATIONS, BY TYPE OF CRIME AND RELATIONSHIP TO OFFENDER (Aug. 2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf> [hereinafter Table 34]. See also Kimberly A. Lonsway, Joanne Archambault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-stranger Sexual Assault*, THE VOICE, Vol. 3, No. 1, at 3–4 (discussing stereotype of rape involving a stranger perpetrator, use of a weapon and/or physical violence and signs of physical injury when in reality in most sexual assaults the perpetrator is known to the victim, weapons or physical violence are not used and there is no sign of physical injury).

66. Of the 54% of rapes committed by non-strangers, more than half were perpetrated by someone well known to the victim. Table 34, *supra* note 65. The category “well-known” does not break down the data into different types of close relationships. *Id.*

67. Patricia Tjaden & Nancy Thoennes, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, National Institute of Justice and Centers for Disease Control and Prevention 9 (July 2000), <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>. For the National Violence Against Women Survey, researchers conducted telephone interviews with a nationally representative sample of 8,000 U.S. women and 8,000 U.S. men about their experience as victims of various types of violence, including intimate partner violence. *Id.* at iii. See also DIANA E. H. RUSSELL, RAPE IN MARRIAGE 1–2 (1990). Russell conducted interviews with 930 women, and found that 84 of the 644 (or 13%) who had ever been married were victims of rape or attempted rape by their husbands.

68. TJADEN & THOENNES, *supra* note 67, at 39.

69. *Id.*

70. *Id.* at 49.

71. *Id.* at 51–52.

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and the minimal involvement by the criminal justice system in addressing it? To answer this question, the traditional treatment of marital rape in this country must be reviewed.

B. The Marital Exemption for Rape

Until very recently, marital rape was not criminalized under American law. The “marital exemption” to rape prosecution was derived from the same system of coverture that justified a husband’s use of physical violence against his wife. Upon marriage, a wife’s identity was merged into that of her husband, so that he alone represented the marital unit. A husband could not legally rape his wife, because he could not be convicted of causing harm to himself or to his property.⁷² As coverture disappeared, the rationale of domestic harmony used to permit physical violence also was invoked to maintain the marital exemption for rape.⁷³ Intimate relations between a husband and wife were private, and therefore the law’s involvement would disrupt the chance for resolution and restoration of domestic harmony.⁷⁴

An additional justification was provided most famously by Lord Matthew Hale, the Chief Justice of England: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”⁷⁵ This ongoing consent theory remained powerful well into the 20th century, with many continuing to hold the view that provision of sex at all times is a “wifely duty.” While no longer a formal legal doctrine, the influence of this theory is evident in the commonly held belief that the injury of marital rape is less severe because the woman

72. Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN’S L.J. 269, 275–76 (2007).

73. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1486–87 (2000) (modern defense of the marital rape exemption focuses on the need to protect the privacy of the spousal relationship from judicial intervention and to promote reconciliation); Note, *To Have and To Hold*, *supra* note 6, at 1268–69 (modern rationales for the marital exemption included fostering marital harmony and encouraging spousal reconciliation).

74. Hasday, *supra* note 73, at 1487 (noting that the marital privacy argument assumes that the rape exemption protects the interests of both husband and wife, and that marriage is “a necessarily harmonious relation, and legal intervention [is] the first, unwelcome introduction of antagonism and injury”).

75. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Sollom Emlyn ed., 1st Am. ed. 1778).

previously has had sex with the perpetrator.⁷⁶ However, contrary to popular belief, substantial research demonstrates that the injury is frequently far deeper because the woman feels betrayed by this act of violence from someone with whom she has been involved. The damage is further compounded by her continued contact with her attacker.⁷⁷

C. *The Law on Marital Rape Today*

The marital rape exemption has died hard in American law. For far longer than it affirmatively condoned domestic violence, the law recognized the right of a husband to rape his wife.⁷⁸ The first case holding the marital exemption unconstitutional was not decided until 1984,⁷⁹ and it was not until 1993 that every state had eliminated the full marital exemption.⁸⁰

Legal reform, however, has been substantially incomplete. Currently, several states continue to treat spousal rape differently

76. RAQUEL KENNEDY BERGEN, MARITAL RAPE: NEW RESEARCH AND DIRECTIONS, VAWNET, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN (Feb. 2006), http://new.vawnet.org/Assoc_Files_VAWnet/AR_MaritalRapeRevised.pdf (citing 1996 study of attitudes among college students which found that marital rape was perceived as less serious than stranger rape and that only 50% of male students thought it was possible for a husband to rape his wife). The Commentary to the Model Penal Code exemplifies this perception: "Where the attacker stands in an ongoing relation of sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought qualitatively different." MODEL PENAL CODE § 213.1 cmt. 8(c). See also Michelle Anderson, *Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1512 (2003).

77. Actual surveys of victims of marital rape reveal that in fact the injury and trauma can be more severe than in stranger rape. See RUSSELL, *supra* note 67, at 192, tbl. 14-2 (in Russell's study, 52% of women raped by a husband or other relative report long-term trauma, as compared to 39% of women raped by strangers); DAVID FINKELHOR & KERSTI YILO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 135-37 (1985).

78. For example, as late as 1981 the Colorado Supreme Court held that the marital exemption passed rational basis review because the state had a legitimate interest in preservation of familial relationships: "the marital exemption may remove a substantial obstacle to the resumption of normal marital relations." *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981).

79. *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984).

80. See Bergen, *supra* note 76, at 2. North Carolina was the last state to repeal its full marital rape exemption in 1993. N.C. GEN. STAT. § 14-27.8 (2005). See Lynn Hecht Schafran, Stefanie Lopez-Boy, & Mary Rothwell Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go*, in CONNECTIONS: A BIENNIAL PUBLICATION OF THE WASHINGTON COALITION OF SEXUAL ASSAULT PROGRAMS, Vol. X, No. 1, at 15, 21 (Summer 2008).

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from stranger rape, considering it a less serious offense and making it more difficult to prove. Until very recently, several states narrowed the time that a victim had to report a marital rape in order for it to be prosecutable.⁸¹ South Carolina still maintains distinct reporting requirements for spousal rape, mandating that it be reported within thirty days.⁸² Some state laws limit prosecution of marital rape to certain lower level offenses, or provide for lesser sentences. For example, in Maryland, a spouse cannot be charged with first or second degree rape—the two most serious charges of sexual assault—unless the parties are separated or other requirements are satisfied.⁸³ In Virginia, both non-marital and marital rape are subject to a sentence ranging from five years to life imprisonment. However, where the offender is the spouse of the victim, the judge may suspend a guilty judgment and dismiss the charges if the defendant successfully completes counseling while on probation.⁸⁴ In Ohio and Kentucky, while generally perpetrators may be prosecuted for rape where the victim is not mentally competent or able to consent, a spouse is exempt from prosecution in such a situation.⁸⁵ While many

81. For example, Illinois and California both had shortened reporting requirements for spousal rape until 2004 and 2007, respectively. *See* 720 ILL. COMP. STAT. 5/12–18, *amended by* 2003 ILL. H.B. 4771 (effective Aug. 20, 2004); CAL. PENAL CODE § 262, *amended by* 2006 CAL S.B. 1402 (effective Jan. 1, 2007).

82. *See* S.C. CODE ANN. § 16-3-615 (2008).

83. *See* MD. CODE ANN., CRIM. LAW § 3-318 (West 2009). Maryland law exempts spouses from first and second degree rape, as well as sexual offense in the third and fourth degrees, unless the parties have a written separation agreement or have been separated for at least three months immediately prior to the incident, or have a decree of limited divorce, or the perpetrator uses force or threat or force and the act is without the consent of the spouse.

84. VA. CODE ANN. § 18.2-61 (2009). The statute states that the judge can do this only where an offender has not previously had a case dismissed under this procedure, and where the victim and the prosecutor consent. The charges may be dismissed “if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.” *Id.* § 18.2-61(C) (2009) (emphasis added). In South Carolina, an offender can be sentenced for up to thirty years for non-marital rape, but only for up to ten years for marital rape. S.C. CODE ANN. § 16-3-652 (2008) (first degree sexual assault carries sentence of up to thirty years); *Id.* § 16-3-615 (2008) (spousal rape carries maximum sentence of ten years).

85. Ohio does not include spouses living separate and apart in the spousal exemption. OHIO REV. CODE ANN. § 2907.02(A)(1) (LexisNexis 2009) (“No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when . . . [f]or the purpose of preventing resistance, the offender substantially impairs the other person’s judgment or control by administering any drug . . . surreptitiously

states have substantially changed the legal requirements for rape in the past 30 years, such as proof of force or resistance, some jurisdictions have kept these elements intact for marital rape. In Oklahoma, for example, spousal rape requires use or threat of force or violence.⁸⁶ Similarly, in Idaho, a spouse can be convicted of rape only if the victim resists and her resistance is overcome by force, or she is prevented from resisting due to threat of bodily harm or because of a narcotic or anesthetic.⁸⁷

D. Modern Prosecution of Intimate Partner Rape

The ambivalence of public attitudes toward marital rape is evident in the continued disparities of the formal law described above, and in the lack of prosecution and even lower conviction rates in these cases. Studies have shown at best marginal progress in the successful prosecution of marital rape crimes. For example, a study analyzed data on acquaintance rape prosecutions in Detroit before and after reforms in rape law generally.⁸⁸ The authors hypothesized that the general reforms in rape law may have greater impact on the

or by force . . .” or the other person is less than thirteen, or whose ability to resist or consent is substantially impaired because of a mental or physical condition.); KY. REV. STAT. ANN. § 510.035 (West 2009) (“A person who engages in sexual intercourse or deviate sexual intercourse with another person to whom the person is married, or subjects another person to whom the person is married to sexual contact, does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen (16) years old or mentally retarded.”); *see also* OKLA. STAT. tit. 21, § 1111 (2009) (In Oklahoma, spouse is exempt where victim “is incapable through mental illness or any other unsoundness of mind . . . of giving legal consent” unless force or violence is used or threatened.).

86. *See* OKLA. STAT. tit. 21 § 1111 (2009) (“Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.”); *see also* NEV. REV. STAT. ANN. § 200.373 (LexisNexis 2009) (“It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.”); MD. CODE ANN., CRIM. LAW § 3-318 (West 2009).

87. IDAHO CODE ANN. §§ 18-6107; 18-6101 (2009).

88. Cassia C. Spohn & Julia Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. & CRIMINOLOGY 861, 863–84 (1996) [hereinafter *Simple and Aggravated Rape*]. The authors had previously studied reforms in rape prosecution generally, and found that in five of six large jurisdictions, these reforms had not resulted in a greater proportion of convictions. *See* CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 77–105 (1992). Detroit was the one jurisdiction in which rape reform had had some impact, and so they focused their analysis of the impact of reform on stranger vs. acquaintance rapes there. Spohn & Horney, *Simple and Aggravated Rape*, *supra*, at 865.

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prosecution of acquaintance rapes than on stranger rape prosecutions. However, though the study found that post-reform a greater proportion of acquaintance rape cases were bound over for trial, there was “no support for [the] hypothesis that simple rapes bound over for trial would be taken more seriously in the post-reform period;” these cases were just as likely to be dismissed, and they were no more likely to result in a conviction or incarceration.⁸⁹ One review of national data found that, from the 1970s to 1990, though there was a small increase in the likelihood that perpetrators of non-stranger rapes and stranger rapes would be sanctioned similarly, a large “acquaintance discount” in the treatment of rape remained.⁹⁰

It is likely that for many prosecutors the failure to go forward in marital rape cases is not due to their lack of interest in prosecution, but rather to the perception that these cases are not winnable.⁹¹ A prosecutor’s strategy not to proceed in this situation may be questioned, but the perception that there is a low likelihood of conviction may be realistic in many cases. Prosecutors face juries who do not believe that women who allege marital rape behave like “real” victims or that there was truly lack of consent.⁹² As one prosecutor who does proceed in spousal rape cases noted, jurors are reluctant to convict because of their belief in the tenets of marriage and “[their] desire to promote that institution.”⁹³

89. Spohn & Horney, *Simple and Aggravated Rape*, *supra* note 88, at 883.

90. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 568–74 (1993).

91. See Lonsway, Archambault & Lisak, *supra* note 65, at 4 (prosecutors may subscribe to stereotypes about victims of sexual assaults, but even if they do not believe them themselves, they know that the stereotypes “will be prominent in the minds of judges and jurors as they make decisions regarding a sexual assault case”). As the authors note, “Prosecutors may therefore believe that they cannot ethically charge a defendant in cases that depart too much from the stereotype of ‘real rape,’ because a jury would not be likely to convict.” *Id.*

92. See Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 701 (1996) (citing California prosecutor who believes that jurors typically view spousal rape as inherently less severe because “the relationship acts as mitigation”).

93. *Id.* (quoting Ray Mendoza, Deputy District Attorney, Santa Clara County, California). Mendoza believed that “the myth that a husband has an absolute right to sex pervades popular attitudes.” *Id.* As the American Prosecutors Research Institute, the research, development and technical assistance arm of the National District Attorneys Association, states in a guide for prosecutors conducting voir dire in marital and date rape cases: “This is a difficult and tricky area for prosecutors. Unfortunately, many jurors have difficulty with marital rape . . . too many of them do not see it as a crime. The best approach for this is to use hypothetical

The heightened requirements that remain embedded in the formal law appear to reflect several misperceptions about marital rape. The justice system continues to assume that wives are more likely to lie about rape perpetrated by a spouse. The law also presumes consent to sex within marriage, so that to establish marital rape, there must be evidence of the use of a level of force no longer required to prove stranger rape.⁹⁴ Moreover, even where the law permits prosecution of marital rape, these views are clearly demonstrated in juror attitudes and prosecutors' sense of those attitudes. As with battered women's self-defense cases, the treatment of marital rape reflects a mischaracterization of reality and the preservation of false stereotypes, many of which are derived from 18th century views of the relations between husband and wife.

These views, rooted in long-abandoned legal doctrines, block progress in addressing sexual violence against women by intimate partners. Part III focuses on another locus of resistance to changes in domestic violence law and policy—the United States Supreme Court.

IV. THE IMPACT OF SUPREME COURT CASE LAW ON THE CRIMINALIZATION OF DOMESTIC VIOLENCE

In recent years, the United States Supreme Court has considered several issues relevant to domestic violence criminal justice policy.

questions/scenarios, relating rape to other crimes so that the stigmas & myths are debunked.” American Prosecutors Research Institute, Violence Against Women Program—Legal Issues/Resources: Voir Dire Questions, http://www.ndaa.org/apri/programs/vawa/voir_dire_questions.html (last visited Feb. 5, 2010). While not spousal rape cases, the publicity surrounding the acquaintance rape charges in the Kobe Bryant and Duke lacrosse players cases has set back non-stranger rape cases generally. See, e.g., Mary Jo Melone, *Bryant Case May Inflict Lasting Harm on Women*, ST. PETERSBURG TIMES, August 25, 2004, http://www.sptimes.com/2004/08/25/Columns/Bryant_case_may_infl.html; Anita L. Allen, *Blaming the Victim*, THE STAR-LEDGER, May 14, 2006, at 5; see also Lonsway, Archambault & Lisak, *supra* note 65, at 3 (“We have all seen how victims are portrayed in the media accounts of rape accusations made against popular sports and cultural figures. These media accounts show us just how easy it is for us as a society to believe the suspect’s statements (a respectable cultural icon) and both discount the victim’s statements and disparage her character.”).

94. Susan Estrich, referring to traditional rape statutes, described such heightened requirements as the “institutionalization of the law’s distrust of women victims through rules of evidence and procedure.” SUSAN ESTRICH, *REAL RAPE* 54 (1987). See also Lonsway, Archambault & Lisak, *supra* note 65, at 2–3 (noting how perception of the number of false reports in sexual assault cases is greatly exaggerated, while estimates of the percentage of false reports are actually from 2 to 8%).

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Although these decisions arguably have produced some positive results,⁹⁵ generally they have created obstacles to full implementation of the progressive changes in this policy over the past few decades. The Supreme Court's negative impact on domestic violence policy is exemplified by its case law in two areas: (1) the line of Confrontation Clause cases beginning with *Crawford v. Washington*,⁹⁶ and (2) the federal civil rights action brought under 42 U.S.C. § 1983, which was at issue in *Castle Rock v. Gonzales*.⁹⁷

A. *The Confrontation Clause Cases*

In *Crawford v. Washington*, the Supreme Court established a new test to determine whether admission of evidence from a witness unavailable at trial was constitutional under the Confrontation Clause.⁹⁸ Under the previous test established by *Ohio v. Roberts*, an unavailable witness' statement was admissible under the Clause if it had "adequate indicia of reliability," which could be established if the evidence fell within a "firmly rooted hearsay exception," or bore "particularized guarantees of trustworthiness."⁹⁹ In *Crawford*, the Court considerably narrowed the circumstances in which out of court statements could be admitted at trial, holding that statements from a witness who was unavailable to testify were inadmissible if they were "testimonial" and the defendant had not had an opportunity to cross-examine the witness.¹⁰⁰ The Court did not provide a definition of "testimonial" statements, other than that they were statements made in contemplation of being used at trial. It stated that a more precise definition was not necessary to decide the case at hand, because the

95. A recent example of a case which was helpful to enforcement of domestic violence laws is *United States v. Hayes*, 129 S. Ct. 1079 (2009) (holding that a domestic relationship need not be an element of an offense in order to qualify as a "misdemeanor crime of domestic violence," and thus a predicate for weapon prohibition under 28 U.S.C. § 922 (g)(9)).

96. 541 U.S. 36 (2004).

97. 545 U.S. 748 (2005). Of course, *United States v. Morrison*, 529 U.S. 598 (2000), which held that the civil rights provision of VAWA was unconstitutional, directly impacted the changes in domestic violence policy sought by the federal government. Despite the fact that the provision was not limited to intimate partner violence and included stranger crime, the Court considered this a "local" family issue, which did not provide the national scope to authorize Congress to act under the Commerce Clause. *Id.* at 608.

98. *Crawford*, 541 U.S. at 60–62.

99. 448 U.S. 56, 66 (1980).

100. *Crawford*, 541 U.S. at 53.

statement at issue was obtained from a witness during formal interrogation at a police station, and so clearly was testimonial.¹⁰¹

Crawford did not involve a domestic violence situation, but its implications for domestic violence cases were immediately apparent to prosecutors. Modern domestic violence prosecutions concentrate on the ability to proceed without victim testimony and to rely on other evidence at trial, including prior statements by victims.¹⁰² Prosecutors have successfully employed traditional hearsay exceptions, including excited utterance and present sense impression, to get these statements admitted. *Crawford*, however, raised a Confrontation Clause issue that previously had not been a concern.

In the companion cases *Davis v. Washington* and *Hammon v. Indiana*, the Court expounded on the definition of testimonial in the specific context of domestic violence.¹⁰³ In *Davis*, the statements at issue were made during a 911 call by a woman who told the operator that her ex-boyfriend was “here jumpin’ on me again,” and had just fled the scene.¹⁰⁴ In *Hammon*, a woman made oral statements to police who responded to a domestic violence call, which she repeated in a written and signed affidavit. The Court held that the statements to the 911 operator in *Davis* were not testimonial, but the statements to police in *Hammon* did meet the definition and must be excluded.¹⁰⁵ The Court noted that a formal interrogation was not necessary in order for statements to police to be considered testimonial, and it distinguished the statements in *Hammon* from those in *Davis*:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁰⁶

The Court found that the purpose of the 911 call in *Davis* was to obtain help from police during an ongoing emergency, whereas the

101. *Id.* at 52 (finding it unnecessary to define testimonial with specificity because statements at issue clearly qualified under any definition).

102. *See supra* text accompanying notes 17–18.

103. 547 U.S. 813 (2006).

104. *Id.* at 817–18.

105. *Id.* at 828.

106. *Id.* at 822.

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statements in *Hammon* were made after the fact, for the purpose of establishing past events.¹⁰⁷

While *Davis* did provide an opening for admission of out of court statements by domestic violence victims in limited situations, it was apparent that many such statements would not be allowed into evidence. Commentators have noted that the distinction between the circumstances in *Davis* and *Hammon* is less than clear since, in *Hammon*, the abuser remained in the home and had to be restrained by officers from interfering when the victim was giving her statement to police.¹⁰⁸ The emergency did not seem to be truly over, but merely at bay, while police remained on the scene. Conversely, in *Davis*, the Court made clear that not all 911 calls would be considered non-testimonial.¹⁰⁹

Prosecutors' concerns about the impact of *Crawford* and its progeny have been borne out. A roundtable of prosecutors, judges, advocates, and other domestic violence practitioners convened by the Office on Violence Against Women found that the rulings in the recent Confrontation Clause cases have had a widespread chilling effect on judges, prosecutors, and law enforcement.¹¹⁰ Many defense attorneys now pose a *Crawford* objection as a matter of course.¹¹¹ One roundtable participant cited the example of a judge who routinely dismisses domestic violence cases when a victim will not testify, assuming that there will be insufficient admissible evidence to proceed post-*Crawford*.¹¹² The *Crawford* line of case law has also increased prosecutors' reluctance to try cases with witnesses they deem unreliable, due to fear that the case will collapse without in-court testimony.¹¹³ Furthermore, law enforcement officers bring charges less frequently if they determine that a victim is unlikely to testify.¹¹⁴ Some officers also report that they feel crippled in their

107. *Id.* at 828.

108. See, e.g., Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 28–32 (2006).

109. *Davis*, 547 U.S. at 828–29 (withholding judgment on whether statements made during the 911 call when operator began to pose questions designed to obtain identification information about the defendant were testimonial).

110. Jennifer L. White, *Report: A Roundtable on the Impact of Crawford on Prosecution of Domestic Violence*, Center for Education on Violence Against Women (held on May 21, 2008), at 7.

111. *Id.*

112. *Id.* at 13.

113. *Id.*

114. *Id.*

investigations because they fear that their questioning will result in the victim statements being considered “testimonial.”¹¹⁵

It is true that *Davis* allows some room for admission of out of court victim statements, though this depends on how a court interprets an “ongoing emergency.”¹¹⁶ However, there is no question that *Crawford* and its progeny have set back some of the progress made in law enforcement and prosecutorial response to domestic violence in the past twenty-five years. Further, these decisions certainly have not encouraged aggressive efforts to obtain and identify evidence that does not require victim involvement in the prosecution of domestic violence cases. The Court’s decisions have also encouraged the perpetuation of some of the excesses of domestic violence policy reform that practitioners have been working to revise, such as increasing pressure on victims to testify. Unfortunately, *Crawford* and its progeny have placed another obstacle in an already difficult road to successful evidence-based domestic violence prosecution.

In both *Crawford* and *Davis*, the Court alluded to a possible exception to the Confrontation Clause requirements, the doctrine of forfeiture by wrongdoing.¹¹⁷ According to this doctrine, if a defendant obtains the absence of a witness by wrongdoing, he forfeits his confrontation rights on equitable grounds.¹¹⁸ In *Giles v. California*, the Court explored the scope and applicability of this

115. *Id.*

116. See *Giles v. California*, 128 S. Ct. 2678 (2008). One judge at the Roundtable argued that the requirements of *Crawford* and its progeny can be satisfied if judges understand the dynamics of domestic violence, prosecutors try cases diligently and law enforcement investigates effectively: “A judge can still find this is not like *Hammon* or *Davis* and find there was an ongoing emergency. The prosecutors need to supply me with something so I can say there was still an emergency, even though the cops were there. Just because he stepped out the door doesn’t mean the emergency is over.” White, *supra* note 110, at 14 (quoting a participant). The Report also notes that statements from the defendants themselves can be a good source of evidence post-*Crawford*. *Id.* Some of the language in *Giles v. California* may permit use of the doctrine of forfeiture by wrongdoing to avoid the Confrontation Clause requirements. See *infra* text accompanying notes 119–126.

117. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (“The rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”). In *Davis*, the Court stated: “We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’ That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Davis v. Washington*, 547 U.S. 813, 833 (2006) (citations omitted).

118. *Davis*, 547 U.S. at 833.

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doctrine in the domestic violence context.¹¹⁹ The defendant was charged with murdering his ex-girlfriend, and prosecutors sought to introduce statements that the victim had made to police responding to a domestic violence incident a few weeks prior to her death.¹²⁰ The state argued that it was the defendant's actions—namely, his fatal shooting of the victim—that caused her to be unavailable to testify; therefore, the doctrine of forfeiture by wrongdoing should prevent him from invoking his Confrontation Clause rights regarding the victim's prior statements.¹²¹

The Court recognized the doctrine but held that its scope was narrow. It stated that a defendant forfeited his Confrontation Clause rights only if his conduct was specifically intended to prevent the witness from testifying.¹²² Therefore, murdering an individual was not itself proof of forfeiture by wrongdoing unless the defendant's specific purpose in killing was to keep his victim from testifying. This of course would not apply to most murders, which are not focused on testimony at a future trial.

The majority opinion did acknowledge that domestic violence often is intended to prevent the victim from accessing help, including from law enforcement authorities. Therefore, in the context of an abusive relationship that leads to murder, the forfeiture doctrine could apply where the evidence shows such intent.¹²³ Writing for the majority, Justice Scalia emphasized, however, that this still required a mens rea of intent, rather than mere knowledge.¹²⁴

Other Justices expanded on the opening provided by Justice Scalia. In an opinion concurring in part, Justices Souter and Ginsburg argued that the intent required for the doctrine to apply “would normally be satisfied by the intent inferred on the part of the domestic

119. 128 S. Ct. 2678 (2008).

120. *Id.* at 2681.

121. *Id.* at 2682.

122. *Id.* at 2683; see Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 862 (2009) (noting that language on forfeiture in *Crawford* and *Davis* seemed to anticipate a broad interpretation of the doctrine and terming the Court's ruling in *Giles* “surprising”).

123. *Giles*, 128 S. Ct. at 2693.

124. *Id.* In an article published before the *Giles* decision, Deborah Tuerkheimer presciently argued utilizing the traditional forfeiture frameworks of “intent to procure” or “witness tampering” would be devastating to the successful application of the forfeiture by wrongdoing doctrine in the domestic violence context because it is the dynamics of abuse over the long term that cause the victim not to testify. See Tuerkheimer, *supra* note 108, at 37–49.

abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.”¹²⁵ Justice Breyer’s dissent, joined by Justices Stevens and Kennedy, elaborated: “[I]nsofar as Justice Souter’s rule in effect presumes ‘purpose’ based on no more than evidence of a history of domestic violence, I agree with it.”¹²⁶

Therefore, it appears that at least five Justices believed that forfeiture by wrongdoing is more likely to apply in the context of a history of domestic violence between the perpetrator and victim who is now unavailable to testify. However, how much must be proven to trigger the doctrine is not entirely clear, and these Justices did not seem to agree on the requirements. As in *Davis*, some opportunity exists for admission of testimony of unavailable witnesses in domestic violence cases, but the extent of that opportunity is not well defined and thus depends upon the interpretation of the trial judge. While *Crawford* and *Davis* preserved the possibility of the forfeiture by wrongdoing doctrine, *Giles* demonstrates that its application will be neither straightforward nor reliable.

B. Suing the Police for Failure to Enforce Domestic Violence Laws

In *Castle Rock v. Gonzales*, the Supreme Court considered whether Colorado’s statute mandating arrest for violations of protection orders created an entitlement or property interest in the party seeking enforcement.¹²⁷ Jessica Gonzales brought a federal civil rights claim under 42 U.S.C. § 1983 against the city of Castle Rock and its police department after her ex-husband took their three children in violation of a protection order and ultimately killed them. She argued that her procedural due process rights were violated because, despite her repeated calls to police to notify them that her husband had taken the children in violation of an order, they failed to take any steps to arrest him.¹²⁸ The issue of whether or not a constitutionally-protected entitlement or property interest existed was critical to whether Gonzales could state a violation of her procedural due process rights, and thus state a claim under section 1983. The Colorado statute said that “[a] peace officer shall use every reasonable means to enforce a restraining order,” and that:

125. *Giles*, 128 S. Ct. at 2694–95 (Souter, J., concurring in part).

126. *Id.* at 2709 (Breyer, J., dissenting).

127. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750 (2005).

128. *Id.* at 751.

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[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a restraining order¹²⁹

The protection order form also contained a warning to respondents and provided notice to law enforcement, describing the arrest requirement using language from the statute.¹³⁰ Despite this language, however, the Court held that the police were not required to make an arrest, as they always are allowed to exercise some discretion.¹³¹ Therefore, Gonzales had no property right or entitlement in enforcement of the order, and thus no procedural due process claim.¹³² The Court dismissed the section 1983 action for failure to state a claim.¹³³

The decision has had multiple repercussions for domestic violence victims. Of course, it bars victims from suing cities and law enforcement in federal court for failing to enforce the changed domestic violence arrest policies that were so hard fought. The Court makes mention of the possibility that such plaintiffs could bring their claims under state causes of action.¹³⁴ However, state remedies are not feasible due both to heightened intent requirements and a causation element. In fact, in state court, the causation element would have required the police to have reasonably foreseen that Gonzales' ex-husband would murder her children.¹³⁵ In *Castle Rock*, the Supreme Court effectively denied victims the ability to hold police accountable for failure to follow the law. In addition, the decision diminished the value of protection orders themselves. If victims have no assurance that police will enforce the orders and no effective

129. *Id.* at 758–59 (citing COLO. REV. STAT. § 18-6-803.5(3) (1999)).

130. *Id.* at 752.

131. *Id.* at 760.

132. *Id.* at 768.

133. *Id.* at 769.

134. *Id.* at 768–69.

135. See Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L.R. 1441, 1504–05 (2006) [hereinafter *The Domestic Relations Exception*]; Brief for the National Ass'n of Women Lawyers et al. as Amici Curiae Supporting Respondent at 11–12, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04–278).

measure to ensure that they do, ultimately there is less incentive for victims to obtain an order in the first place.¹³⁶

Without question, many explanations for the Court's rulings in the Confrontation Clause cases and in *Castle Rock* exist. Nonetheless, both the Confrontation Clause decisions and *Castle Rock* reveal at best a misunderstanding of domestic violence. In *Davis* and *Hammon*, the Court drew a distinction without a difference, construing the situation facing the battered woman in *Hammon* as a non-emergency, though police were fending off her husband as she tried to speak to them. The stricter Confrontation Clause test of *Crawford* was applied narrowly in a domestic violence setting. In *Castle Rock*, the Court interpreted a statute with the words "shall arrest" to be discretionary, ignoring both the language of the entire bill—which included several provisions to strengthen domestic violence law enforcement—and legislative history demonstrating that this was the statute's purpose.¹³⁷

Although the Justices may not have deliberately set out to place obstacles in the path of effective domestic violence policy, these cases suggest a blindness to the realities of the situations presented. As in the battered women's self-defense cases and the treatment of marital rape, it seems that very traditional images of battered women and views of marital roles are at work in the depths of these opinions.

CONCLUSION

This Article identifies key areas in which changes in domestic violence criminal justice policy, while significant in many ways, have been incomplete. The use of expert testimony in battered women's self-defense cases, the law and prosecution of marital rape, and Supreme Court case law affecting domestic violence, all demonstrate limitations in society's attempts to effectively address domestic violence.

However, the reason for these limitations on furthering domestic violence policy is not easily explained or understood. It cannot be simply that there has not been adequate time for domestic violence reforms to settle in. Although more time and refinement of the policies undoubtedly will contribute to their institutionalization, in

136. See Sack, *The Domestic Relations Exception*, *supra* note 135, at 1508–09; Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 13–15, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04–278).

137. See Sack, *The Domestic Relations Exception*, *supra* note 135, at 1507.

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many jurisdictions the “new” reforms have been in effect for over 20 years. I believe the problem lies deeper—in beliefs and values we thought we had expunged many years ago. In order to understand this collective resistance to fundamental change in the criminalization of domestic violence, we must understand the impact that coverture and its concepts of women continue to have on modern attitudes.

The process is more difficult than previously imagined some decades ago. Ultimately, the only path toward changing attitudes about domestic violence is a re-concentrated effort on the unfinished work of the women’s movement. Despite some attempts to argue that women have achieved equality and that feminism is no longer necessary, such work is far from complete. If we truly care about eradicating domestic violence, we have to take on the even more challenging job of winning women’s equality throughout the strata of our law, our policy, and our values.

