

Dealing With the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women— A Tenth-Year Reflection

Linda L. Ammons*

It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman . . . [T]hat woman should be permitted to mix professionally in all the nastiness of the world which finds its way into the courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies. . .the vices and all the infirmities of all society with which the profession has to deal. . . .¹

INTRODUCTION

When I was in law school, I was often asked the inevitable question, "What type of law do you want to practice?" Like many law students, I was not sure. However, I do remember being quite clear about what I did not want to do. I told people with an air of confidence that I had no interest whatsoever in domestic relations or criminal law. In fact, I was so assured that my career path

* Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. The author would like to acknowledge the assistance of The Cleveland-Marshall Fund in the preparation of this article and thank the following persons: Paul Carrington, Diane Adams, Patti Falk, Phyllis Crocker, Dena Davis, Lynne Henderson, April Cherry, Leslie Hayashi, Lilian Bahgat, Wendy Woodford, Marie Rehmar, Ellen Quinn, Tom Hurray, Schuyler Cook, Jessica Mathewson, Bae Smith, Leon Boyd, Harold Jackson, Aaron Germ, Denise Carpenter, and Nancy Erickson.

1. In re Goodell, 39 Wis. 232, 245-46 (1875).

would lead me elsewhere that I left the study of family law to the bar preparation course.

During my law school matriculation, the number of women students was beginning to increase dramatically. The words "affirmative action" were just beginning to be used as code words to indicate that some students, primarily black but also sometimes women, had somehow fooled administrators into allowing them access to legal education. New courses like Sex Discrimination Law were being added to the curriculum. Before taking this class, I thought I fully understood what discrimination was all about. I am an African-American woman, a child of the fifties and sixties, and I had often been the first of my kind in many (particularly career) situations. Feminism and women's studies were not new topics for me. On my own and in graduate school, I had read many of the books in the emerging feminist canon. I was not afraid to be identified with a group of persons who believed that women were fully human and had the God-given right to determine for themselves their destinies. I was probably drawn to the sex discrimination class for a variety of reasons, not really sure of what to expect but willing to be open to whatever I could learn.

I do not remember how much time we spent on the topic of battered women. Textbooks on gender or women and law were scarce. The professor had to compile handouts on current issues. Employment discrimination and reproductive freedom were the hot topics then, and the core of feminist jurisprudence was equality theory. What I do remember is being one of a handful of women who were challenged by a thoughtful, tough female law professor² first to learn and then to question the rules, the analysis and the obvious. I left law school thankful that I had been exposed to an expanding area of law that would or should help women in their quest of full citizenship.

I was hired in the public sector and my career was

2. Nancy Erickson was Assistant Professor of Law at Ohio State University College of Law.

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very fast-tracked. One day I found myself responsible for giving good counsel to the sixty-fifth governor of the state of Ohio. I had been hired to handle regulatory, administrative, and criminal justice matters (prisons), and I remained with this administration until the day the governor left office.

PHILOS AND PRAXIS, MUCH MORE THAN JUST THE FACTS

A lawyer is either a social engineer or . . . a parasite on society.³

One day in 1989, I received an e-mail from then Governor Richard Celeste that he wanted to review cases of incarcerated women who had been battered. Although consulted from time to time, I was neither the point person for women's issues, nor was I the person in charge of the routine requests for clemency, but as the gubernatorial liaison to the Department of Rehabilitation and Correction, this was clearly my assignment.

Recovering from the shock of the enormous nature of the request, I began to catalog the resources from which I could draw to complete the task. For some reason, I had kept on the corner of my cluttered desk a page torn out of the American Bar Association Journal. That scrap of paper had sat on my desk for weeks, perhaps months, and each time I thought to throw it away, I could not. The article reviewed two newly published books. The first was *Justifiable Homicide* by the late Cynthia Gillespie. Gillespie's book was about battered women who had killed their abusers while trying to defend themselves. The second publication was by Lenore Walker on the battered woman syndrome.

I immediately secured the books, and after reading them, decided that I needed to consult with someone who would understand that this project would not be like the

3. Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 218 (1983).

other routine clemency requests that governors receive. The first person that came to mind was my sex discrimination law professor. By this time, this scholar was no longer at my alma mater and was visiting elsewhere. I knew that she had been working on a project concerning sex discrimination and criminal law. After a conversation with her about additional resources (which were few), I began the process of consciousness raising⁴ by re-educating myself, prison officials, the governor, and his staff, on this complex, controversial issue. Coupling social science, feminist, and womanist⁵ methodologies, I insisted that the women be able to tell their stories.⁶ The clemency petition would provide that opportunity; however, in my opinion, that forum would not be enough. It was important to understand both the unique set of circumstances (a discrete event) that led to each woman's incarceration, as well as the continuum of behavior by the woman and her batterer and the systemic recurring issues that could be flagged in the narratives that might not be included or be

4. See Catherine A. MacKinnon, *Toward a Feminist Theory of the State* 83 (1989).

5. As an African-American female, I also identify with a description of feminism that has been carved out by women of color. Author Alice Walker created this term in her book, *In Search of Our Mother's Gardens*, and defined it as, "a black feminist who continues the legacy of outrageous, audacious, courageous and willful responsible, in charge, serious . . . women who are agents for social change for the wholeness and liberation of black people, and by extension, the rest of humanity." See Irene Monroe, *Womanism*, in *Africana: The Encyclopedia of the African and African-American Experience 2006* (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 1999).

6. Story telling, while not exclusive to African-Americans, has always been integral to the African and African-American cultures. On the African continent, Griots (story tellers) are persons of honor, who in some ethnic groups spend their lives doing this work. The use of the narrative to instruct, entertain, heal, motivate, and inform is central to African-American life. In the legal academy, there has been much debate and confusion about the use of narrative, particularly when scholars of color employ this technique to illustrate a theory or prove a point. However, every time a case is tried, read, or discussed, a story is told. Nobel Laureate Toni Morrison explaining why storytelling might be threatening, says "Narrative is radical, creating us at the very moment it is being created." See Toni Morrison, Nobel Lecture, at <http://nobel.sdsc.edu/literature/laureates/1993/Morrison-lecture.html> (Dec. 7, 1993).

apparent in the petitions. In other words, to understand fully the battered woman's state of mind at the time of the incident, I felt we needed to find out whatever we could about her socio-familial history (including her upbringing), her psychological profile,⁷ the batterer's background, his reputation, and his prior bad acts.

During this time, while prison officials were collecting the routine data for clemency review,⁸ the women in prison were given a voice, perhaps for some for the first time. I told prison officials to assign a researcher to interview women who claimed to have been battered. The interviewees were allowed to tell their stories their own way. These narratives compiled and forwarded to me would later provide context and in many cases, clues to incomplete records and the cold facts recorded by bureaucrats. A year after I received the initial e-mail that began this process, one hundred and three cases were delivered to me.

When I read the first file, my reaction was much like the movie depiction of the rookie detective witnessing a first autopsy. I was sick to my stomach. Despite the fact that I had been preparing for over a year by reading numerous accounts of domestic torture, I could not get past my initial visceral reaction to the parade of horrors in front of me. I thought there was nothing left to shock me. I was wrong. The stories in the books I had read were of

7. Dr. Maureen Black, a staff psychologist was assigned to this project. Other psychologists have been interested in stress disorder symptomatology exhibited by battered women in prison. See Maura O'Keefe, *Posttraumatic Stress Disorder Among Incarcerated Battered Women: A Comparison of Battered Women Who Killed Their Abusers and Those Incarcerated for Other Offenses*, 11 *J. Traumatic Stress* 71, 80 (1998). In comparing battered women in prison with other incarcerated women, O'Keefe found, "that a high percentage of incarcerated battered women experienced severe spousal abuse and are currently experiencing significant symptomatology." *Id.* at 80.

8. For more details on the role of the Ohio Adult Parole Authority (the administrative agency responsible for clemency and other prison-related hearings) and the battered women's project, see Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 *J.L. & Pol'y* 1, 20-22 (1994) [hereinafter *Discretionary Justice*].

people with whom I had had no contact. I could afford to be sympathetic or ruthlessly indifferent and no one would be at risk. The decisions to be made on cases in front of me were the last appeals for justice and mercy. In one case, my recommendation could make the difference between life and death. I closed the file, prayed for strength and objectivity and went home.

My other duties continued while I tried to complete this process and time was running out. In addition to handling issues in seven other agencies, and trying to prepare for transition for a new administration, I was monitoring the media leaks on this issue, and I was being called upon by our media staff to strategize as to how to frame the issues and deal with speculation and misinformation. After months of reading files, finding trial transcripts and newspaper accounts, chasing clues to either confirm or discredit proffered information, talking to experts, lawyers, and witnesses, and juggling the above mentioned other responsibilities, I made my recommendations to the governor. His final decisions and my recommendations were not identical, but there was very little variance.

Governor Celeste was not the first person to announce publicly that he would provide this type of relief for a battered incarcerated woman,⁹ but he was the first to review systematically these kinds of cases. Ten years ago, Governor Richard F. Celeste, granted clemency to twenty-eight incarcerated women.¹⁰ These women claimed that they were acting in self-defense.¹¹ The sentences of most of these women were reduced to time served.¹² Celeste gave a pardon to one woman who had already returned to society,¹³ and he commuted a death row woman's sentence

9. See Rob Karwath & Hanke Gratteau, *Edgar Frees Woman Who Killed Lover, Ex-Convict Boyfriend Was Abusive*, Chi. Trib., Feb. 4, 1993, at 1N.

10. See *Discretionary Justice*, supra note 8, at 2-3.

11. *Id.* at 3.

12. These women were to also perform 200 hours of community service.

13. Kathy Thomas had already served her time. She was the defendant in the Ohio Supreme Court case, *State v. Thomas*, 423 N.E.2d 137 (Ohio 1981). The court ruled that battered woman syndrome testimony would not be admitted in

to life in prison.¹⁴ This process was not a general amnesty for women claiming abuse. Each case was reviewed and decided on its own merits. Of the one hundred and twenty three cases reviewed, almost half were denied clemency and another quarter were sent back to the parole board for more fact-finding because the data on those women were not sufficient to make a determination. The requested information was not received in time to take any definitive action.

A BATTERED WOMAN'S WORLD, CIRCA 1990.

The teaching of violence is so pervasive,
so totally a part of male experience, that
I think it best to acknowledge this teaching
as a civic rather than as a cultural or as a
social phenomenon.¹⁵

A decade ago, the plight of battered women was not a part of the national consciousness. The physical security of women in their homes was not a societal priority. Battered women advocates struggled to get the attention of politicians, law enforcement, legislators, courts, health care providers, clergy,¹⁶ and lawyers. The now articulated norm of recognizing a woman's right to live free of gender-based violence in the home did not resonate as being an aspect of full citizenship. Domestic terrorism was considered a private, personal problem not suited for public discussion or public remedy.

When the Ohio governor was considering what to do about the unjust result of sending women to prison for long periods of time and in one case, a woman to the electric chair because they defended themselves and they could not

cases like Kathy's because that type of evidence was not scientific. *Id.* at 138 n.1.

14. Beatrice Lampkin remains in prison.

15. Wayne Ewing, *The Civic Advocacy of Violence*, in *Men's Lives* 358, 396 (Michael S. Kimmel & Michael A. Mesner eds., 2d ed. 1992).

16. See generally Linda L. Ammons, *What's God Got To Do With It? Church and State Collaboration, in Subordination of Women and Domestic Violence*, 51 *Rutgers L. Rev.* 1207 (1999); see also Nada L. Stotland, *Tug-of-War: Domestic Abuse and the Misuse of Religion*, 157 *Am. J. Psychiatry* 696 (2000).

get a trial that would tell the complete story,¹⁷ all fifty states, the District of Columbia, and Puerto Rico had some version of domestic violence legislation on the books.¹⁸ However, ten states barred women from bringing tort suits against their battering husbands.¹⁹ The United States Commission on Civil Rights had sponsored a public policy forum on issues related to battered women twelve years before.²⁰ Despite the fact that books on domestic violence had been published in the mid seventies,²¹ in 1990, neither the media nor the general public was focused on the importance of eliminating domestic violence. The Lorena Bobbitt²² and the O.J. Simpson trials²³ were yet to make front-page news. The United States Surgeon General had just declared domestic violence an epidemic.²⁴ There was

17. See Discretionary Justice, *supra* note 8, at 18-19.

18. See Linda B. Lengyel, Survey of State Domestic Violence Legislation, 10 Legal Reference Service Q. 59, 79-82 (1990).

19. See Women & Violence: Hearing Before the Senate Comm. on the Judiciary, 101st Cong. 57, 59, 64 (1990) (statement of Helen Neuborne, Executive Director).

20. See Battered Women: Issues of Public Policy, A Consultation Sponsored by the United States Commission on Civil Rights, Wash. D.C. (1978).

21. See generally Erin Pizzey, *Scream Quietly or the Neighbors Will Hear* (1977); Del Marin, *Battered Wives* (1976).

22. See David Margolick, Lorena Bobbitt Acquitted in Mutilation of Husband, N.Y. Times, Jan. 22, 1994, at A1; see also Robert Nigro, Kemler Says Hype Overshadowed Real Issues in [Lorena Bobbitt Trial](#), Phila. B. Rep., Feb. 28, 1994, at 1.

23. See generally *People v. Simpson*, No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995).

24. See Linda L. Ammons, Mules, Madonnas, Babies, Bathwater, Racial Imagery, and Stereotypes: The African-American Woman and the Battered Woman Syndrome, 1995 Wis. L. Rev. 1003, 1017 n.66 (1995). As of 1998, the National Institute of Justice Centers for Disease Control and Prevention reported that 25% of women as compared with 8% of men surveyed said they were raped and/or physically assaulted by a current or former spouse, cohabitating partner, or date at some time in their life. See Patricia Godeke Tjaden & Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey, National Institute of Justice Centers For Disease Control and Prevention, Research in Brief 6 (Nov. 1998). Researchers also found that 76% of women, raped and/or physically assaulted since the age of eighteen were violated by a former husband, cohabitating partner, or date, and that most violence against women (93%) was perpetrated by males. *Id.* at 8. In an exhibit on the average annual injury and care utilization for physical assault of women, it was estimated that 5.9 million physical assaults

no twenty-four hour national hotline for victims of domestic violence.²⁵ The National Center for Disease Control (CDC) was in the fledgling stages of providing data and assistance on this issue.²⁶ The CDC and the National Science Foundation had not co-sponsored a study on gun use in households.²⁷ The United States Justice Department Bureau of Justice Statistics was just beginning to revise its statistical data on intimate violence.²⁸ That agency had not yet discovered that domestic violence costs sixty-seven billion dollars a year in property damage and loss, medical costs, mental health care, police, fire and victim services, and worker productivity.²⁹ The American Medical

(excluding rape) against women occur each year. Over 500,000 women receive hospital care; 367,784 are seen by doctors; 69,393 require dental care; 124,908 get paramedic attention; and 62,454 are sent to physical therapy because of their injuries. *Id.* at 11.

25. In one year this hotline received 87,847 calls. See American Bar Association Commission on Domestic Violence, *When Will They Ever Learn? Educating To End Domestic Violence*, A Law School Report 21 (1997). In 1992, 65,000 domestic violence calls were made to Columbus, Ohio's 911 emergency line. See Fund for the Feminist Majority: Hearing Before The Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights*, House Comm. on the Judiciary, 103d Cong. 114-15 (1993) (testimony by Eleanor Smeal, President) [hereinafter House Judiciary Hearing, VAWA].

26. See Centers for Disease Control and Prevention: Hearing Before Subcomm. on Human Resources and Intergovernmental Relations, Comm. on Gov't Operations, 103d Cong. 68 (1994) (discussing what the agency can do to have a closer partnership with advocates working on the domestic violence issue).

27. *Id.* at 76.

28. See U.S. Dep't of Justice, Bureau of Justice Statistics Factbook, *Violence By Intimates, Analysis of Data On Crimes By Current or Former Spouses, Boyfriends and Girlfriends* viii (Mar. 1998) [hereinafter *Violence By Intimates*]. The Bureau states that in the latter part of the 1980's, the DOJ and the Committee on Law and Justice of the American Statistical Association wanted to improve the National Crime Victimization Survey so that rape, sexual assault, and family violence were better reflected in their reports. *Id.* The new questions and procedures were not fully adopted until 1993. *Id.* In 1996, three out of four of the 1800 murders in the United States committed by intimates had a female victim. *Id.* at v. This figure represents a decline in spousal killings over the past two decades. *Id.*

29. See Roberta L. Valente, American Bar Association Commission on Domestic Violence, *Domestic Violence and the Law*, in *The Impact of Domestic Violence on Your Legal Practice: A Lawyers Handbook* 1-1 (1996) (citing Ted R. Miller et al, National Institute of Justice, U. S. Dep't of Justice, *Victim Costs and Consequences*, A New Look 18-19 (1996)).

Association had not released its findings that 22 to 35% of the women in emergency rooms were there because of repeated abuse.³⁰ The Joint Commission on the Accreditation of Health Care Organizations would two years later institute a requirement that all emergency rooms and ambulatory care facilities have written policies and procedures to guide the identification and care of victims of domestic violence.³¹ A decade ago, there were no specific protocols established by those training doctors on how to treat battered women for the numerous injuries they sustained.³² Researchers were not yet publishing their data, which indicated that battered women are four to five times more likely than non-battered women to need psychiatric treatment, and five times more likely to attempt suicide.³³ The World Health Organization was yet to articulate the health consequences of violence against women.³⁴ The United States General Accounting Office had

30. The A.M.A. published its report in 1992. See *Violence Against Women: Relevance for Medical Practitioners*, 267 *J. Am. Med. Assoc.* 3184, 3184-89 (1992).

31. See Oral Testimony of the American College of Emergency Physicians (ACEP) before the House Government Operations Comm., Subcomm. on Human Resources and Intergovernmental Relations, 103rd Cong. 137 (1994). JCAR did not begin these practices until 1992. *Id.*

32. In 1994, nearly 37% of violence related injuries of women seen in hospital emergency rooms were inflicted by an intimate. See Michael R. Rand, *Violence-Related Injuries Treated in Hospital Emergency Departments*, Bureau of Justice Statistic, U.S. Dep't of Justice 5 (Aug. 1997). A Centers for Disease Control and Prevention Study indicates the following ; "[e]ach year vast numbers of women must seek medical treatment for severe injuries such as head and facial injuries, burns, knife wounds, broken bones, spinal injuries, internal bleeding, gunshot wounds, breast mutilation, and injuries to sex organs." The Centers for Disease Control and Prevention, *Healthy People*, Nov. 3, 2000, at 1. Additionally women suffer from neurological damage and permanent disabilities. *Id.* A recent newspaper article cited a Wisconsin hospital study, which indicated that emergency room personnel and other medical providers still need more training in this area. See Sabrina Eaton, *Hospital Staffs Urged To Learn To Aid Victims Of Violence In The Home*, *Clev. Plain Dealer*, Aug. 7, 2000, at 1E. An Ohio Hospital Association spokeswoman stated that most hospitals in her state do not regularly train employees to "recognize domestic violence symptoms." *Id.*

33. See Evan Stark & Anne Flitcraft, *Spouse Abuse in Violence in America: A Public Health Approach* 123, 141 (Mark Rosenberg & Mary Ann Fenley eds., 1991).

34. The WHO lists those factors as nonfatal physical outcomes, including injuries from lacerations to fractures and internal organ injury, unwanted

not quantified how batterers sabotage the independence efforts of welfare-dependent mothers.³⁵ Five years later, the United States Justice Department and the U.S. Department of Health and Human Services formed the Advisory Council on Violence Against Women.³⁶ The Violence Against Women Act³⁷ (VAWA) had just been introduced into Congress.³⁸ States' Attorneys General were about to give VAWA their endorsement.³⁹ Congress had

pregnancy, gynecological problems, STDs including HIV, miscarriage, pelvic inflammatory disease, chronic pelvic pain, headaches, permanent disabilities, asthma, irritable bowel syndrome, and self-injurious behaviors like smoking and unprotected sex. The mental health consequences are: depression, fear, anxiety, low self-esteem, sexual dysfunction, eating disorders, obsessive-compulsive disorder, and post traumatic stress disorder. The fatal results are: suicide, homicide, maternal mortality, and HIV/AIDS. See World Health Organization Consultation, *Violence Against Women, Gender and Health Equality* 2-4 (1996).

35. See *Domestic Violence, Prevalence and Implications for Employment Among Welfare Recipients*, United States General Accounting Office, Health, Education and Human Services Division 7-8 (Nov. 1998). In government surveys 33 to 46 % of responding battered women reported that their partners prevented them from working. *Id.* at 7. Women told researchers that the abusers would promise daycare and then not follow through, as well as destroy or hide items women needed for employment, inflict visible signs of abuse like bruises, black eyes, and cigarette burns, so that they would be too embarrassed to go to training, work, or on an interview. *Id.* If the woman were successful enough to obtain a job, some batterers would frequently call them during the day, come to the worksite unannounced, and/or cause disruption at her place of employment. *Id.* "Seventy percent of the surveyed women stated that their job performance was negatively affected by the abuse and about 50% said that they felt they had lost opportunities for salary and career advancement because of problems related to abuse." *Id.* at 8.

36. See *Violence Against Women Act: Hearing Before the Senate Comm. on the Judiciary, 105th Cong. 42* (1996) (statement of Janet Reno, U.S. Attorney General); see also *Agenda for the Nation on Violence Against Women* at www.ojp.usdoj.gov/vawo/advisory.htm.

37. Pub L. No. 103-322, Title IV, § 40302, Sept. 13, 1994, 108 Stat. 1941, (codified in scattered sections of 42 and 28 U.S.C.). The Judicial Conference initially opposed the passage of the Act. See *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 103d Cong. 70-72* (1993).

38. The Supreme Court found 42 U.S.C. § 13981 (1994) unconstitutional on May 15, 2000, in *United States v. Morrison*, 529 U.S. 598 (2000). For a discussion of *Morrison*, see section *infra* entitled "A Forum in the Highest Court?"

39. See *Violence Against Women: Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary, 102d Cong. 37-38* (1991); *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 103d Cong. 34-36* (1993).

not made a finding that: “existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress of the laws to which they are entitled.”⁴⁰ Laws against discrimination against battered women by insurance companies had not been introduced into Congress.⁴¹ Provisions in the Internal Revenue Code

In the winter 1990 meeting, the National Association of Attorneys General passed a resolution asking for the passage of VAWA. *Id.* at 37. The Attorneys General that were on record in support of the Act included: Connecticut, Delaware, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia, and Wisconsin. See House Judiciary Hearing, VAWA, *supra* note 25, at 36. In a letter to Congress in 1993, the state Attorneys General said:

[T]he current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. (VAWA) would begin to meet those needs by . . . creating a specific federal civil rights remedy for victims of gender based crime.

Id.

40. See H.R. Rep. No. 103-711, at 385 (1994).

41. Senator Paul D. Wellstone of Minnesota introduced S. 1069, The Battered Women's Economic Security and Safety Act in the 106th Congress (May 18, 1999). Subtitle C § 1021 was the Victims of Abuse Insurance Protection provision. The discriminatory acts that were prohibited included:

1. Denying, refusing to issue, renew or reissue or canceling or otherwise terminating an insurance policy or health benefit plan;
2. Restricting, excluding or limiting insurance coverage for losses or denying a claim, except as otherwise permitted or required by State laws relating to life insurance beneficiaries;
3. Adding a premium differential to any insurance policy or health plan.

Id. at § 1023.

This bill was referred to the Senate Finance Committee and nothing more happened. A similar bill (S. 2558) was introduced in the 105th Congress and died there. Other provisions of Wellstone's 1999 Omnibus bill included:

- providing specified appropriations to assist in providing housing and financial assistance for victims to leave their residences because of domestic violence;
- assisting tribal governments in strengthening law enforcement efforts and to enforce protection orders;
- prohibiting employer discrimination based on a person's status as a victim

that would grant immunity from penalties to battered women when forced to sign fraudulent tax returns did not exist.⁴² Immigration laws left battered immigrant women at the mercy of their abusers, who could refuse to certify that they were good wives; as a result, deportation was always hanging over their heads.⁴³

When Governor Celeste and I were scrutinizing the cases before us, states were updating their criminal code provisions to include domestic violence.⁴⁴ However, statutes and ordinances did not provide for warrantless arrests of

of domestic violence;

mandating unemployment compensation coverage for battered persons separated from employment;

and amending the Family and Medical Leave Act of 1993 to entitle leave to employees that must address the effects of domestic violence.

Id.

42. See I.R.C. § 3304(a) (West 1986).

43. See 8 U.S.C. § 1254(a)(3) (1994). The Congress has also amended the INS Act to protect immigrant women from batterers by giving the INS the power to deport aliens that commit domestic violence crimes. See 8 U.S.C.S. § 1227(a)(2)(E) (1997); Tien-Li Loke, *Trapped in Domestic Violence: The Impact of U.S. Immigration Laws on Battered Immigrant Women*, 6 B.U. Pub. Int. L.J. 587 (1997).

44. All fifty states have protection order laws. Most states have enacted domestic assault and/or battery laws. Those jurisdictions include: Alaska Stat. § 12-55.135(g), (h) (Michie 2000); Ariz. Rev. Stat. § 13-3601, 13-3601.01, 13-3601.02 (1989); Ark. Code Ann. §§ 5-26-303 to 306 (Michie 1997); Cal. Penal Code § 273.5 (West 1999); Colo. Rev. Stat. § 18-6-801 (1999), 16-21-103(2)(b) (1998); Fla. Stat. Ann. §§, 784.035, .036 (repealed); Ga. Code Ann. § 16-5-23.1(f) (1999); Haw. Rev. Stat. § 709-906 (1993); Idaho Code § 18-918 (Michie 1997); Ind. Code Ann. §§ 35-42-2-1 (1998); Iowa Code Ann. § 708.2 (West 1993); Kan. Stat. Ann. § 21-3412 (1995); Ky. Rev. stat. Ann. § 508.032 (Michie 1999); Mich. Stat. Ann. §§ 28.276, 276(1), (2) (Michie 1938); Minn. Stat. Ann. § 609.224 (West 1997); Mo. Rev. Stat. § 565.070(4), 1998 Acts, HB 1918 § 1 (1999); Miss. Code § 97-3-7(3) (1999); Mont. Code Ann. § 45-5-206 (1999); Nev. Rev. Stat. § 200.485 (Michie 1987); N.M. Stat. Ann. §§ 30-3-12 to 16 (Michie 2000); Ohio Rev. Code Ann. § 2919.25 (Anderson 1999); Okla. Stat. tit. 21 § 644 (C) (2001); Or. Rev. Stat. § 163.160 (1999); R.I. Gen. Laws § 12-29-5 (1994); S.C. Code Ann. §§ 16-25-20 to 65 (Law. Co-op. 1985), § 16-25-65 (Law. Co-op. 2000); Tex. Penal Code Ann. § 22.01(b); Utah Code Ann. § 77-36-1.1 (1999); Vt. Stat. Ann. tit. 13 § 1042-1044 (1998); Va. Code Ann. § 18.2-57.2, 18.2-57.3 (Michie 1996); W. Va. Code § 48-2A-10d (1999); Wis. Stat. Ann. § 939.621 (West 1996); Wyo. Stat. § 6-2-501(e) (Michie 1999). Domestic assault or battery mentioned as a secondary topic in: Conn. Gen. Stat. § 46b-38a(2) (2000); Nev. Rev. Stat. § 171.137 (Michie 1987); N.Y. Crim. Pro. §140.10 (1992); S.D. Cod. Laws §23a-3-21 (Michie 1998).

batterers by police based on probable cause.⁴⁵ Police departments were not taking seriously the duty to train their officers on how to respond appropriately to domestic violence calls. In more than half the states, a man could legally rape his wife.⁴⁶ The term “stalking” had no real legal significance.⁴⁷ Fewer than twenty states had completed their gender bias task forces.⁴⁸ The American Bar Association’s recommendation condemning lawyers and judges who commit domestic violence and/or condone such behavior in their professional capacities did not exist.⁴⁹ The National Council of Juvenile and Family Court

45. See Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence, The Criminal Justice Response* 121 (2d ed. 1996) (“Pennsylvania is noted as being the first jurisdiction in 1977 to allow police to make warrantless arrests in domestic violence situations.”).

46. See National Center on Women and Family Law, *Marital Rape Exemption* (1988).

47. In 1990, California was the first state to expand its harassment and threatening laws by adopting a stalking law. See Cal. Penal Code § 646.9 (West 1990). For a discussion on gender and stalking, see U.S. Dep’t of Justice, *The Third Annual Report to Congress Under the Violence Against Women Act, Stalking and Domestic Violence* (1998). The report stated that 87% of the stalkers were male. *Id.* at 5. The data show that 8% of all women will be stalked during their lifetime, as compared with 2.2% of men who will be stalked. *Id.* at 6.

48. Those states included: California, Colorado, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Rhode Island, Utah, and Washington. Ohio did not complete its task force report until 1995. For a discussion on what state court taskforces identified as the inadequacies of states in dealing with domestic violence, see Brief of Arizona et al., at 5, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

49. See A.B.A., Recommendation 120, in *Reports with Recommendations to the House of Delegates* 13 (Aug. 5-6, 1996). The A.B.A. also called for the development of interstate and intrastate computer registries of protection orders, training of police, judges, and medical professionals about the full faith and credit mandate, and the development of state, territorial, tribal, and local protocols to remove barriers to enforcement of foreign protection orders and prioritize victim safety. *Id.* In 1997, Baltimore County Circuit Judge Thomas J. Bollinger, removed himself from a case where he had ruled that a man who beat his estranged wife could have that conviction erased so that the batterer could join a country club. See *Judge Rescinds Ruling That Clear Man Of Beating Wife: Impartiality Questioned*, *Chi. Daily L. Bull.*, Feb 11, 1997, at 3. The abuser was initially sentenced to ninety days in a work release program, a five hundred dollar fine, counseling, and three years probation. *Id.* When the public learned what the judge had done, Bollinger reversed his decision and further asked that he not be assigned to cases “dealing with rape, sexual offense and domestic violence.” *Id.* This same judge had been labeled one of “America’s Most Sexist

Judges had not adopted the Model Code on Domestic and Family Violence.⁵⁰ Domestic violence courts were virtually non-existent. The United Nations had not taken steps to call for the elimination of violence against women in all forms, in public and private life.⁵¹ The World Bank would not publish its discussion paper on the health burden of domestic violence until 1994.⁵²

Ten years ago, according to the Department of Justice, women were more likely to die at the hands of their intimate partners than from any other cause.⁵³ In 1990,

Judges” by a woman’s magazine for telling a female lawyer she could take off anything she wanted in his courtroom and had been reprimanded by a state judicial board for saying that “an unconscious woman in bed was the ‘dream of a lot of males, quite honestly.’” He made this statement in connection with granting probation to a man convicted of raping a drunken woman. *Id.*; see also Zanita Fenton, *Mirrored Silence: Reflections On Judicial Complicity in Private Violence*, 78 Or. L. Rev. 995 (1999) (arguing that judges should use rhetorical strategies designed to get the full story); James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (1999) (focusing on women attempting to get protective orders). For a review of this book, see Kathleen Waits, *Insights Into the Judicial Response to Domestic Violence*, 5 Domestic Violence Rep. 67 (June/July 2000); see Martha W. Barnett, *Ending Domestic Abuse*, A.B.A.J., Nov. 2000, at 6 (providing a list of things lawyers can do to assist in working on this problem).

50. See Advisory Committee Family Violence Project, National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence* (1994).

51. See G.A. Res. 48/104, U.N. GAOR 3d. Comm., 48th Sess., 85th mtg., U.N. Doc. A/48/629 (1994). See generally Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law’s Enhancement of Congressional Power*, 22 Hous. J. Int’l L. 209 (2000). Article 1 of the Declaration Against Violence Against Women includes: “any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life.” Article 2 expands the definition to include not only physical, sexual, and psychological violence at home and/or in public, but also includes sexual harassment and intimidation at work or in educational institutions. See also Jennifer L. Ulrich, *Confronting Gender-based Violence With International Instruments: Is A Solution To The Pandemic Within Reach*, 7 Ind. J. Global Legal Stud. 629 (2000). Recommendation 19 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that gender-based violence is a form of discrimination.

52. See generally Lori L. Heise et al., *Violence Against Women, The Hidden Health Burden*, World Bank Discussion Papers (1994).

53. According to the Justice Department, over a twenty year period, from

the year of the Celeste commutations, 1,500 women were killed by their intimate associates.⁵⁴ In the legal academy, theories about the interrelationships of sex discrimination, misogyny, male supremacy, and battered women were considered novel.⁵⁵ In a report published that year entitled "Sex Bias in the Criminal Law," the author found that "Conjugal assault and self defense by battered women were mentioned once" by only one casebook a piece.⁵⁶ Of the five textbooks that mentioned marital rape, only one devoted more than a page to the topic.⁵⁷ Theories and facts about separation assaults and homicides committed against women who leave their abusers had not been adequately articulated or understood.⁵⁸ The connection between duress and crimes committed by battered women was not identified.⁵⁹

1976-1996, 18.9% of women victims were murdered by husbands, 1.4% by ex-husbands, and 9.4% by non-marital partners. See *Violence By Intimates*, supra note 28, at 5.

54. *Id.* at 37. Intimates include: spouses, ex-spouses, common-law spouses, and boyfriends. Over a twenty-year period, from 1976-1996, there has been a small increase in the number of murders of white females by non-marital intimates. *Id.* at 1.

55. Ten years before, Professor Elizabeth Schneider published her law review article on defense of battered women and the inequality in the law of self defense in a Harvard law review. See *Equal Rights To Trial for Women: Sex Bias in the Law of Self-Defense*, 15 *Harv. C.R.-C.L. L. Rev.* 625 (1980). However, most of the research in the area has been of recent vintage. For a partial listing of the earlier work on self-defense and battered women, see Ammons, supra note 8, at 14 n.22.

56. Nancy S. Erickson, *Final Report "Sex Bias in the Teaching of Criminal Law,"* 42 *Rutgers L. Rev.* 309, 327 (1990).

57. *Id.*

58. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *Mich. L. Rev.* 1 (1991); see also Marina Angel, *Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 *Temp. Pol. & Civ. Rts. L. Rev.* 283 (1999) (discussing recent school shooting victims as targets of young boys hostilities when they have been rejected by girls).

59. See generally Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 *Ohio St. L.J.* 670 (1995); Susan D. Appel, *Beyond Self-Defense: The Use of Battered Woman Syndrome in Duress Defenses*, 1994 *U. Ill. L. Rev.* 965 (1994).

A FORUM IN THE HIGHEST COURT?

Two hundred and two years after its establishment, the Supreme Court, for the first time acknowledged that women in the United States are battered in *Planned Parenthood v. Casey*,⁶⁰ a reproductive freedom case decided eight years ago. Justice O'Connor's majority found that a spousal notification requirement placed a substantial obstacle in the way of battered women seeking to terminate a pregnancy.⁶¹ The Court acknowledged that "battering can often involve a substantial amount of sexual abuse including marital rape and sexual mutilation."⁶² In addition to sexual-physical abuse, the Court made note of the psychological terror that pregnant battered women may face. The Court stated: "Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support or the disclosure of the abortion to family and friends."⁶³

During the past ten years, the United States Supreme Court has addressed the issue of violence against women in one other major case. Earlier this year, the Court handed down its much-awaited decision in *United States v. Morrison*.⁶⁴ This case (originally brought by plaintiff, (Cindy Brzonkala) involved a suit by a woman who claimed to be raped by three student athletes (football players) at a college.⁶⁵ Brzonkala filed suit for a civil remedy under The Violence Against Women Act (VAWA).⁶⁶ A 5-to-4 majority of the Supreme Court found that neither the Commerce Clause nor section five of the Fourteenth Amendment gave Congress the authority to enact this provision of the law.⁶⁷

60. 505 U.S. 833 (1992).

61. *Id.* at 893-94.

62. *Id.* at 889.

63. *Id.* at 893.

64. 529 U.S. 598 (2000).

65. *Id.* at 666.

66. *Id.* at 666-67 (citing 42 U.S.C § 13981 (1994)).

67. *Id.* at 682.

The Court's Commerce Clause analysis was based on its belief that "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."⁶⁸ According to the majority, the Fourteenth Amendment did not apply in this case because it found that the acts against Brzonkala were private and not motivated by or engaged in by state actors.⁶⁹ Justice Souter's stinging dissent outlines how the majority ignored the findings of the Congress relative to the economic effect of domestic violence.⁷⁰ He not only points out the desperate situation for women before VAWA, but also states that the need for the Act according to state officials remains, "virtually unchanged."⁷¹

No other landmark cases dealing with battered women have been decided by the Court.⁷²

68. *Id.* at 673.

69. See Paust, *supra* note 51 (arguing that the Congress has the power to enact VAWA based on U.S. Const. art. I, § 8, cl. 10 (the Offenses Clause), cl. 18 (the Necessary and Proper Clause), and the Supremacy Clause of the United States Constitution). *Id.* at 216, 217, 221; Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *Ohio St. L.J.* 1, 1 (2000). See generally *Morrison*, 529 U.S. 598.

70. See *Morrison*, 529 U.S. 598 (Souter, J. dissenting); see also notes 4-8 and accompanying text.

71. *Id.* at 698. Although the civil rights remedy was found unconstitutional, VAWA still provides for a number of other programs, including the national hotline, monies for shelters, etc. See U.S. Supreme Court Strikes Down VAWA, *Civil Rights Remedy: U.S. v. Morrison*, 5 *Domestic Violence Rep.* 81, 95 (2000). Other remedies including criminalizing interstate violence and interstate violation of protective orders remain in place. *Id.* See Rhonda McMillion, *Stronger Voice For Victims, Reauthorized Violence Against Women Act Expands Scope of Programs*, A.B.A.J., Dec. 2000, at 98.

72. In *Flippo v. West Virginia*, 528 U.S. 11 (1999), the Court reversed and remanded a search and seizure case in which a defendant sought to suppress evidence taken from a cabin by police investigating the death of his wife. The defendant claimed he and his wife were attacked by others. The Court did not recognize a murder exception to the Fourth Amendment requirement of a warrant. In *United States v. Dixon*, 509 U.S. 688 (1993), a case brought by a batterer, the Court concluded that double jeopardy prevented criminal prosecution in a case where a battering defendant was prosecuted for violating a civil protection order. *Id.* at 700. For a criticism of Justice Scalia's decision, see David M. Zlotnick, *Battered Women and Justice Scalia*, 41 *Ariz. L. Rev.* 847 (1999).

HALF EMPTY OR HALF FULL? DEBATED DOCTRINE,
CONTESTED STRATEGIES, AND THE SEARCH FOR SOLUTIONS

Theoretical explanations for
Battering are not mere exercises:
By pinpointing the conditions that
Create violence against women
They suggest the directions in which
A movement should proceed to stop it.⁷³

The efforts to end male violence against
Women will succeed only if they are part
of an overall struggle to end violence.⁷⁴

For crimes of the scale of domestic violence, it may be
unrealistic to expect legal institutions to effectively control
crimes that affect significant portions of
The population.⁷⁵

Quite simply, abuse by a family member. . .
is a violation of the most basic human right, the most basic
condition of civilized society: the right to live in physical
security free from the fear that brute force will determine
the conditions of one's daily life.⁷⁶

Whatever progress has been made on the issue of
battered women is directly attributed to those feminists
lawyers, scholars, advocates, and crusaders⁷⁷ who insisted

73. Susan Schechter, *Toward an Analysis of the Persistence of Violence Against Women in the Home Aegis* (July/Aug. 1979).

74. Bell Hooks, *Feminist Movement to End Violence in Feminist Theory From Margin To Center* 125 (1984).

75. See Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limits*, U.S. Dep't of Justice, Office of Justice Programs, at 30 (1996).

76. *In re Vaughn*, 664 N.E.2d 434, 437 (Mass. 1996) (Fried, J.).

77. On October 15, 2000, thousands of women from around the world marched in Washington, D.C. demanding that their governments end domestic violence. See Justin Blum, *Women Take A Turn; D.C. March, Rally Call for An End To Violence*, Wash. Post, Oct. 16, 2000, at B1.

that the criminal law must be written, interpreted, or revised and fairly applied in ways that takes into account the plight of abused women without stigmatizing them. In 1990, releasing a woman from prison when the criminal justice system had unjustly imposed too harsh a sentence on her because she decided to protect her own life rather than be the victim of death or grievous bodily injury was a revolutionary, feminist, humanitarian, legal, and just act. If feminist practical reasoning is "expand[ing] traditional notions of legal relevance to make legal decision making more sensitive to the features of a case not already reflected in legal doctrine,"⁷⁸ freeing oppressed, tortured, and wrongly convicted, incarcerated women was feminism in action. However, providing clemency for incarcerated battered women after the fact is like ending slavery by granting emancipation to one slave at a time. The better solution is to grant relief to battered women before the violence escalates to homicide. There is no quick fix to this universal problem.

There are those who will recoil at the notion that public policy and the criminal justice system should be informed and influenced by feminist theory.⁷⁹ Today some view even the label feminist as something akin to a four-letter word.⁸⁰ Unfortunately, those who have benefited the most from the hard won battles to treat women as equals and human often try to distance themselves the farthest from being associated with the politics or responsibilities of

78. Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 836 (1990).

79. See generally Janet E. Ainsworth, *Struggling For a Future: Juvenile Violence, Juvenile Justice: Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 *B.C. L. Rev.* 927, 951 n.102 (1995); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 *N.Y.U. L. Rev.* 589, 646 (1986).

80. See Jill Nelson & Amy Aronson, *Is Feminism a 4-Letter Word*, *MS Magazine*, Feb.-Mar. 2000, at 45-46; see also Marjorie E. Kornhauser, *What Do Women Want: Feminism and the Progressive Income Tax*, 47 *Am. U. L. Rev.* 151, 156 (1997); Andrea Giampetro-Meyer, *Resurrecting Comparable Worth as a Remedy For Gender-based Wage Discrimination*, 23 *Sw. U. L. Rev.* 225, 249 (1994).

feminism.⁸¹ Criminal law, a type of public law, is not made in a vacuum. This body of law that so preoccupies our legislators, ties up our courts, and fills our jails is influenced by ideas (good and bad), theories, and notions that have been passed down for millennia. Feminism and feminist theory had to be created because the stories were only half told. Because “absolute power corrupts absolutely,”⁸² those in power failed to make sure that all of the laws worked for all of the people, including the female people. Feminist legal theory is an attempt to set the record straight and straighten out the law.

Over the past ten years, I have watched as fewer students, men and women, express any interest in gender and law classes. Students have told me that they fear that having such courses on their transcripts might make employers hesitant to hire them. Women who might, under other circumstances, be open to studying the gender issue are intimidated by the possibility of being labeled “feminazi”⁸³ or worse yet, lesbian if they express too much interest in “women’s” issues. This trepidation is tragic. One never knows from where the next idea of liberation

81. For a discussion concerning why women of color distanced themselves from feminist ideology, see Open Letters to Catherine MacKinnon, 4 Yale L.J. 177, 181-82 (1991); Nelson & Aronson, *supra* note 80, at 50, 54-55.

82. Lord Acton, *Essays in Freedom and Power* 335-36 (Gertude Himmelfarb ed., 1955).

83. See Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 Mich. J. Gender & L. 299, 314 (1999) (“While male participants are given negative labels, these tend to be of a gender-neutral variety (e.g., “asshole”). Their female cohorts, however, are often given labels that directly relate to their femininity (e.g. “man-hating lesbian” or “feminazi dyke”).”). A woman who is assertive and/or opinionated runs the risk of being labeled this way. For example, “Another woman reported that she was called a ‘feminazi dyke’ for her frequent comments in first-year classes.” See Cecil J. Hunt, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 Fla. St. U. L. Rev. 721, n.328 (1996) (citing Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League School*, 143 U. Pa. L. Rev. 1, 51 n.128 (1994)). Women who strike back at their abusers are at the top of the man-hating list, Schneider writes, “The circumstances of battered women who kill are critical junctures for the intersection of law and social attitudes because they trigger a national chord of anxiety about ‘abuse excuse’ justice and ‘feminazi vigilantism.’” See Elizabeth M. Schneider, *Resistance to Equality*, 57 U. Pitt. L. Rev. 477, 482 (1996).

will spring. I cannot recount all of the things I learned and took with me from that women's law class, but I do believe that my perspective and analysis concerning male supremacy at law were sharpened, and I was prepared to use this much-needed tool when the time came. My interest in how the law affects half of humanity has led directly and indirectly to the freedom of scores of women, who had been punished enough. Perhaps the pressure to conform was not as great when I was a student, or maybe I just understood that we had not yet overcome.

Gains have been made in most areas of society relative to women. Hopefully, the world will never be as it was for women just thirty years ago. However, to declare that victory has been won because privileged women are enrolled in professional schools in equal numbers to men, get jobs in traditionally male segregated fields, and earn almost as much as men is premature and shortsighted.

In this post-modern era within the feminist community,⁸⁴ the debates rage on about which theoretical paradigm provides the best approach to resolving women's suffering. Scholars are fine-tuning equality theory,⁸⁵ difference (ethic of care versus ethic of justice),⁸⁶ dominance

84. For a discussion of Feminism and global politics, see Karena Shaw, *Reframing International Law for the 21st Century: Feminist Futures: Contesting the Political*, 9 *Transnat'l L. & Contemp. Probs.* 569, 569-98 (1999). Shaw finds that there is "the necessity of reorienting feminist analysis towards a critical investigation of how practices and possibilities for politics are changing." *Id.* at 571.

85. Equality theory in law is derived from the U.S. Constitution and based on the belief that similarly situated persons should be treated similarly. See Deborah L. Rhode, *Justice and Gender* 81 (1989). Rhode traces this doctrine to Aristotelian theory and states, "under this approach, discrimination presents no legal difficulties if the groups differ in ways relevant to a valid regulatory objective." *Id.*; see also Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 *Buff. L. Rev.* 573, 576 n.16 (1986). Express equality language did not appear in the United States Constitution until the Fourteenth Amendment, which was designed to protect newly freed slaves, was added. An express equal rights amendment for women has never been adopted.

86. The differences feminist theory is derived from the work of psychologist Carol Gilligan. See generally Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (1982). Gilligan's thesis is that women's construction of morality is different from that which theorists had previously

or subordination theory,⁸⁷ and critical race feminism⁸⁸ in an effort to provide the best unifying legal analysis of how gender, de facto, can make a difference. An incarcerated battered woman will not often initially grasp the theoretical variations of gender discrimination law. What she does know is that she was being brutalized because of her intimate relationship and it was either strike back or be killed. Often these women will tell you that all they really wanted was for the beatings to stop.⁸⁹ Understanding the critical lesson that gender may count can mean that a battered woman who legitimately defends herself will not have to spend her life behind bars or be executed by the state.

identified. See Ellen C. Dubois et al., *Feminist Discourse, Moral Values, and the Law—A Feminist Conversation*, 34 *Buff. L. Rev.* 11 (1984). Gilligan found that there is a voice (or methodology) called justice reasoning and another that she labeled care reasoning that people rely on in problem solving. *Id.* at 47. Her research showed that American men tend to focus on justice reasoning and women tended to focus on caring. *Id.* at 48-49.

87. Catherine MacKinnon has written extensively in this area. Her analysis is critical of both equality and difference theories because the reference point for women is male, which in her opinion reinforces male supremacy. See generally Catherine MacKinnon, *Feminism Unmodified* (1987). MacKinnon offers the dominance approach as an alternative to mainstream legal theory. *Id.* at 40-41. She states: "The dominance approach, in that it sees the inequalities of the social world from the standpoint of the subordination of women to men is feminist." *Id.* at 43. Dominance "centers on the most sex-differential abuses of women as a gender." *Id.* at 40. MacKinnon then lists the reality of many women, including poverty, rape, battery, prostitution, etc. *Id.* at 41.

88. Critical Race Feminism challenges the essentialism of traditional feminist discourse which uses the white woman as the exemplar. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory in Critical Race Feminism*, *A Reader* 11 (Adrien K. Wing ed., 1997); see also Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology*, 3 *UCLA Women's L.J.* 1892-1920 (1993). For a fascinating account of how essentialist western notions of the proper way to communicate with attorneys and in court resulted in the incarceration of a battered aboriginal woman, see Diana Eades, *Legal Recognition of Cultural Differences In Communication: The Case of Robyn Kina*, 3 *Language & Comm.* 215 (1996).

89. See Misty Murray, *People v. Humphrey: The New Rules of Self-defense for Battered Women Who Kill*, 27 *Sw. U. L. Rev.* 155, 158 (1997); see also Susanne M. Browne, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 *S. Cal. L. Rev.* 1295, 1295-96 (1995).

If I were given the clemency assignment today, there would be more resources available to complete the job. We now understand that a good, just government does not allow its citizens (male or female) to be tortured either by public institutions or by private (albeit intimate) associates. Hopefully, we have concluded that when a woman defends her life or herself from grievous bodily harm, she should not be unjustly penalized for trying to survive. In the year 2000, we have a better understanding of the myriad ways of intervening and assisting persons being victimized by familial violence, either through the courts, police authorities, social service agencies, public health institutions, or community-based forums. We are better equipped to handle such crisis and more alert to the signs of domestic terrorism. But our remedies are far from perfect. We seem to be stymied as to what really works in getting abusers to change their behavior.⁹⁰ Scholars and researchers are questioning the mandated interventions lobbied for in the halls of legislatures.⁹¹ Some argue that the criminalization of domestic violence may contribute to escalated abuse and fatalities.⁹² Solutions to battering in

90. See Jeffrey Fagan, *supra* note 75, at 18-20 (discussing recidivism and batterer treatment); see also Kerry Healy et al., *Batterer Intervention: Program Approaches and Criminal Justice Strategies*, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice (Feb. 1998) [hereinafter *Batterer Intervention*]. The authors of this study had the following to say about intervention: "Among evaluations considered methodologically sound, the majority have found modest but statistically significant reductions in recidivism among men participating in batterer interventions." *Id.* at 8.

Batterer intervention programs include anger management, individual and couples counseling, and self-help groups like Batterers Anonymous. *Batterer Intervention supra*, at 25; see MacKenzie Carpenter, *Taming The Beast*, *Pittsburgh Post-Gazette*, Oct. 1, 2000, at A1. A Pennsylvania program is boasting about its successes in this area. See Robert A. Foster, *We Know How To Help Men Break The Cycle Of Domestic Violence*, *Pittsburgh Post-Gazette*, Oct. 16, 2000, at A18.

91. Researchers and advocates debate this issue relative to mandatory arrest in *Legal Interventions in Family Violence: Research Findings and Policy Implications*, Nat'l Inst. of Justice, A.B.A., at 54-58 (July 1998).

92. See Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *Harv. L. Rev.* 550 (1999); see also Evan Stark, *Do Mandated State Interventions Contribute to Woman Battering?*, 5 *Domestic Violence Rep.* 65 (June/July 2000) (critically discussing Mills' article).

minority communities are more complex.⁹³ For example, African-American women are still torn between reporting their abusers for fear that law enforcement officials will more zealous than necessary in prosecuting the case.⁹⁴

While we try to determine just what formula is best, women continue to die at the hands of those who are supposed to love them. Nearly ten years later, with a declining crime rate, 1.9 million women in America are assaulted annually.⁹⁵ While law, and criminal law in particular, can deter inappropriate behavior, law is not

93. Cultural competence in dealing with batterers is paramount. Men of color including African-American men are disproportionately represented in mandated battering programs. See *Batterer Intervention*, supra note 90, at 63. African-American and Latino men have the lowest program completion rate. *Id.* Wealthy and White batterers can often escape mandates for treatment because they do not end up in the criminal justice systems. Culturally competent professionals and programs "place a particular race or ethnicity's culture and values at the center of the treatment." *Id.* at 65. One treatment professional told researchers that in dealing with black male batterers the

[E]nvironment of violence and poverty in which many African American men are raised fosters an association between manhood and violence . . . [and] [t]reatment is more effective . . . if battering is not isolated from relevant psychological and social realities of membership in a minority group, such as cultural self-hatred, displacement of anger, "black-on-black violence," suicide, drug abuse and cultural codes, including the urge to respond physically if someone appears to be disrespectful.

Batterer Intervention, supra note 90, at 66. See Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 *Me L. Rev.* 283 (1998) (discussing how other ethnic communities of color struggle with this issue); see also Donna Coker, *Enhancing Autonomy For Battered Women: Lessons From Navajo Peacemaking*, 47 *UCLA L. Rev.* 1 (1999); Virginia H. Murray, *A Comparative Survey of the Historic, Civil, Common and American Indian Tribal Law Responses to Domestic Violence*, 23 *Okla. City U.L. Rev.* 433 (1998).

94. One treatment specialist told researchers that she must deal with the issue of racism before she focuses on violent behavior: "The men say to me, 'How dare you betray us? Don't you know about racism? You know how we've been treated, what the system has done to us.' I say, 'Yes, but you're beating up women.'" *Batterer Intervention*, supra note 90, at 67. See Ammons, supra note 24, at 1018-24 (discussing the difficulties battered African-American women face in getting relief and their struggles with the "loyalty trap"); see also Angela Mae Kupenda, *Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women*, 42 *How. L.J.* 1 (1998).

95. See Tjaden & Thoennes, supra note 24, at 2.

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enough.⁹⁶ Something more needs to be added to the mixture. Intractable domestic violence is only symptomatic of a much larger problem which law alone cannot resolve. When policy makers, clergy, social service providers, lawyers, athletes, legislators, entertainers, homemakers, laborers, teachers, medical personnel, and others really begin to act on the belief that women are equal citizens and valuable human beings and that violence, against women—real, simulated, or virtual—harms us all, then and only then will the need to review and challenge our theories and practices regarding domestic violence cease. In the meantime, the nastiness continues.⁹⁷

96. See generally Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence*, 50 *Case W. Res. L. Rev.* 851 (2000).

97. See *Domestic Violence Against Women and Girls*, 6 *Innocenti Digest*, May 2000, at 2 (A UNICEF report indicates that the domestic abuse of women is epidemic); see also Barbara Crossett, *Unicef Issues Report on Worldwide Violence Facing Women*, *N.Y. Times*, June 1, 2000, at A15.