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## Access to Justice for Battered Women

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## Access to Justice for Battered Women

Mary Becker\*

Our legal system routinely fails women who live with domestic violence. True, there have been significant changes in recent decades as a result of feminist efforts. Orders of protection are now available, as are advocates to help victims obtain them. Batterer treatment programs have been developed. Police officers have been trained on appropriate responses to domestic violence calls. Judges have been trained on the dynamics of domestic violence. When battered women kill, judges allow expert testimony on the dynamics of domestic violence. Prosecutors and defense attorneys are now more likely to ask about domestic violence, and to consider it relevant to their prosecution or defense.

Survivors of domestic violence nevertheless face problems throughout the legal system. I have seen these problems in three contexts: in the divorce custody cases that I teach in family law courses, as well as those I hear about from attorneys; while working on clemency petitions for battered women in prison; and while teaching a course in which students work four hours a week for an organization providing direct services to victims of domestic violence in Cook County, Illinois.

In this Article, I consider some of the problems facing battered women in three situations: when involved in a custody dispute with an abuser; when on trial for the murder of an abuser or of a child killed by the abuser; and when seeking an order of protection or filing a domestic violence report with the police, thus triggering the local domestic violence response system.

In my discussion of these three areas, two themes emerge. One is our systemic failure to understand the emotions of battered women, a

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problem often caused not by the differences between “them” and “us,” but by the similarities between their emotional responses and our own. The second is our tendency to blame the domestic violence survivor for the act of violence by seeing the consequences of domestic violence as evidence of *her* innate character traits, *her* failings, and *her* responsibility for violence perpetrated by someone else. Finally, I propose specific changes, including legislative action, which would improve conditions for battered women in each of the three situations discussed.

### I. VIOLENCE AND CUSTODY AT DIVORCE

Abusers routinely use interaction with their children to turn them against a former partner. Many men seek custody as part of this pattern of abuse and successfully use the legal system as a tool in their arsenal. Judges are shockingly naive, uninformed, or indifferent to the abuser’s ability to manipulate their children as well as the legal system in this way. All too often, abusers succeed in obtaining custody.

Domestic violence, even if directed only at an adult partner instead of the children themselves, is nevertheless harmful to children.<sup>1</sup> For example, girls who see their mothers abused are somewhat more likely than other women to find themselves in abusive relationships as adults. Boys who see their mothers abused are significantly more likely than other men to grow up to be abusers. Further, a man who abuses his wife or girlfriend is likely to abuse her children as well, either physically, sexually, or both. There are no winners here; abusers are not a happy group.

Despite all the evidentiary data, it is not at all unusual to see appellate decisions affirming awards of custody to a father when factual details indicate that he has been abusive. These details are typically recounted in the section of the appellate opinion describing the facts, only to be ignored thereafter.<sup>2</sup> In most jurisdictions, judges

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1. See, e.g., Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others*, 2 U. CHI. ROUNDTABLE 13, 19-20 (1995) (discussing the increased likelihood that a boy who witnesses the domestic abuse of his mother will himself be an abusive adult).

2. See, e.g., *Patricia Ann S. v. James Daniel S.*, 435 S.E. 2d 6 (W. Va. 1993). For

can consider an act of violence or abuse directed at the mother or children in determining custody but are not required to do so. Such abuse is only one of a long list of statutory and other factors that the judge may consider at her or his discretion. In addition, many states have “friendlier parent” provisions in their custody statutes. These provisions create a preference for awarding custody to the friendlier parent, i.e., the parent who appears to be more willing to allow the other parent access to the children. An abused woman is unlikely to want her children to have much (or any) contact with their father, both because of the harm he does to the children and because of the ways in which he uses his contact with them to control, harass, and abuse her. Friendlier parent provisions thus give abusive fathers an advantage in custody battles.

In addition, the effects of abuse on the mother and on her relationship with her children may make her look like a bad or inadequate parent. She may appear emotional and frantic, even somewhat unbalanced, while the abusive husband appears calm and collected. Witnesses may report that she used foul language with the children when the husband has used such language in their presence and against her for years. She may abuse drugs or alcohol, as do many abused women, to dull the pain.

Children in an abusive household often do one of two things: (1) side with the mother and want nothing to do with the father; or (2) side with the father and want nothing to do with their mother, regarding her, as their father does, as incompetent or crazy. Older children, particularly boys, may be especially likely to take the latter approach. Regardless of whom the children side with, the mother may lose custody. If the children are alienated from their father because of his abuse of her and (or) themselves, she may be blamed for their alienation under the so-called “Parental Alienation Syndrome” theory, which blames the non-alienated parent for the children’s alienation.<sup>3</sup> Conversely, if the children are alienated from

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evidence of the continual and widespread nature of this problem, see Pamela Burke, *Fit Calif. Moms Losing Custody to Abusive Dads*, *Women’s Enews*, at <http://www.womensenews.org/article.cfm/dyn/aid/1080> (Oct. 22, 2002).

3. Dr. Richard A. Gardner developed the theory of this supposed psychological phenomenon. For discussions and critiques of Gardner’s theory, see Kathleen Coulborn Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L.

their mother and identify with their father, the abusive father may receive custody because of the problematic relationship between the mother and her children.<sup>4</sup>

The abusive husband has a number of other advantages in a custody dispute. He is likely to be better off financially and thus able to spend more money on lawyers and experts. Many judges and other participants in the custody system assume that allegations of spousal abuse raised at divorce are fabricated to gain an advantage, though the available empirical evidence suggests that such fabrications are rare.<sup>5</sup> The abuser can also use the proceedings before the divorce court in maddening ways to anger the other parent and draw out the proceedings, seeking delays, re-litigating issues and making spurious arguments.

One might expect judges in family court to see an abuser's manipulative behavior for what it is and to prevent him from misusing the system. But judges in family court often know little or nothing about abusive relationships and fail to recognize abuse which occurs before their eyes.

The qualifications of family-court judges vary by jurisdiction. Most are elected or appointed by other judges, as in Illinois. Appointed judges in Illinois must be reappointed every year; they tend, therefore, not to rock the boat, and to do things in the same way as other judges. The usual way of getting elected as a judge in Cook County—which will obviously vary from county to county—is to have your name put on the “palm card” distributed by Democratic precinct workers to the party faithful before the election. Most voters know nothing about the many judges running for office, so those elected are likely to have their names on the palm card which is carried into the voting booths by the faithful. The best ways to get your name on a palm card are to either have close personal connections with party leaders or to contribute significant amounts of

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REV. 429, 431-34 (2000); Rhonda Freeman, *Parenting After Divorce: Using Research to Inform Decision-Making About Children*, 15 CAN. J. FAM. L. 79, 104-08 (1998); P. Susan Penfold, *Questionable Beliefs About Child Sexual Abuse Allegations During Custody Disputes*, 14 CAN. J. FAM. L. 11, 14-15 (1997).

4. See *Patricia Ann S.*, 435 S.E. 2d at 13-15 (affirming award of custody to father who had beaten his children, rather than awarding custody to the children's non-abusive mother).

5. See Penfold, *supra* note 3.

money to the local Democratic Party. Judges, whether elected or appointed, tend to regard family court as only a step above traffic court, and hope that their tenure is only a short stint before moving to a more prominent court.

Thus, most family law judges are not particularly qualified to make the extremely difficult decisions in the cases before them. Many are manipulated by abusers who use the proceedings to abuse women who are trying to leave them. Too often, abusers succeed in obtaining custody of children following a divorce. The judicial system then becomes a vehicle of abuse. As explored further in Part II, similar problems haunt the criminal justice system when a woman is prosecuted for murder, either of her partner or of a child killed by her partner.

## II. CLEMENCY PETITIONS FOR BATTERED WOMEN IN PRISON

The Illinois Clemency Project for Battered Women (the “Project”) filed four sets of petitions between 1994 and 2002. In 1994, the Project filed petitions for twelve women who were in Illinois prisons for either killing or hiring someone to kill an abusive partner. Four of these petitions were granted by Governor Jim Edgar, presumably because he was running for re-election against a woman and wanted to appeal to female voters. The four granted petitions were all from the Chicago metropolitan area; no petitions from downstate counties were granted, though some were extremely compelling. Edgar apparently did not want to alienate any downstate Republican state’s attorneys during an election, as many are influential in local politics. The Project filed eighteen petitions the next year, 1995, several of which were applications for clemency for prisoners whose petitions had been denied the preceding year. None of the women for whom these petitions were filed were released, though the sentence of one was shortened. In 1996, six petitions were filed with the governor, and all were denied.

In 2002, the Project filed four petitions, three on behalf of women who had killed or injured an abusive partner, and one on behalf of a severely abused woman who had been convicted of first-degree murder under the Illinois accountability statute for her partner’s murder of her son. None of these petitions were granted by Governor

Ryan, though one woman's sentence was reduced. In this section on problems facing battered women as criminal defendants, I draw on the experiences of our clients.

I also refer extensively to the 2000 conviction of Sylvia Flynn for the killing of her abusive husband. This New Jersey case drew national media attention, and the trial was covered by Court TV as well as by local papers. Court TV published daily reports on the internet throughout the proceedings.<sup>6</sup> These reports, as well as newspaper accounts, included a great deal more detail—about the witnesses, their testimony, and the arguments of prosecutors and defense counsel—than what is normally included in reported decisions.

I also rely on Neil Jacobson and John Gottman's study on the violence of couples living in Seattle.<sup>7</sup> I begin this section by first describing the Jacobson-Gottman study, and then talking about the major problems faced by battered women who are prosecuted for killing or injuring an abusive partner.

### *A. The Jacobson-Gottman Study*

Jacobson and Gottman observed arguments of partners in severely violent relationships and compared them to arguments of other couples.<sup>8</sup> Of 140 couples included in the study, sixty-three were classified as "battering" (severe violence),<sup>9</sup> twenty-seven were classified as somewhat violent, thirty-three were unhappy with their marriages but not violent, and twenty were happily married couples.<sup>10</sup> Jacobson and Gottman videotaped couples after asking them to

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6. For the details of Sylvia Flynn's case, as described in these reports and newspaper articles, see Mary Becker, *The Passions Of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 24-47 (2001).

7. NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* (1998).

8. *Id.* at 19-20. Couples were recruited "mostly through public-service announcements in the local media." *Id.* at 24. They were paid "at least \$160 for their participation." *Id.* at 26.

9. Eighty percent of the women in the battering group required medical care for an injury inflicted by their husbands within the preceding year, while only twenty percent of the batterers had been arrested for domestic violence within the past year. *Id.* at 24-25. Most of the couples in this group "had come into contact with the criminal justice system at some point in the past as the result of battering episodes." *Id.* at 25.

10. *Id.* at 24.

discuss an issue causing conflict in their marriage.<sup>11</sup> They also used electronic sensors to measure arousal during the arguments.<sup>12</sup>

Consistent with the stereotypes associated with battered women, Jacobson and Gottman found that severe violence “is always accompanied by emotional abuse, is often accompanied by injury, and is virtually always associated with fear and even terror on the part of the battered woman.”<sup>13</sup> The authors also found, however, that many battered women fought back verbally, and that those who did were more likely to leave their batterers within the two-year follow-up period.<sup>14</sup> They found the battered women in the study to be “resourceful, courageous, and in many ways heroic.”<sup>15</sup>

The study also revealed that battered women are angry: “Most people get angry when they are insulted and degraded. So do battered women.”<sup>16</sup> Indeed, “the battered women were just as angry, if not angrier, than their husbands were.”<sup>17</sup> Jacobson and Gottman report:

In fact, battered women appear to respond during arguments—both violent and nonviolent—much as one would expect. When you’re being abused, you are bound to be scared, but you are also bound to be angry. We saw much effort on the

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11. *Id.* at 27.

12. *Id.*

13. *Id.* at 25. Jacobson and Gottman designed their study so as to limit the risk of violence:

To be confident that we were not putting battered women in jeopardy, we developed a set of procedures to help assess the risk of violence to ensure that no couples left the laboratory until the risk was minimal. We designed our debriefing procedures with the help of . . . a nationally respected clinician specializing in domestic violence. All battered women were given referrals for shelters, and individual psychological and legal counseling after each session. They were asked privately whether they felt safe, and if they felt that the argument in the laboratory would put them at risk of physical aggression. If a woman felt unsafe, we constructed a safety plan.

*Id.* at 26. They also called the wives following the study’s completion to determine whether their participation resulted in any further violence. *Id.* at 27. In no case was there any indication that the study had caused additional violence. *Id.*

14. *Id.* at 28, 32.

15. *Id.* at 33.

16. *Id.* at 64.

17. *Id.* at 66.



part of battered women to contain their anger, but it tended to leak out anyway.<sup>18</sup>

Anger is an emotion that is normally experienced by human beings when they are physically or psychologically abused.

Battered women often challenge their partners about behavior they consider inappropriate<sup>19</sup> and fight back verbally and sometimes physically.<sup>20</sup> Battered women who stay in relationships have not given up hope that their partners will change:

They are holding on to a dream that they have about what life could be like with these men. They love their husbands and they have developed a sympathy for them and their plight in life. They hope that they can help their men become normal husbands and fathers. These dreams can be powerful and are very hard to give up.<sup>21</sup>

In addition to continuing love, some relationships involve traumatic bonding, which occurs when love and violence are combined. Jacobson and Gottman contend that “[t]here is a very strong bond created by the violence being paired with love . . . and it makes leaving very difficult.”<sup>22</sup>

Psychological abuse often includes infidelity by the abuser. For example, Jacobson and Gottman describe this exchange between an abusive man, Dave, and his partner, Judy:

Judy opened a letter from a doctor documenting that Dave had been tested for sexually transmitted diseases. When she confronted him about it, Dave taunted her: “Why do you think? Because I [expletive deleted] some other chicks.” She began to sob, and yelled, “How could you?” He kept taunting her: “Don’t you get it? I’m bored!” She pressed him for details, and he finally admitted that he had slept with “some chick in

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18. *Id.* at 66-67.

19. *See id.* at 59-60.

20. Malcolm Gordon, *Validity of “Battered Woman Syndrome” in Criminal Cases Involving Battered Women*, in *LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS* 64, 65 (Nat’l Inst. Just. & A.B.A. eds., 1998).

21. JACOBSON & GOTTMAN, *supra* note 7, at 51.

22. *Id.* at 167.

the back of my truck.” Judy lost her temper. She began yelling and swearing at him. She was enraged and flooded by feelings of being betrayed, unappreciated, and unloved.<sup>23</sup>

Sexual humiliation “was a dominant theme” in Dave’s relationship with Judy.<sup>24</sup> If Judy refused to do something sexual because she found it “degrading and disgusting,” he would “threaten to have affairs.”<sup>25</sup>

Jacobson and Gottman describe another relationship, Roy and Helen’s, in which the batterer’s infidelities were an aspect of his emotional abuse for many years.<sup>26</sup> Once, after Helen and Roy moved to a new town for a fresh start:

Helen bought Roy a \$75 necklace. They were sitting in a bar when she gave it to him. She had quit drinking, but he was drunk. In walked one of his ex-lovers. Roy disappeared for about half an hour, and when Helen asked him where he had been, he said that he had given this woman the necklace and ten dollars, and in return he received fellatio from her.<sup>27</sup>

When a partner is unfaithful, battered women feel jealousy just like other people. But for battered women, the response to infidelity is both complicated and amplified by the fact that her partner deliberately uses it as a means to hurt her.

Many battered women support their partners financially. Helen, “one of the most severely battered women” in the Gottman-Jacobson sample,<sup>28</sup> was a hotel receptionist; her husband Roy was a homeless “alcoholic and heroin addict.”<sup>29</sup> Martha and Don were another couple in the Gottman-Jacobson sample. When the study began, Martha, a mental health caseworker, had been severely beaten by Don twenty

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23. *Id.* at 126.

24. *Id.* at 150.

25. *Id.*

26. *Id.* at 97-100, 150-51.

27. *Id.* at 99.

28. *Id.* at 52. Roy had broken Helen’s back on one occasion and her neck on another. Further, he caused eight miscarriages, as he refused to use birth control and beat her whenever she became pregnant. *Id.*

29. *Id.*

times in the preceding year.<sup>30</sup> One beating occurred after Martha had dinner with a friend after work.<sup>31</sup> Indeed, not all batterers are emotionally dependent on the women they abuse.<sup>32</sup> Gottman and Jacobson report that some batterers “encouraged their wives to be independent.”<sup>33</sup>

Many of the problems that battered women face as defendants result from the failure of other participants in the proceedings to understand that battered women do not fit one narrow mold. As explored in detail in the next section, prosecutors, judges, and even “experts” on domestic violence often have narrow and stereotypical notions of who is a battered woman, notions inconsistent with the reality of battered women’s lives as revealed in the Jacobson-Gottman study.

### *B. Problems Battered Women Face as Defendants*

We would like to believe that the problems facing battered women on trial for murdering, injuring, or hiring someone to murder an abusive partner have been eliminated by admitting expert testimony explaining why a woman might stay in a violent or abusive relationship. Expert testimony is, however, far from a cure-all for two reasons:<sup>34</sup> the prosecution can easily neutralize the defendant’s battered woman’s expert by introducing their own “expert,” and many other problems that battered women face in the criminal justice system.

#### 1. The Battle of the Experts

Every court to consider the issue has determined that when the defense introduces an expert on battered woman’s syndrome or

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30. *Id.* at 114.

31. *Id.* at 71.

32. *Id.* at 30.

33. *Id.*

34. There has been scholarly commentary in recent years on whether the expert testifying on behalf of the battered woman should do so in terms of either the “battered woman syndrome” or the experiences of battered women. *See, e.g.,* Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1195 (1993).

battered women's experiences, the prosecution has the right to hire an expert who can also examine the defendant and testify at her trial. Increasingly, prosecutors are doing so, and when two experts testify, jurors tend to dismiss the testimony of both as contradictory hired guns. But this defeats the whole point of allowing an expert to testify on behalf of the battered woman. Jurors and judges need to hear from someone with expertise in this area because they are likely to share the many common biases, misperceptions, and stereotypes about domestic violence, battered women, and their abusers, including: if it was as bad as she now insists, she would have left him; she stayed because she enjoyed it, or because this was the kind of relationship she wanted; she provoked the violence; she could have escaped in safety (with her children); she would have called the police or would have called the police more often had the situation been that bad; what happened was the result of her own innate traits, her desire to be controlled, her abuse of alcohol or drugs; she cannot have been a battered woman because she was not poor or uneducated; she had friends and was not isolated; or she denied the abuse in the past. The judge and jury need to hear from someone who can explain the dynamics of abusive relationships and the likelihood of violence escalating when a woman attempts to leave. The prosecution has no similar need of an expert because common stereotypes and misconceptions consistently work in the prosecution's favor.

The consequences of an expert who is testifying for the prosecution are even more dangerous in the many states which do not require a psychiatrist or psychologist, who is testifying on battered women or domestic violence to have any knowledge of the subject matter. In the *Flynn* case in New Jersey, Mary Ann Dutton, a nationally recognized expert on battered women who teaches at Georgetown University, and has worked and published extensively in the field,<sup>35</sup> testified for the defense. Dutton interviewed Sylvia Flynn

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35. See Lauren Bennett et al., *Risk Assessment Among Batterers Arrested for Domestic Assault: The Salience of Psychological Abuse*, 6 VIOLENCE AGAINST WOMEN 1190 (2000); Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999); Mary Ann Dutton, *Multidimensional Assessment of Woman Battering: Commentary on Smith, Smith, and Earp*, 23 PSYCHOL. WOMEN Q. 195 (1999); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191

twice and administered ten psychological tests. Dr. Azariah Eshkenazi testified for the state. Eshkenazi is a psychiatrist from Long Island who regularly testifies in workers' compensation and a variety of other cases having nothing to do with domestic violence. He did, however, testify against Hedda Nussbaum who was prosecuted for the death of a child at the hands of her abusive partner. Eshkenazi interviewed Sylvia twice and did not administer any tests.

Dutton testified that in her opinion, Flynn "was a battered woman, and she had been exposed to chronic abuse that was quite severe."<sup>36</sup> According to Dutton, "[Sylvia Flynn] knew how to read John Flynn, and she knew by looking and listening to him that day that he meant to hurt her . . . . Sylvia Flynn had tried to leave and failed, she'd tried to summon police and failed, and she felt as though she had no options."<sup>37</sup>

Eshkenazi, testifying for the State as a rebuttal witness, disagreed:

A battered woman . . . all her life has depended on her father, mother or husband; she has little education, is unable to support herself and is totally dependent, emotionally and financially, on her husband . . . . She cannot walk away from him because she is totally dependent on her husband for total survival.<sup>38</sup>

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(1993); Lisa A. Goodman et al., *Episodically Homeless Women with Serious Mental Illness: Prevalence of Physical and Sexual Assault*, 65 AM. J. ORTHOPSYCHIATRY 468 (1995); Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERSONAL VIOLENCE 63 (2000); Philinda Smith Hutchings & Mary Ann Dutton, *Sexual Assault History in a Community Mental Health Center Clinical Population*, 29 COMMUNITY MENTAL HEALTH J. 59 (1993); Mary Ann Dutton, *Sexuality in Close Relationships*, 26 SEX ROLES 533 (1992) (book review); Mary Ann Dutton, *Impact of Evidence Concerning Battering and its Effects in Criminal Trials Involving Battered Women* (1994), at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Impact> (last visited Feb. 24, 2003); Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women* (Malcolm Gordon ed., 1994), at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid> (last visited Feb. 24, 2003).

36. Harriet Ryan, *Flynn Turns Down Chance to Tell Her Side of the Story*, COURT TV ONLINE, at [http://courttv.com/trials/flynn/100300-am\\_ctv.html](http://courttv.com/trials/flynn/100300-am_ctv.html) (Oct. 3, 2000).

37. *Id.*

38. Carol Gorga Williams, *Flynn Slaying Case Goes to Jurors; Decision on Fate of Brick Woman Could Come Today*, ASBURY PARK PRESS, Oct. 5, 2000, at B1.

Because Sylvia Flynn had her own beauty shop and friends, she was not a battered woman.<sup>39</sup>

Eshkenazi not only gave the jury a reason to ignore Dutton's informed testimony, but his testimony was inaccurate and misleading. Battered women, like other people, come in many shapes and sizes. It is simply not true, much as we (and jurors and judges) would like to believe it, that all battered women are uneducated and have a history of life-long extreme dependence on others.

## 2. The Many Problems Battered Women Face in the Criminal Justice System

The second, and the major, reason why admissibility of expert testimony on domestic violence has not solved the problems of battered women defendants is that such testimony cannot eliminate the many other problems they face throughout the criminal justice system. In the clemency cases I have worked on, the major problem for many, perhaps most, of our clients was that they were poor and represented by public defenders who spent little time on their cases, had no resources for investigation, and convinced them to accept a guilty plea of murder or attempted murder with a sentence of fourteen, twenty, or thirty years.

For example, one of the Project's clients, a woman with only one arm, killed her partner when he was attacking her with a crazed look in his eyes after consuming \$1000 worth of cocaine. The client's public defender told her that the autopsy showed that there was no cocaine in her partner's body and recommended that she should plead guilty. She did and received a fourteen-year sentence. The students working on her petition took the autopsy report to a doctor for his evaluation, who said that although there was no cocaine, the autopsy reported high amounts of the substance into which cocaine breaks down when absorbed by the human body.

In another case, a mother and daughter were charged with trying to hire someone to kill the mother's partner, who—in addition to being extremely sexually and physically abusive of her—had been

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39. Harriet Ryan, *Final Testimony Paints John Flynn as a Victim, Not an Abuser*, COURT TV ONLINE, at [http://courtvtv.com/trials/flynn/100400-am\\_ctv.html](http://courtvtv.com/trials/flynn/100400-am_ctv.html) (Oct. 4, 2000).

sexually abusing her daughter since she was nine. The same public defender represented both the mother and daughter, despite obvious conflicts of interest. He never met privately with either of them or investigated their cases, and he advised them to plead guilty to twenty years (for the mother) and twenty-five years (for the daughter). The abuser, who was not harmed, ended up with custody of the youngest child.

There is no solution for this, as it is the major problem for many poor battered women who kill, short of providing adequate representation for all poor defendants. Public defenders need reasonable caseloads and resources for investigation. True, prosecutors also have demanding caseloads and must pursue plea bargains in most cases. But it is one thing for prosecutors to agree to pleas and another for poor defendants to get lengthy jail sentences when adequate representation might have exonerated them. Prosecutors, moreover, have resources for their investigations, which are unavailable to public defenders: the police, the coroner, and the forensic experts.

For those battered women defendants who have sufficient legal representation to get to trial, the major problem is that prosecutors are allowed to make just about any argument—no matter how prejudicial, biased, or outrageous—which often reinforce the stereotypes of battered women to jurors and judges. I offer two examples of such arguments.

First, prosecutors routinely assert their commitment to justice for battered women and then argue that *this* defendant is not a *truly* battered woman. In Sylvia Flynn's case, the prosecutor made this argument despite overwhelming evidence that Sylvia's husband, John, had severely abused her both physically and psychologically. Sylvia told the police that John "had beaten her with a shoe and shoved her head through a kitchen wall."<sup>40</sup> She obtained a restraining order against John, but asked that it be rescinded a month later.<sup>41</sup> He agreed to go for counseling, and they reconciled.<sup>42</sup> John was

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40. Carol Gorga Williams, *Dispatch Tapes Key to Defense*, ASBURY PARK PRESS, Nov. 30, 1999, at B1.

41. *Id.*

42. *Id.*

scheduled to meet with Valerie Brown, a psychiatric social worker, for an evaluation and determination of an appropriate form of therapy. At the time of the appointment, however, it was Sylvia, not John, who appeared at Brown's office.<sup>43</sup>

At Sylvia's trial for killing John, Brown testified that Sylvia had told her that "John Flynn had hit her only once in the last two years."<sup>44</sup> Brown said she gave Sylvia some information about a shelter and that Sylvia "did not seem terribly interested in it."<sup>45</sup> Brown regarded Sylvia as "so imbedded in the conflict of the marriage that she really didn't want to get out."<sup>46</sup> Brown, like Eshkenazi, told the jury that Sylvia did not "present the typical 'markers' of battered women's syndrome," which she described as "helplessness, hopelessness, isolation from family and friends and financial dependence."<sup>47</sup>

Brown's testimony may have been particularly important to the jury. During deliberations, jurors asked to have the testimony of three witnesses read to them: Brown's, the medical examiner's, and the state's crime scene reconstruction analyst.<sup>48</sup> Unlike Mary Ann Dutton and Azariah Eshkenazi, Valerie Brown was not hired by either the prosecution or defense to examine Sylvia in preparation for trial. Thus, she may have been regarded by the jury as especially credible, though her only meeting with Sylvia took place when Sylvia appeared at her office to explain John's absence.

The prosecution argued throughout the proceedings that Sylvia's credibility was undermined by her alleged denials of John's repeated violence (to Valerie Brown, for example) and her conflicting stories about the alleged incidents (sometimes admitting and sometimes denying or minimizing abuse).<sup>49</sup> But battered women routinely deny or minimize the harm done to them and, as a result, inevitably report

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43. Carol Gorga Williams, *'I Was Afraid of Her Voice' Slain Man's Girlfriend Says She Lived in Fear of Wife's Stalking, Phone Threats*, ASBURY PARK PRESS, Sept. 28, 2000, at B1.

44. *Id.*

45. *Id.*

46. *Id.*

47. Harriet Ryan, *Juror Replaced By Alternate, Deliberations Start Over*, COURT TV ONLINE, at [http://courttv.com/trials/flynn/100600\\_ctv.html](http://courttv.com/trials/flynn/100600_ctv.html) (Oct. 6, 2000).

48. Harriet Ryan, *Trials Open With Conflicting Portraits of Sylvia Flynn*, COURT TV ONLINE, at [http://courttv.com/trials/flynn/092500\\_ctv.html](http://courttv.com/trials/flynn/092500_ctv.html) (Sept. 25, 2000).

49. See Williams, *supra* note 43.



incidents in ways that conflict with other reports. State's attorneys who work on domestic violence prosecutions are familiar with this phenomenon. A major problem in prosecuting batterers arises when the victim changes her story and denies the abuse after reconciling with her abuser.<sup>50</sup> Most battered women do not successfully leave an abusive partner on the first attempt. When they return to an abuser—hopeful that the abuse is over—they inevitably deny or minimize the past abuse,<sup>51</sup> as Sylvia did in her conversations with Valerie Brown and others.

Indeed, the Project found that battered women who are in prison for killing their husbands, or hiring someone to do so, still minimized their abuse. Often, the most horrific details would surface in interviews with others and then be confirmed by the client. But the client herself would not mention these details, even when doing so could help in the preparation of her clemency petition.

Sylvia's arrival at John's counseling session is, moreover, entirely consistent with his being a dangerous batterer, though Valerie Brown was oblivious to this. That Sylvia showed up rather than John actually indicates that John was "likely to have committed more severe domestic violence and [was] more likely to reoffend."<sup>52</sup> Such men either tend to drop out of treatment programs or fail to keep appointments.<sup>53</sup>

Like Dr. Eshkenazi, Brown indicated to the jury that the only women who are *really* battered women are those who are economically dependent on their abusers and isolated from family and friends.<sup>54</sup> But, as indicated earlier, not all battered women conform to this paradigm. Indeed, as the Jacobson-Gottman study found, some abusers actually depend on their victims for economic support, and some want their partners to have other interests.<sup>55</sup>

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50. See generally Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999) (discussing why victims deny the abuse rather than cooperate with the prosecution).

51. *Id.*

52. Edward W. Gondolf, *Batterer Programs: What We Know and Need To Know*, 97 J. INTERPERSONAL VIOLENCE 83, 89 (1997).

53. *Id.*

54. See *supra* note 39 and accompanying text.

55. See JACOBSON & GOTTMAN, *supra* note 7, at 30.

Like many abusers, John had numerous affairs during his relationship with Sylvia. According to his secretary, he had as many as twenty-four affairs “during the two-year period she worked for him.”<sup>56</sup> John taunted Sylvia with his infidelity as evidence of her inadequacy, a common form of psychological abuse. Sylvia, like other battered women in similar situations, and like most people if taunted with a partner’s infidelity, responded with jealousy. The prosecution used her jealousy to argue that she was not truly a battered woman; rather, she was a jealous woman. But battered women feel jealousy just like other people. For battered women, the response to their partner’s infidelity is amplified by the fact that it is deliberately used to hurt and humiliate her.

Often, the prosecution attempts to undermine the defendant’s case by painting either the defense lawyer or an expert on domestic violence as a feminist. In one of the Project’s clemency cases, the client had kept a diary over the years detailing the abuse, a diary so long it could not possibly have been written between the time when she killed her abuser and the time of her arrest. Yet the prosecution argued that the allegations of abuse had been fabricated by a young feminist lawyer on the defense team. In Sylvia Flynn’s case, the prosecutor tried to discredit the defense expert, Mary Ann Dutton, by calling the jurors’ attention to several papers that she had written on “feminist” topics. The prosecutor also asked Dutton if she was an advocate for domestic violence victims. Dutton responded by looking puzzled and said, “I think domestic violence is wrong, if that’s what you mean.”<sup>57</sup>

If there is evidence that a woman ever fought back against her abuser, either verbally or physically, it may be used by the prosecution as evidence that she was not truly a battered woman. For example, in one of the Project’s cases before Governor George Ryan in 2002, Kathy Cecil, a nineteen-year-old mother of two, was charged with first-degree murder under the Illinois accountability statute after her abusive partner murdered her son.<sup>58</sup> As her son lay dead and she

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56. Carol Gorga Williams, *Threat Showed Husband’s Rage, Lawyer Says*, ASBURY PARK PRESS, Oct. 1, 2000, at A17.

57. See Ryan, *supra* note 36.

58. Petition for Executive Clemency for Kathy Cecil, Before the Illinois Prisoner Review

sat in shock, the abuser wanted her to help him hide the body and tell the police that the boy had been kidnapped. She refused. In its closing argument, at the end of a two-day sentencing hearing, the State argued that this showed that she was not a truly battered woman because she knew how to say “no” when she wanted to.<sup>59</sup> As the Jacobson-Gottman study found, however, battered women often say “no” and even argue with their abusers. Yet prosecutors are allowed to argue that if she once said “no,” the defendant is not a truly battered woman.

The two cases just described, Sylvia Flynn’s and Kathy Cecil’s, also illustrate another common prosecutorial argument: this defendant is not truly a battered woman because she loved her abuser and was enmeshed in the relationship. In Sylvia’s case, Valerie Brown, the psychiatric social worker, supported this argument by testifying that Sylvia was “so imbedded in the conflict of the marriage that she really didn’t want to get out.”<sup>60</sup> But, of course, this is the problem for many battered women. Jacobson and Gottman—and others knowledgeable about domestic violence—tell us that women often stay with abusers and love them because they have not yet given up on their relationship. They continue to hope that the violence and abuse will end and that they will have the family that they have always dreamed of.

In Kathy Cecil’s case, the prosecutor used Kathy’s love for her boyfriend, Keith, as evidence that she was culpable as an accomplice to his first-degree murder of her son. Keith kept close watch and control of Kathy during the last three months of her son’s life, the period in which his abuse of Kathy and her son escalated to severe levels.<sup>61</sup> She may have loved Keith in some sense—hostages often bond with their captors—but she also feared him and wanted to escape. She could see no way to escape without endangering her children, parents, and younger sister. Keith routinely and credibly threatened to kill her parents and her nine year-old sister by setting

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Board July Term (filed May 29, 2002).

59. Closing Argument of Prosecutor Brown, *Illinois v. Cecil*, No. 93-CF-1277 (Oct. 11, 1996), Record at 59.

60. See Williams, *supra* note 43.

61. Clemency Petition of Kathy Cecil, *supra* note 58, at 18-31, 35-40, 42-45.

fire to her parents house, starting with her sister's bedroom.<sup>62</sup> That Kathy loved Keith does not mean that she was not afraid of him, or that she failed to do all that she could to protect her son.

Often, prosecutors introduce evidence that a battered woman on trial for killing an abusive partner was a bad mother in order to appeal to the judge's or the jurors' biases with evidence of at-best marginal relevance to the case at hand. In Sylvia Flynn's case, the prosecution introduced evidence that decades earlier she had allowed her infant son to be adopted by a sister-in-law after her husband was killed in an automobile crash. The prosecution introduced evidence that following this incident she had not attempted to see the boy and that Sylvia's current friends did not know about this child's adoption. Indeed, she had told them that he died in the crash. The prosecutor argued that Sylvia's friends did not really know her and were therefore mistaken in their understanding of the relationship between her and John.

In one of the Project's clemency cases, the client had suffered unspeakable abuse for years. During that time, she had had four abortions, each due to her husband's physical and emotional abuse. This woman had one child and desperately wanted another one. Her husband repeatedly convinced her that *now* was the right time, and she would become pregnant. After she was pregnant, he would announce that *now* was *not* the right time and order her to get an abortion (unless she wanted him to perform an abortion on her himself, which he had done to another woman in the past). Of course, she got an abortion each time. The abortions were undesired and traumatic. Yet the court allowed the prosecutor to argue that her four abortions indicated that she had no regard for human life.

In both this client's case and Sylvia Flynn's case, the State used allegations about the defendants' inadequacies as mothers to make them look bad. Such evidence is likely to be far more prejudicial than probative. The fact that Sylvia lied about something she was ashamed of—having given up a child for adoption—does not indicate that her friends did not know her. Moreover, the fact that the Project's client had four abortions at her abuser's insistence shows nothing about her

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62. *Id.* at 42-43.

attitude toward taking a human life. Nor does it contradict her claim that she killed her abuser because she feared him.

Although not framed as such, these are character arguments: because the Project's client and Sylvia were bad mothers, they were also bad women and did not act in self-defense when they killed their husbands. Such arguments appeal to a powerful cultural script: good women are good mothers, and bad mothers are bad women. But like other arguments based on character, which are generally excluded by the rules of evidence, these are far more prejudicial than probative.

A final problem for battered women as defendants is that battered women are not typically angels, and their cases usually have "bad facts." Leading a life filled with degradation, abuse, and violence does not lead to the development of saintly qualities. Battered women often abuse drugs and (or) alcohol as forms of self-medication, in order to deaden themselves to pain. If foul language has been directed at them for years, they may themselves use foul language. There may, as in Sylvia Flynn's case, be a boyfriend or quasi-boyfriend in the background.<sup>63</sup> Understandably, many battered women look to another man for the support they are not getting at home.

Given the problems I have detailed, the admissibility of expert testimony in the defense of battered women does little to ensure that the criminal system affords justice to such women. We need to continue to press for clemency for battered women in prison because of continued systemic failures. Of course, the clemency process is plagued by its own set of problems. Most states give their governors the power to award clemency in light of the recommendation of a body, like the Illinois Prisoner Review Board, whose members generally know nothing about domestic violence and its consequences. More fundamentally, there is no standard; whether to grant clemency is an entirely discretionary decision vested in the governor. As a result, most decisions on clemency petitions are political and the merits are irrelevant.

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63. See Ryan, *supra* note 39. Sylvia used to regularly meet a male friend at Dunkin' Donuts. When he arrived, he would put a necklace that he purchased around her neck, and would remove it as they parted. There was no other evidence supporting the existence of a relationship. *Id.*

### III. PROBLEMS WITH THE DOMESTIC VIOLENCE RESPONSE SYSTEM

As a result of the efforts of those concerned with high levels of violence against women in this country, we now have formalized procedures in every jurisdiction for the grant of orders of protection to the victims of domestic violence, batterer treatment programs, training on domestic violence for police recruits, and battered women shelters. In some places, there are specialized domestic violence courts, sometimes with judges educated on domestic violence and its issues. Many resources are devoted to the various components of domestic violence response systems. Various entities in a large metropolitan area like Chicago employ thousands of professionals and others working as state's attorneys, judges, probation officers, social workers, psychologists, and counselors in batterer treatment programs.

Despite these efforts, one problem pervades the entire country: a shortage of shelter space and the lack of adequate housing, economic supports, and education programs or vocational training for women, particularly those with children, who are trying to escape an abusive relationship. Shelters are not adequate housing. They are crowded, noisy places where few people would be willing to spend even one night. Even so, there is not enough shelter space. For example, in Chicago, shelters are usually full. Some shelters do not allow boys over the age of thirteen, so a woman with an older male child might be unable to use many shelters. Most shelters will not admit women with alcohol or drug problems, and as noted earlier, many battered women self-medicate with these substances. Few shelters have drug treatment programs.

Battered women with children need housing appropriate for a family, such as an apartment, rather than a room (or less) in an overcrowded shelter. If they are addicted to drugs or alcohol, they need a facility that has an effective treatment program and provides adequate space and living conditions for children. Those without adequately paying jobs and are responsible for paying a family's wage need education, training, health insurance, and child care. These needs are largely unmet except for small programs which help only a few women at a time and always have long waiting lists.

Public officials—including police chiefs, state’s attorneys, and judges—express concern about levels of domestic violence and their commitment to its elimination. Yet the more you know about the domestic violence response system in a particular locale, the more problems you discover. This section concentrates on a few of the problems in Cook County, Illinois, the county in which the city of Chicago is located. I became familiar with the Cook County response system while teaching a course in which each student spent four hours a week working for an entity providing direct services to survivors of domestic violence. Some of these students helped women get orders of protection in civil or criminal court. Others worked on divorces and related issues, while a few worked in shelters. During class each week, students would report on their experiences over the previous week, and participants had the opportunity to learn, not just about problems in the area in which they worked, but in other areas as well.

I am sure we did not encounter all the problems that persist in Cook County, and that other jurisdictions face similar problems. But some problems are doubtless common in large metropolitan areas. Rural areas have another set of problems. I mention a few Cook County problems to illustrate that problems pervade the domestic violence response system.

A major and very general problem with the Cook County domestic violence response system is the need for coordinating information and efforts among so many large governmental bureaucracies: the state’s attorney’s office, which obtains orders of protection in criminal court; the courts, which issue the orders of protection; the county Sheriff’s department, which enters information into the Illinois State Police Law Enforcement Agencies Data System (“LEADS”); the Illinois state police force, which administers LEADS; the dispatchers, police officers, and sheriff’s deputies who use the LEADS system when enforcing orders of protection; and the Cook County probation department which is responsible for overseeing batterer treatment programs as well as probation. The heads of these bureaucracies are: the Chief of the Illinois State Police (appointed by the governor); the Chief Judge of Cook County (chosen from among elected judges); the Cook County Sheriff (elected); the President of the Cook County Board of Commissioners

(elected); and the Chief of Police of Chicago (appointed by the mayor).

I describe specific examples of problems in Cook County in three areas: LEADS, batterer treatment programs, and transparency, *i.e.*, the availability of information about how well the domestic response system works.

### A. LEADS

There are numerous long-standing and well-known problems with LEADS, the electronic database used by police to retrieve orders of protection. These problems were first brought to my attention by Nikki Carrion, who was then a student of mine, and is now a lawyer for Land of Lincoln Legal Services in Alton, Illinois. Nikki Carrion spent a summer internship investigating problems with LEADS and then drafted a report on which I rely.<sup>64</sup>

LEADS is an antiquated computer system designed over thirty years ago.<sup>65</sup> Although orders of protection are regularly updated from emergency to interim to plenary, LEADS records cannot be updated; they can only be deleted and re-entered, increasing the risk of entry error.<sup>66</sup> All but emergency orders of protection from criminal court are entered by a clerk who is looking at a carbon copy of the order of protection form, a copy which is difficult to read and on which critical information is often handwritten.<sup>67</sup> Additionally, the copy is often illegible, again increasing the risk of error.<sup>68</sup> Police officers and dispatchers usually access the appropriate record in the LEADS system by the respondent's date of birth, a required field.<sup>69</sup> But the recipient of the order of protection may not know the respondent's date of birth or it may have been entered incorrectly. In either event, police officers will usually be unable to find the order on the LEADS

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64. Nikki Carrion & Mary Becker, *Report on LEADS and Its Use to Enforce Orders of Protection* (Aug. 13, 2001) (copy on file with author and available on request).

65. Claire E. House, *Illinois Trains Law Officers to Access New Database System*, GOVERNMENT COMPUTER NEWS, available at <http://www.gcn.com/archives/sl/1999/May/1a.htm> (May 1999).

66. Carrion & Becker, *supra* note 60, at 16-17.

67. *Id.* at 5.

68. *Id.* at 12.

69. *Id.* at 10.



system.<sup>70</sup> If the order includes a prohibition on the respondent's possession of firearms, that prohibition is buried in a miscellaneous remedy field in the LEADS system, a field that the officer or dispatcher will not see unless he or she scrolls through the entire LEADS record.<sup>71</sup>

### *B. Batterer Treatment Programs*

Abusers are routinely required to attend mandatory batterer treatment programs in Chicago as in other parts of the country. But there is no evidence that such programs are effective, particularly when mandatory. "Successful" completion often means only that the abuser showed up for all required sessions. In Cook County, those running the treatment program are not given information about a particular participant's background, thus making it very difficult to respond appropriately when a batterer explains that there is no real problem because he only hit her once and not very hard.

The probable ineffectiveness of batterer treatment programs would not be as serious if mandatory participation were but one of an arsenal of sanctions of varying degrees of severity applied to stop domestic violence. But for the vast majority of abusers, there is no penalty other than mandatory participation in one of these programs. This is true even for abusers who have repeatedly violated orders of protection and pose a severe threat to the safety of their victims. In the end, this huge system of interlocking bureaucracies does little to stop an abuser who is undeterred by the order of protection itself.

### *C. Lack of Transparency*

A third problem is the lack of information about the effectiveness of the domestic violence response system. Data is unavailable about many key facts, such as how many men who complete a batterer treatment program are subsequently charged with domestic violence or jailed. Nor do we know how often police are unable to find an order of protection on the LEADS system when many victims insist

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70. *Id.* at 10-11.

71. *Id.* at 15-16.

that there is a current order.

Officials in charge of the bureaucracies that respond to domestic violence are uniformly and absolutely committed to appearing concerned about eradicating domestic violence. Elected officials, such as the state's attorney, are particularly concerned about looking good on domestic violence. Many of those working for such officials are, therefore, more concerned about keeping problems hidden and ensuring that their boss looks good than about improving the system. In truth, given the complexity of the system and the number of different entities involved—entities reporting to the governor, the mayor, the county sheriff, the president of the county board, and the chief judge of the county—effective coordination and communication is difficult. In such an environment, problems, even known problems, tend to be swept under the rug rather than addressed and resolved. Moreover, with little concrete information available, it is difficult for activists to know where change is most needed or even to argue that it is needed.

#### IV. CHANGES

In this section, I discuss possible changes in each of the three areas discussed above. I begin by discussing some general problems and possible solutions.

##### *A. General Problems and Possible Solutions*

Two general problems are immediately apparent: the lack of resources spent on certain key components of the domestic violence response system and the failure of many participants in the criminal justice system and elsewhere to understand domestic violence and its effects. Better allocation of resources (or more resources) and more education and training would seem to be obvious solutions. I consider each of these in turn.

##### 1. Resources

When one steps back and looks at the entire domestic violence response system, it seems virtually certain that most resources are spent on employing people in police departments, state's attorney's

offices, probation departments, sheriffs' offices, courts, and probation departments. Relatively little is spent on LEADS, though that system is the essential infrastructure of the response system. Relatively little money is spent on shelters, drug-treatment programs, adequate transitional housing, education, and assistance with childcare costs for victims of domestic violence. It does not take a cynic to conclude that money is being spent, not where it is most needed or can do the most good, but where it can produce jobs and contribute to the growth of bureaucracies.

More resources are needed for an entirely new, up-to-date LEADS system and for direct support to battered women in terms of housing and job training. In assessing the current allocation of resources, information on actual expenditures today would be invaluable. I therefore include disclosure of some of these numbers in the accountability legislation discussed below.

## 2. Education and Training

As discussed above, judges, prosecutors, psychiatrists, and others often hold a narrow and inaccurate notion of what battered women are like, believing that they are always and only passive, compliant, and economically or emotionally dependent on their abusers. But the truth is that they are diverse: some are economically dependent; some support their abusers economically; some have friends; others are isolated; most fight back and are far from compliant. In each area that I have discussed, a greater number of judges, lawyers, state's attorneys, and police, with a greater understanding of the dynamics of domestic violence and its negative effects on children, particularly boys, would make an enormous difference. Education would therefore seem to be key.

Education and training on domestic violence may, however, be part of the problem rather than the solution. As with batterer treatment programs, there is no good information about the effectiveness of training programs on domestic violence. What little evidence we have about other training programs should give us pause. Employers are increasingly implementing training programs for employees on diversity and sexual harassment. Although judges in employment discrimination cases assume that such training is

valuable and indicative of the employer's compliance with anti-discrimination laws, there is little reason to think that such training has long-term positive effects.<sup>72</sup> In fact, it may have negative effects.<sup>73</sup>

Empirical studies of the effects of training on diversity or sexual harassment are limited, but there are some. None of the programs studied had long-term positive effects.<sup>74</sup> Indeed, diversity training can reinforce stereotypes and misunderstandings, particularly when controversial topics are covered in a single session or day.<sup>75</sup> I wonder whether the belief that all battered women fit a single narrow mold, a belief expressed by both Azariah Eshkenazi and Valerie Brown in Sylvia Flynn's case, might have roots in short training programs with the unfortunate effect of reinforcing stereotypes. Sessions for prosecutors and judges might also have produced such effects, explaining prosecutors' arguments in the cases discussed above as well as the judges' tolerance of such arguments.

If we cannot teach people about domestic violence during a one-day training session, then we need something other than education to protect battered women from narrow stereotypes. I therefore propose that we develop a Battered Woman Shield Statute along the lines tentatively sketched in the section below on battered women defendants. I now turn to suggest legal changes in each of the three areas discussed above, beginning with child custody law, then battered women as criminal defendants, and finally the domestic violence response system.

### *B. Domestic Violence and Child Custody*

Child custody law should be changed in a number of ways. There should be a very strong presumption that children are best off with only limited visitation with an abusive father, regardless of whether

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72. Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 30 (2001).

73. *Id.*

74. *Id.* at 39-41.

75. *Id.* at 40.

he abuses only the mother or his children.<sup>76</sup> Friendlier parent provisions should be abolished; there are good reasons—reasons grounded in the needs of the children—for a parent to be less than friendly to the other parent. It is true that divorced spouses are often unfriendly to each other when, for the children's sake, they should not be. But it nevertheless remains true that many parents, particularly women who have been abused by (or have seen their children abused by) the father, have compelling reasons for their hostility. It is dangerous to use friendlier parent provisions in such situations.

Finally, custody statutes should be amended to prohibit the introduction of evidence of parental alienation syndrome. There is no foundation for this syndrome in the psychological literature. It is in large part the creation of one man, Richard A. Gardner, who says that when children are alienated from one parent, the explanation is inappropriate behavior by the parent to whom the children remain close.<sup>77</sup> But children can have compelling reasons to be alienated from an abusive parent, reasons that have nothing to do with the other parent's conduct.

### *C. Battered Women as Defendants*

Given the difficulty of changing long-standing beliefs and attitudes through education, we need to work for clear, non-discretionary rules which exclude prejudicial evidence of little relevance and restrict the ability of prosecutors to make outrageous arguments. A Battered Woman Shield Statute could accomplish some of this. Although I am not an expert in either criminal law or

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76. To be effective, this statute should *not* be gender neutral, i.e., it should not treat mothers and fathers the same with respect to partner abuse. The vast majority of abusers of partners—about ninety-five percent—are men, and many of them are adept at using both the order of protection and divorce systems as tools in their continued abuse. The presumption described in the text should apply, therefore, only if it is the man who is the abuser. When a woman appears to be abusing a partner, it is more likely than not that she is actually the victim.

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

evidence, the following are some ideas about what such a statute should do:

#### Battered Woman Shield Statute

- Require a pre-trial hearing before a judge to determine whether there is significant evidence of physical abuse of the defendant at the hands of the deceased. If such evidence exists, prohibit the prosecutor from arguing that the defendant is not a battered woman or that she was an equal partner in a bad situation.
- Make evidence that a woman denied, minimized, or gave inconsistent descriptions of abuse in the past inadmissible to show that there was in fact no prior abuse.
- Make evidence that a woman was either angry or jealous of her abuser inadmissible to show that she was not acting out of fear at the time she, or someone she hired, killed or injured her abuser.
- Make evidence of a woman's inadequacies as a mother inadmissible in her prosecution for murder or attempted murder of an adult partner.
- Prohibit prosecutors from using the word "feminist" to undermine the credibility of a woman's claim that she is a battered woman, to undermine the credibility of any expert, or to suggest that someone invented the claim.

In addition, it is important that those testifying as "experts" on battered women's syndrome or experiences base their testimony on something other than the narrowest stereotypes of battered women. Because these stereotypes generally favor the prosecution, in an ideal world the statute would provide that only the defendant has the right to introduce such evidence.

### Domestic Violence Experts Preferred Alternative

- Require experts to demonstrate familiarity with literature on the effects of domestic violence on victims, as well as the literature on abusers and their characteristics. In addition, require experts to be currently engaged in domestic violence issues through teaching, writing, or research.<sup>78</sup>
- When a pre-trial hearing produces significant evidence that the defendant has been physically abused at the hands of the deceased, allow only the defendant to call an expert to testify on battered woman syndrome or experiences.

Although only defendants should be able to present an expert on battered women and domestic violence, courts tend to give prosecutors the same rights as those accorded to defendants. I therefore propose the following as an inferior alternative that would nevertheless improve upon the status quo:

### Domestic Violence Experts Second-Best Alternative

- Make familiarity with the literature on domestic violence of abusers and their characteristics a requirement for experts. In addition, the witness

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78. For a similar suggestion in the context of psychological experts who are testifying on the reliability of eyewitness' accounts, see SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 86 (1988). The authors state:

[C]ourts should set more stringent standards when it comes to qualifying as an expert. According to the rules, an individual is qualified "by knowledge, skill, experience, training or education." In current practice, that standard is rather loosely applied. Just as not all physicians are qualified to perform surgery, not all psychologists are experts on the topic of eyewitness testimony. At the very least, the courts should demand that their experts be "actively engaged" through teaching, writing, or research.

*Id.* (citing FED. R. EVID. 702) (footnote omitted).

should be actively engaged in domestic violence issues through teaching, writing, or research.<sup>79</sup>

- When a pre-trial hearing produces significant evidence of physical abuse of the defendant at the hands of the deceased, allow both the defendant and the prosecution to introduce an expert who has examined the defendant to testify on the battered woman syndrome or experiences.

#### *D. The Domestic Violence Response System*

In this section, I propose two different types of changes with the potential to provide the foundation for improvements to the domestic violence response system. To counteract the problems associated with so many overlapping bureaucracies, I propose the creation of a county-wide entity responsible for the system with the power to improve coordination among the various involved entities. I also suggest accountability legislation requiring the disclosure of key information.

##### 1. A County-Wide Department of Home Security

After identifying the involvement of many bureaucracies as a major problem in the war on terror, the federal government responded by creating a Department of Homeland Security. The Department has general responsibility for anti-terrorism efforts and the ability to call on any agency for information or cooperation when appropriate.

In the war on the most common type of domestic terror, domestic violence, there is a similar need. Each county needs to establish a Department of Home Security that is authorized to oversee the effectiveness of the local domestic violence response system and to collect the data needed to assess effectiveness. This Department should also be authorized to conduct a post-mortem review six months after any woman dies at the hands of a boyfriend or partner as

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79. *See id.*



one way to assess the system's effectiveness.

This Department of Home Security could report to the county executive, though that might result in too much entanglement in local politics. Another possibility would be to have the Department report to the state Attorney General, thus ensuring some independence from local politics. Perhaps some other, more appropriate, organizational form could be designed.

## 2. Transparency and Accountability Legislation

There is little transparency in the Cook County Domestic Violence Response system. Even insiders find it difficult to assess how well the system works as a whole and how well the various overlapping bureaucracies interact and cooperate. Many things known or available to one bureaucracy are unavailable to others. For instance, an activist outside any of the governmental agencies has little available information to assess the effectiveness of the domestic violence response system in her area. We therefore need accountability legislation requiring disclosure of information to make the domestic response system more transparent. Activists would then be in a better position to assess the effectiveness of the system, identify areas needing change, and to advocate needed changes.

Each county should be required to publish a Domestic Violence Report Card on a yearly basis. Each county's Department of Home Security could compile it. Included in this document would be information on how much money was spent during the reporting year on: (1) shelters (including separate entries for public and private funding); (2) long-term adequate housing for victims and child care for their children; (3) education and training for victims (including separate entries for public and private funding); (4) probation department personnel monitoring of the abuser's compliance with their probation and other requirements or penalties; (5) batterer treatment programs (including separate entries for public and private funding); (6) State's Attorney personnel working in the Order of Protection system; and (7) judges and other personnel in the county judicial system working in the Order of Protection system.

In addition, the statute should provide that each police department and sheriff's office must release, on a yearly basis, data answering the following questions:

- (A) In how many instances have police been unable to find an order of protection on LEADS despite someone insisting that there is an outstanding order?
  - (1) In how many of these instances did the police department forward information on the discrepancy to the state's attorney's office?
  - (2) In how many of these instances did the state's attorney's office inform the police whether there was an order of protection?
  - (3) In those cases in which there was an order of protection, what was the explanation for why it was not found initially?

Each state's attorney's office should release, on a yearly basis, data answering the following questions:

- (A) In how many instances did police forward a report noting its inability to find an order of protection on LEADS?
  - (1) In how many of these instances did the state's attorney's office locate the order of protection? In how many cases was the attempt unsuccessful? For those cases in which orders were found, what happened thereafter? Was the victim harmed during the period in which the order could not be found? If so, how seriously?
  - (2) In those cases in which there was an order of protection, what was the explanation for why it was not found initially?
- (B) How many domestic violence cases did the office prosecute?
  - (1) How many of these cases resulted in convictions and how many in acquittals?

- (2) How many of the convictions were the result of plea bargains? What penalties were imposed in the plea bargain cases? What penalties were imposed in the cases that went to trial?
- (C) How many criminal prosecutions did the office undertake for violation of an order of protection?
  - (1) How many of these cases resulted in convictions and how many in acquittals?
  - (2) How many of the convictions were the result of plea bargains? What penalties were imposed in the plea bargain cases? What penalties were imposed in the cases that went to trial?

Each county court system and probation department should release, on a yearly basis, data answering the following questions:

- (A) How many defendants were ordered to enter a mandatory batterer treatment program either as a result of a plea bargain for violation of an order of protection, a plea bargain to a domestic violence charge or a conviction on either?
  - (1) What information was given to the batterer treatment program about each individual referred to the programs sponsored by governmental entities?
  - (2) What information was given to the batterer treatment program about each individual referred to the programs sponsored by private agencies?
  - (3) How many of these individuals successfully completed the program for each category and what constitutes successful completion?
  - (4) Of those individuals who successfully completed a batterer treatment program either this year or in the past five years, how many were arrested this year for domestic violence for violating an order of protection?

- (5) For those individuals who failed to successfully complete a batterer treatment program, what were the consequences? How many were arrested? How many spent time in prison, and how much time did they spend?
- (A) How many defendants who were convicted in criminal prosecutions for domestic violence spent time in prison for violating an order of protection, failing to successfully complete a treatment program, or for violating any other bond restrictions?

Each county's Domestic Violence Response System Report Card should also contain information about the system used by dispatchers and police officers to get information about orders of protection. These are generally state-wide electronic databases. The administrator of the database should be required to give each county the necessary information to include in the county's report card. In Illinois, the LEADS administrator should be required to report on: (1) plans, if any, for an entirely new LEADS system; (2) plans, if any, to eliminate the need to search for records by the respondent's date of birth; (3) plans, if any, to allow for more efficient updating of orders of protection; and (4) plans, if any, to enable the electronic transfer of orders of protection between civil and criminal courtrooms.

This accountability legislation could easily be expanded to include information on violence against women generally. The Department of Home Security could compile relevant information into a Report Card on Violence Against Women. Information could, for example, be included on how many date rapes and marital rapes were reported to the police and how many were subsequently prosecuted by the state's attorney. This would give the state's attorney's office an incentive to act on such cases. They rarely prosecute such cases today because these cases are difficult to win and state's attorneys are judged by conviction rates. But disclosure would create an incentive to try some cases, and increased prosecution might lead to changing attitudes and standards.

### CONCLUSION

In this Article, I have discussed some of the ubiquitous problems that women face in our legal system when they have endured, or are enduring, domestic violence. I have suggested a number of changes in each of three areas: custody at divorce, battered women as defendants, and the domestic violence response system. These changes would only be a beginning in the continuing effort to shape a more just legal system.

We also need to develop a network of pro bono lawyers who are capable of helping victims of domestic violence with complicated cases. Domestic violence cases often involve immigration, custody, and divorce issues. There are far too few legal services in these areas given the level of need. As I have discussed, women need better laws and more adequate responses to ongoing domestic violence. But access to legal services is a prerequisite for access to justice.