

# When Is a Battered Woman Not a Battered Woman? When She Fights Back

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## INTRODUCTION

“I will not allow him to beat on me,” the woman stated.<sup>1</sup> The judge hearing her petition for a temporary protective order seemed skeptical of her explanation: After her partner assaulted her, she hit him back to stop him from battering her further. While she was clear and truthful about having fought back, she continued to insist that she was the victim of the assault, that his violence was vastly disproportionate to hers, and that she needed the assistance of the court to ensure her future safety. The judge expressed disbelief: Why would a woman who fought back need protection? Why should he find her eligible for a remedy that is intended to stop violence when she had admitted to violent behavior? The advocates in the courtroom grimaced at the exchange—you never let a client tell a judge that she fought back unless it is absolutely necessary.

Ultimately, after much back and forth about what exactly she had done, the judge granted the woman a temporary protective order. Given the lesser burden of proof required for temporary order—as opposed to final protective orders—and the ex parte nature of the hearing,<sup>2</sup> his decision was hardly surprising. But if that petitioner were to tell the judge hearing her request for a final protective order the same story she had shared with this judge, the odds are good that her petition would be denied. She simply would not have looked enough like a victim to be believable.<sup>3</sup>

Over the past thirty years, the public, the media, and the legal system have coalesced around a stereotypical image of victims of domestic violence. Before the birth of the battered women’s movement, the assumption was that domestic violence happened to “them”—poor African American women who lived in slums.<sup>4</sup> Advocacy by the battered women’s movement around the idea that domestic violence is endemic to all races, ethnicities, religions, and

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1. This story is based on a specific encounter I witnessed and recorded one morning in the District Court for Baltimore City, Maryland, but have observed many times before.

2. See, e.g., MD. CODE ANN., FAM. LAW § 4-505 (West 2008) (describing the temporary protective order process). Like most states, Maryland has a two-stage process for protective order proceedings, the first of which is ex parte. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1035-37 (1993) (describing the legal standard required to issue ex parte temporary protection orders).

3. In her study of battered women and narrative, Elaine Lawless describes a reshaping process that begins from the moment a woman who fights back reaches shelter and tells her story to shelter staff and residents:

The warnings of the staff, the advice of the other residents, the interjections of the counsel who leads the support group that night, and the court advocates who work closely within the ‘system,’ all point to one imperative. She must not tell her story, or at least she must not tell the story the way she’s been telling it here, in the shelter, for the past few hours and days.

ELAINE J. LAWLESS, *WOMEN ESCAPING VIOLENCE: EMPOWERMENT THROUGH NARRATIVE* 48 (2001).

4. LENORE E. WALKER, *THE BATTERED WOMAN* 21-22 (1979) (describing the myth that poorer and minority group women are battered more frequently than middle class or “Anglo” women).

socioeconomic brackets, coupled with the introduction of “battered woman syndrome” and its reliance on the theory of learned helplessness to explain why battered women remain in abusive relationships, changed the portrait of the victim of intimate partner violence.<sup>5</sup> The image of a victim of domestic violence morphed from a low-income woman of color to a passive, middle-class, white woman cowering in the corner as her enraged husband prepares to beat her again. This woman never fights back. Because this woman is the one who lawyers want to present and judges expect to see in their courtrooms, women who fight back are at a distinct disadvantage when they turn to the civil legal system for assistance. The battered woman who fights back simply is not a victim in the eyes of many in the legal system.

Who fights back? Unsurprisingly, women who fight back are those with the fewest other options for addressing the violence against them. They are women who lack access to resources, women who may be afraid or unwilling to turn to the police or other professionals for assistance, and women whose marginalized status may deprive them of the ability to make choices other than retaliation. They are women who may be conflicted about turning to the civil legal system and who find that when they do, and when they are honest about how they have defended themselves, they are penalized for exercising one of the few options open to them to prevent or escape from an assault.

Listening to the exchange described at the beginning of this Article, the advocates grimaced because they knew that once the judge heard that the woman had used force, her credibility would be sharply questioned.<sup>6</sup> Concerned about how it would affect her ability to secure a protective order, many, even most, advocates would have dissuaded her from telling that story, editing it to prevent questions about who was the primary aggressor and whether she actually needed protection. The advocates would have counseled her to change her story—not to lie, but to tailor it more narrowly given the objective she sought.<sup>7</sup> In doing so, they would have denied her reality, her truth and her voice.

This Article looks at the conflicting narratives of victims of domestic violence who ask the civil justice system for assistance. It first discusses the importance of narrative in the construction of identity, both in constituting one’s self and in determining how that self is presented to the world. It then juxtaposes the prevailing narrative of the domestic violence victim—the passive, middle-class white woman—against the narratives of women who

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5. See *infra* Part II.

6. Battered women find their credibility challenged on a number of different dimensions: as women, as women of color, as women alleging violence, and in cases that rely almost exclusively on sorting out conflicting testimony. See *infra* Part III.

7. As Mary Coombs recognizes, “That natural and appropriate desire to win one’s case . . . inevitably colors the way the case is presented and heard . . . [T]he story is likely to be crafted, within the limits of the factors, to resonate rather than clash with the fact finder’s cultural script.” Mary I. Coombs, *Telling the Victim’s Story*, 2 TEX. J. WOMEN & L. 277, 278 (1993).

fight back. The Article argues that victims of violence are encouraged to tailor their stories as closely as possible to the prevailing narrative to persuade the legal system of their need for protection, and presents the consequences both for victims and for their advocates in constructing narratives that deny women the right to defend themselves. The Article finally asks how the construction of the victim of domestic violence can be reframed to enable women who fight back to tell the stories they choose to tell.<sup>8</sup>

### I. THE IMPORTANCE OF NARRATIVE<sup>9</sup>

From earliest childhood, narratives are how we understand and order the world around us. As psychologist Jerome Bruner explains, children begin using narratives at three and four years old to organize their experiences: “They are not able to bring theories that organize things in terms of cause and effect and relationships, so they turn things into stories, and when they try to make sense

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8. Before I began working on this Article, I was concerned about the appropriateness of a white, straight woman telling the stories of African American women and lesbians. bell hooks has stated, “When we write about the experiences of a group to which we do not belong, we should think about the ethics of our action, considering whether or not our work will be used to reinforce and perpetuate domination.” BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 43 (1989). Richard Delgado has similarly warned legal scholars that when white scholars write about subordinated groups, the writing may suffer “from a failure of empathy, an inability to share the values, desires, and perspectives of the population whose rights are under consideration,” and he suggests that white authors move on to other topics. Richard Delgado, commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568 (1984). Battered women also share this skepticism:

When I read [the advertisement for a study of African American battered women], I thought “Here’s another White woman researcher from the University of Washington who wants to come to our community and get into our business!” They always come to our communities to study us and you never hear from them again.

Janette Y. Taylor, *No Resting Place: African American Women at the Crossroads of Violence*, 11 VIOLENCE AGAINST WOMEN 1473, 1478 (2005). Joan McClellenn discusses her “journey as a stranger in a foreign land” as a straight woman investigating violence in the lesbian, gay, bisexual, and transgender communities, and offers strategies for doing meaningful work as a nonaffiliated researcher. Joan C. McClellenn, *Researching Gay and Lesbian Domestic Violence: The Journey of a Non-LGBT Researcher*, 15 J. GAY & LESBIAN SOC. SERVICES 31, 32 (2003). I have tried to heed these criticisms and to rely heavily on the work of battered women, African American women, and lesbians to inform my analysis. I have also relied on my own experiences, however, having listened to the stories of hundreds of women in the context of protective order and other civil family law proceedings. This is, in part, my story as well, the story of an advocate who has been leery of presenting non-conforming narratives of women who fight back to courts.

9. I use the terms “narrative” and “story” interchangeably in this Article, although I realize that others define those terms far more precisely. See, e.g., JEROME BRUNER, ACTS OF MEANING 43-52 (1990) (outlining the characteristics of a “narrative”); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 145 (1997) (arguing that the terms “narrative” and “story” require clear definition). But see Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 399 (1996) (book review of RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995)) (using “narrative” and “story” interchangeably, and noting the imprecision and fluidity of the terms); Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3, 3 (Theodore R. Sarbin ed., 1986) (using “narrative” and “story” coterminously).

of their life they use the storied version of their experience as the basis for further reflection.”<sup>10</sup> Even after adults have developed more complex forms of reasoning and ordering, they continue to rely on narrative to understand their lives.<sup>11</sup> Bruner notes, “[O]ur capacity to render experience in terms of narrative is not just child’s play, but an instrument for making meaning that dominates much of life in culture.”<sup>12</sup>

Using narratives to order their worlds and understand their experiences is particularly important for victims of domestic violence. Battering—being physically, emotionally, and/or sexually abused, isolated, controlled, or degraded—can drastically affect how women view themselves. Battering can fundamentally change a woman’s personality and undermine her confidence in her abilities, her skills, and even her sanity. Narratives that enable a woman to see that she is not responsible for the violence against her, and that she is actively struggling against that violence, can be an essential tool in helping her hold on to her sense of self.<sup>13</sup> Elaine Lawless, who documents the experiences of battered women in her book, *Women Escaping Violence: Empowerment Through Narrative*, explains that “telling our stories is a positive, therapeutic act that aids the storyteller in trying to make sense of a life that otherwise might appear too fragmented, purposeless, or chaotic”<sup>14</sup>—adjectives that might seem to describe the lives of battered women. If the battered woman is denied her ability to tell her story, “self” can never be realized.”<sup>15</sup>

Narratives are essential in creating a basis for self-knowledge by helping individuals to understand and organize their worlds. Beyond the individual, though, narratives are also a building block for developing interpersonal relationships. Narratives form the foundations of our ties to other people. We establish relationships based on the stories we tell about ourselves, our history, our likes and dislikes, our goals and aspirations. Bonds develop when the stories we share resonate with others. Narratives shape the self that we present

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10. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 118 (2002) (quoting Jerome Bruner).

11. See BRUNER, *supra* note 9, at 56 (“The typical form of framing experience (and our memory of it) is in narrative form.”); see also DONALD E. POLKINGHORNE, *NARRATIVE KNOWING AND THE HUMAN SCIENCES* 150 (1988) (“[W]e achieve our personal identities and self concept through the use of the narrative configuration, and make our existence into a whole by understanding it as an expression of a single unfolding and developing story.”); John A. Robinson & Linda Hawpe, *Narrative Thinking as a Heuristic Process*, in *NARRATIVE PSYCHOLOGY*, *supra* note 9, at 111, 111 (“The stories we make are accounts, attempts to explain and understand experience.”).

12. BRUNER, *supra* note 9, at 97.

13. Elaine Lawless, who conducted ethnographic research with battered women in Missouri, posits that in telling their stories, many battered women are able to construct themselves for the first time. Lawless believes that the time the women spent telling their stories allowed them to try to make “some sense of a life that perhaps has not made a great deal of sense to [them] as [they have] lived [them].” LAWLESS, *supra* note 3, at 14.

14. *Id.* at 16.

15. *Id.* at 18.

to the rest of the world for society's approval and approbation.<sup>16</sup> Narratives can be instrumental as well; they may be offered for their ability to show others what we need and how they can help us.<sup>17</sup> As psychologist Robert Coles was reminded by an early clinical supervisor, "The people who come to see us bring us their stories. They hope they tell them well enough so that we understand the truth of their lives. They hope we know how to interpret their stories correctly."<sup>18</sup>

The stories battered women tell profoundly affect their ability to enlist those who hear those stories in helping them address the violence. Battered women may tell their narratives to police, shelter staff, friends, clergy, welfare caseworkers, and/or child protection social workers. How the hearer interprets and constructs these stories may determine whether assistance is forthcoming. In her study of shelter staff, for example, Michelle VanNatta found that workers looked for particular elements in a potential client's story to determine whether the woman really needed shelter because she had been battered (as opposed to being a "nonbattered homeless woman," for example).<sup>19</sup> Through screening interviews, VanNatta found that shelter workers attempted to elicit detail about the intensity of the violence, the immediacy of the danger, and the actions that the woman had taken to protect herself.<sup>20</sup> If the woman's story did not mesh with the shelter worker's expectations of battered women, the woman was likely to be denied refuge.<sup>21</sup> This screening did not end when the woman was admitted to shelter; workers continued to scan the narratives told by battered women in the shelter to determine whether their stories reflected what workers expected to hear from battered women. As VanNatta notes, "Because 'real' battered women are constructed as women in pain who would want to seek help and support from staff, as well as to connect with the other residents with whom they are assumed to have many common experiences, women who do not actively participate in these programs may come under workers'

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16. Janette Y. Taylor describes battered women's "testimony" as "a vehicle by which women share their stories and perform self-healing, affirmation, and empowerment." Janette Y. Taylor, *Talking Back: Research as an Act of Resistance and Healing for African American Women Survivors of Intimate Male Partner Violence*, in *VIOLENCE IN THE LIVES OF BLACK WOMEN: BATTERED, BLACK AND BLUE* 145, 154 (Carolyn M. West ed., 2002); see also Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 756 (2005) (discussing the impact sharing stories had on participants in the Battered Mothers' Testimony Project).

17. ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION* 20-21 (1989) (discussing the functions of patient stories in the psychological context). Coles cautions, though, that even when stories are instrumental, it is essential not to jump past the story itself to reach a diagnosis, lest the full nature of the client's story be lost. *Id.* at 21-23.

18. *Id.* at 7; see also BRUNER, *supra* note 9, at 86 (explaining that children learn not only that they need to determine their desires, but also to "tell[] the right story" in order to get what they want).

19. Michelle VanNatta, *Constructing the Battered Woman*, 31 FEMINIST STUD. 416, 424 (2005).

20. *Id.* at 423-25.

21. EVAN STARK, *COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 77 (2007) ("Danielle is excluded [from a shelter] because her aggressive response to abuse proves she was not really a victim. Wrote the shelter worker, 'she is an extremely young woman with "ruff attitude"—if he hits me I always hit him back.'").

suspicious.”<sup>22</sup> To secure assistance, a battered woman must tell a compelling story; if her narrative fails to resonate, she may find the shelter door barred.<sup>23</sup> Establishing interpersonal bonds through narrative is often the key to ensuring battered women’s access to services.

#### A. *Narratives and the Law*

Narratives are central to the development of the law and the operation of the legal system. Stories are passed from actor to actor, shaping the way that a particular event or person is understood within a legal context and influencing the legal system’s reaction to that event or person.

Law lives on narrative, for reasons both banal and deep. For one, the law is awash in storytelling. Clients tell stories to lawyers, who must figure out what to make of what they hear. As clients and lawyers talk, the client’s story gets recast into plights and prospects, plots and pilgrimages into possible worlds.<sup>24</sup>

Those stories are then told to judges, who retell them in findings of fact, conclusions of law, and orders.<sup>25</sup> Repeating these stories allows those involved in the legal system to situate their own actions and decisions within a familiar and accepted context, shielding them from criticism or question.<sup>26</sup>

Storytelling is at the heart of the petition of a battered woman seeking a civil protection order. Judges routinely tell the petitioners who come before them asking for assistance, “Tell me why you’re here.” Victims, who are typically unrepresented,<sup>27</sup> attempt to convey their stories to the court, with varying degrees of success. Some victims’ stories are difficult to follow: The narratives are not linear, the victims struggle with injuries and emotions, and sometimes, the stories are told in different languages. Other victims tell stories that do not meet the judge’s needs: They fail to focus on the immediate violence that brought the woman to the court that day, they include details the

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22. *Id.* at 426.

23. Elaine Lawless explains, “The woman telling her story may believe that she got into the shelter and received help because of what ‘he did,’ when, in fact, she receives aid and shelter based on what *she* says.” LAWLESS, *supra* note 3, at 38 (emphasis in original).

24. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES 110 (2000).

25. *Id.*; see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (describing the violence that judges do through their interpretation of narrative).

26. AMSTERDAM & BRUNER, *supra* note 24, at 110.

27. The vast majority of petitioners in domestic violence cases do not have counsel; the numbers are close to one hundred percent at temporary protective order hearings, which take place almost immediately after the violence, long before the victim ordinarily has the chance to secure assistance. See Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges To Protect Battered Women*, 11 AM. U. J. OF GENDER SOC. POL’Y & L. 499, 511-12 (2003) (finding that few women had lawyers in protective order hearings, and that those with lawyers were more successful in securing protective orders).

judge deems erroneous, and they stress incidents that are not actionable under the law.<sup>28</sup> Because most victims are unrepresented in protective order proceedings, the victim's story is typically unedited by anyone else. Without assistance in shaping the narrative in a way that meets the needs of the forum, the victim's need for protection may not be clear. When her story does not conform with what the judge expects to hear or contain language (like "I am afraid" or "I was beaten") that signals to the judge that the woman is, in fact, a victim of violence, the judge may not recognize her narrative as one that warrants granting the court's protection.<sup>29</sup>

Narratives both help women understand their own experiences and enable women to reach out to others for assistance in addressing the violence against them. A danger lurks in the narratives, however: If the narrative the woman constructs does not resonate with the hearer, the battered woman's ability to engage that hearer in her struggle may be imperiled. As a result, how battered women construct their narratives is essential.

## II. THE PARADIGMATIC VICTIM AND HER SILENCED SISTERS

The dilemma for women who fight back is that a stock narrative already exists for victims of domestic violence. That narrative has been shaped by the work of Lenore Walker, who first introduced the ideas that came to be known as battered woman syndrome, as well as by political choices the battered women's movement made in attempting to secure support, resources, and legislative and systemic change. That narrative is drastically different from the narratives of women who fight back.

### A. *The Paradigmatic Victim Is Passive*

In 1979, Lenore Walker changed the way that society, and particularly the legal system, looked at battered women. In her book *The Battered Woman*, Walker provided what quickly became accepted as one answer to the question perennially asked of battered women: Why doesn't she leave?<sup>30</sup> Walker explained that over time, battered women, finding that they cannot anticipate, control, or stop the violence against them, begin to suffer from learned

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28. While the law's primary focus is physical violence, many victims present stories of fear or emotional abuse—not because no physical abuse occurred, but because that abuse was secondary for them. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 28-30 (2004).

29. See, e.g., Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1275 (1993) (describing one judge's refusal to grant a protective order by stating "[S]ince I would not let that happen to me, I can't believe that it happened to you.").

30. WALKER, *supra* note 4, at 43.



helplessness.<sup>31</sup> This inability to exercise control, according to Walker, leads battered women to assume that they cannot stop the violence. Instead of actively seeking ways to escape violent relationships, the women sink into relative passivity, self-blame, and fatalism born of the randomness of the violence.<sup>32</sup>

As Walker's ideas gained currency among experts on domestic violence, a portrait of the paradigmatic victim began to emerge. In the literature on domestic violence, the battered woman has been described as "scared, helpless, meek, and blameless,"<sup>33</sup> "passive" and "submissive,"<sup>34</sup> and "weak" and "powerless."<sup>35</sup> Battered women have also been depicted as "deferential, submissive to authority, and compliant to the demands of others,"<sup>36</sup> "vulnerable, ashamed . . . dependent, unassertive, depressed and defenseless . . ." <sup>37</sup> Although the paradigmatic victim wants to leave the relationship, she is described as feeling powerless to do so. She is expected to cooperate with the legal system—with police who want to arrest and prosecutors who want to pursue her abuser.<sup>38</sup> By all accounts, the paradigmatic battered woman comports with societal notions of the "victim"—she does not use violence against her batterer unless she is convinced that she must do so or face imminent death herself. Other than retaliating against her batterer when she sees no other viable option, the victim does not fight back.<sup>39</sup>

31. In her book, Walker discusses the concept of learned helplessness, describing the conclusions Martin Seligman reached based on his research on dogs who were shocked at irregular intervals, and adopting that research to explain the behavior of battered women. *Id.* at 45-48.

32. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALA. L. REV. 973, 998 (1995) (citing WALKER, *supra* note 4, at 75-85).

33. Laurie S. Kohn, *Barriers to Reliable Credibility Assessments: Domestic Violence Victim-Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 733, 741 (2003).

34. Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 48 (1993); see also Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107, 129 (2000) ("In order for the syndrome defense to work, the woman must be portrayed as passive and weak . . .").

35. Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow To Support the Substance*, 38 HOW. L.J. 297, 301 (1995); see also *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1592 & n.136 (1993) (citing to court opinions that portray battered women as "helpless, passive or psychologically disturbed").

36. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservativization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 309 (2005).

37. Lisa A. Harrison & Cynthia Willis Esqueda, *Myths and Stereotypes of Actors Involved in Domestic Violence: Implications for Domestic Violence Culpability Attributions*, 4 AGGRESSION & VIOLENT BEHAV. 129, 130 (1998). Sharon Allard notes that these stereotypes reflect traditional views about what constitutes appropriate behavior for all women. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 196 (1991).

38. Joanne Belknap & Hillary Potter, *The Trials of Measuring the "Success" of Domestic Violence Policies*, 4 CRIMINOLOGY & PUB. POL'Y 559, 559 (2005); Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence: A Comment on Linda Mills's Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 10 VIOLENCE AGAINST WOMEN 1331, 1341 (2004).

39. Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 28 (1998).

Walker's theory of battered women as passive non-actors quickly spread throughout the legal world, primarily (and counterintuitively) to justify the actions of battered women who killed their abusers rather than leaving their relationships.<sup>40</sup> The theory of learned helplessness was used to explain how battered women were so conditioned to live with violence that they could not take affirmative steps to leave their relationships; resorting to the extreme violence of killing a partner was cast as an understandable reaction to a kill-or-be-killed situation, when no other option was available. Professor Elizabeth Schneider writes

Expert testimony on battered woman syndrome was developed to explain the common experiences of repeated assault on battered women, and its impact. The goal was to assist the jury and the court in fairly evaluating the reasonableness of the battered woman's action. The notion of expert testimony was predicated on an assumption that battered women's voices either would not be understood or were not strong enough to be heard alone in the courtroom.<sup>41</sup>

Expert testimony on battered woman syndrome began to be heard regularly in the cases of battered women who killed their abusers; most states now permit experts to testify on the impact of domestic violence on battered women.<sup>42</sup> As former prosecutor and Professor Alafair Burke notes, "[T]he theory is taught to counselors, police officers, prosecutors, parole board officials, and social-service providers to improve the quality of their responses to domestic violence."<sup>43</sup> These professionals, in turn, defined their clients by and planned their interventions around what they had been taught about battered woman syndrome. As the image of the battered woman depicted by Lenore Walker took hold among the major players in the legal system, the paradigmatic victim began to crowd out the stories of women who did not conform to the stereotype.

Not everyone who worked with battered women recognized their clients as the passive non-actors of Walker's theory, however. Nine years after the publication of *The Battered Woman*, sociologists Edward Gondolf and Ellen Fisher developed an alternate theory intended to explain the behavior of battered women. Survivor theory provided an alternative narrative for victims of violence, one that purported to explain why they remained in violent relationships without labeling them as passive or weak. In an effort to shift the conversation about why battered women remain in abusive relationships,

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40. Shelby Moore points out that this is the "glaring contradiction" in Walker's theories—that a woman who has been totally helpless suddenly realizes that she can kill her batterer. Moore, *supra* note 35, at 318.

41. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 80 (2000).

42. STARK, *supra* note 21, at 135 (stating that all fifty states permit this testimony "at least to some degree").

43. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 221 (2002).

Gondolf and Fisher recast the battered woman as a survivor who actively takes measures to protect herself and her children from within the relationship, rather than the passive victim immobilized by the failure of past efforts to forestall the violence and unable to leave her abuser.<sup>44</sup> Having determined that help is not available, the survivor may come to the rational conclusion that she may be more likely to survive if she suffers physical violence within the relationship than if she attempts to leave.<sup>45</sup> Victims embraced this theory and its language of survival, which emphasizes their strength, resilience, and ultimate triumph over the violence.<sup>46</sup> The legal system, however, has been slower to accept this alternate narrative.<sup>47</sup>

While survivor theory provides an alternative narrative to Walker's helpless victim, it similarly fails to capture the experiences of women who fight back. Survivor theory recasts a victim's passivity in terms of a conscious choice to stay in a violent relationship, but does not account for affirmative actions that a victim might take—like fighting back.<sup>48</sup> The problem with reframing victims as survivors, psychologist Sharon Lamb notes, is that, like Walker's theory, it oversimplifies the experience of being battered. She writes, "If the culture overemphasizes the helpless victim, and if victims overemphasize the survivor victim, we are caught between two stereotypes that preclude a range of experiences and the unifying awareness that victimization is too frequently a part of every woman's life."<sup>49</sup> The stories of battered women are too complex to be shunted into the overarching categories of "victim" and "survivor." Creating such categories has the unintended but nonetheless harmful consequence of penalizing those victims whose stories do not fit neatly within them.

### B. *The Paradigmatic Victim Is White*

Victimhood is intimately tied to traditional notions of womanhood, notions that have been largely defined by a white norm. As Professor Shelby Moore argues

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44. EDWARD W. GONDOLF WITH ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 17-18 (1988).

45. STARK, *supra* note 21, at 304.

46. Sharon Lamb, *Constructing the Victim: Popular Images and Lasting Labels*, in NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 108, 119-20 (Sharon Lamb ed., 1999).

47. STARK, *supra* note 21, at 138 (arguing that Walker's model remains the primary explanation for battered women's behavior in the legal system because it better fits the system's temporal and procedural constraints).

48. Survivor theory has also been used by prosecutors to overcome expert testimony on battered woman syndrome in the cases of women who kill their abusers. My thanks to Nancy Levit for this observation.

49. Lamb, *supra* note 46, at 126; *see also* STARK, *supra* note 21, at 305 (describing Donna, a battered woman who killed her husband, as exemplifying the tension between a "victim" self and a "survivor" self).

Victim status . . . is readily accessible to white women because both the Anglo American tradition and the social development of women have established “true women” as pious, pure, submissive, and domestic. Generally speaking, white women in America are, and have been, best able to enjoy the benefit of victim status because they are expected to be “true women.” Comparatively, African American women, whose stereotype was created by slavery, have been and continue to be denied “true woman” status as defined by American culture.<sup>50</sup>

Or as Professor Adele Morrison bluntly asserts, “The battered woman is a victim. Victims are white.”<sup>51</sup>

Simply by virtue of their race, women of color face an uphill battle in having their victimization recognized and rectified, even when they attempt to conform their behavior to that of a stereotypical victim. April, an African American battered woman, described her experience:

I was told to act like a little white girl . . . to look sad, to try to cry, to never look the jury in the eye. It didn't really work for me because the judge took one look at me and said, “You look pretty mean; I bet you could really hurt a man.”<sup>52</sup>

The word victim, then, implies whiteness, a construction that deprives African American women of victim status and its associated protections.

The battered women's movement has long struggled with issues of race.<sup>53</sup> Although women of color have been involved in the movement from its beginnings, their cautions and criticisms about the development of the movement have not always been heeded,<sup>54</sup> and the face of the battered

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50. Moore, *supra* note 35, at 324; *see also* Fenton, *supra* note 39, at 21 (explaining that the white woman ideal, the “good girl” deserving of protection, as a function of historical characterizations of women); Kathleen J. Ferraro, *The Words Change, But the Melody Lingers: The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women*, 9 VIOLENCE AGAINST WOMEN 110, 113 (2003) (arguing that “the characterization of battered women as helpless reinforces conventional notions of femininity” that have traditionally excluded women of color); Marilyn Yarbrough with Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 633-34 (examining the historical contrasting of African American and white women).

51. Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1078 (2006).

52. BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 119 (1996).

53. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* 271 (1982) (quoting a white woman within the movement as saying, “Our idea of including women of color was to send out notices. We never came to the business table as equals. Women of color join us on our terms . . .”).

54. Martha McMahon & Ellen Pence, *Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence*, 9 VIOLENCE AGAINST WOMEN 47, 56 (2003); Charlene M. Waldron, *Lesbians of Color and the Domestic Violence Movement*, in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS 43, 43-44 (Claire M. Renzetti & Charles Harvey Miley eds., 1996).

women's movement has been that of a white, middle-class, heterosexual woman.<sup>55</sup>

The early women's movement's desire to propound a unified women's experience—a “We the Women” position—ignores or silences differences in favor of presenting one voice. As Professor Angela Harris notes, the gender essentialism written in to this type of rhetoric worked to silence the voices of women of color. “Not surprisingly, the story they tell about ‘women,’ despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socioeconomically privileged . . . .”<sup>56</sup> Differences are relegated to the footnotes, and the experiences of “white women quietly become the norm, or pure, essential woman.”<sup>57</sup>

Feminists brought gender essentialism with them into the battered women's movement.<sup>58</sup> Attempting to universalize the experience of being battered, advocates for battered women argued that battering was a society-wide problem. As Lenore Walker wrote in *The Battered Woman*, “Battered women are found in all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups. Who are the battered women? If you are a woman, there is a 50 percent chance it could be you!”<sup>59</sup> The result of this campaign was to bring to the forefront the one characteristic shared by all of these women—that they were women.<sup>60</sup> Suppressing the differences in the experiences of those women behind the face of the dominant culture—the face of a white woman—had serious consequences for women whose experiences did not mirror not women of color.<sup>61</sup> “[I]t is only the white ‘she’ who is the real

55. Aarati Kasturirangan et al., *The Impact of Culture and Minority Status on Women's Experience of Domestic Violence*, 5 TRAUMA VIOLENCE & ABUSE 318 (2004); Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1157-58 (2005).

56. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

57. *Id.* at 595.

58. McMahon & Pence, *supra* note 54, at 55; see also Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 321 (2003) (explaining how gender essentialism is employed by feminists to explain domestic violence).

59. WALKER, *supra* note 4, at 19. This language continues to be used by scholars in the field. See, e.g., Albert R. Roberts, *Myths, Facts, and Realities Regarding Battered Women and Their Children: An Overview*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 3, 6 (Albert R. Roberts ed., 2002) (“Woman battering takes place in all social classes, religions, races and ethnic groups. Although violence against women seems to be more visible in the lower class because it is more frequently reported to police and hospital emergency rooms in inner-city neighborhoods, it is increasingly being recognized as a pervasive problem in middle- and upper-class homes as well.”).

60. Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 50, 52 (Natalie J. Sokoloff with Christina Pratt eds., 2005)

61. Morrison, *supra* note 51, at 1081-82. The image of the battered woman as white is reinforced by depictions of white victims in the media and popular culture. Farrah Fawcett in *The Burning Bed* (Tisch/Avnet Productions Inc. 1984); Julia Roberts in *Sleeping with the Enemy* (Twentieth Century-Fox Film Corp. 1991); the obsession with the trial of O.J. Simpson for killing his beautiful, white ex-wife, Nicole Brown—all contribute to the image of battered women as white women. As Linda Ammons

battered woman, who is the ‘real’ victim.”<sup>62</sup> Unsurprisingly, with white women as the movement’s focus, the particular problems facing women of color were largely ignored.<sup>63</sup> While there is little doubt that domestic violence does, in fact, affect women of all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups, it is equally true that all of these groups experience battering differently, and that women of color, poor women, and lesbians face a number of obstacles not encountered by straight, white, middle-class women as they seek safety<sup>64</sup>—obstacles that may cause them to react differently to the violence. The decision to universalize women’s victimization in the home, manifested in the movement’s “every woman could be a victim” rhetoric, pushed the concerns of marginalized women further to the sidelines of debates about how to address domestic violence.

Putting a white face on the battered woman had a political dimension. To increase the legal protections for and funding to assist battered women, advocates needed the support of state and federal politicians and policymakers. While politicians may not have been terribly interested in the problems of poor black women, it was easier to sell them on the need to protect their own mothers, sisters, and daughters.<sup>65</sup> In the 1970s, the leaders of the battered women’s movement made a “conscious, strategic decision” to universalize the experience of being battered in order to get the issue of domestic violence on the national agenda.<sup>66</sup> Battered women’s advocates recast the image of the battered woman to reflect society’s most powerful voices, a move designed to bring home the message that because domestic violence affected white women, it was worthy of the attention of those in power.<sup>67</sup>

This recasting, though, had perverse consequences. As sociologist Beth Richie points out, “In the end, the assumed race and class neutrality of gender violence led to the erasure of low-income women and women of color from the dominant view.”<sup>68</sup> The message that domestic violence happens to everyone (meaning middle-class white women) was underscored by the faces of the

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notes, the stories of women who do not fit that image, such as African Americans, are rendered suspect. 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, 1006-07 (1995).

62. Morrison, *supra* note 51, at 1083.

63. As Beth Richie notes, “[T]he assumption of ‘everywoman’ fell into the vacuum created by a white feminist analysis that did not very successfully incorporate an analysis of race and class.” Richie, *supra* note 60, at 52.

64. Black women, for example, are more likely to need help with medical care and face greater economic hardships when they leave abusive relationships. Harrison & Willis Esqueda, *supra* note 37, at 133; see also JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 20-23 (1999) (debunking both the “class myth” (the notion that battering occurs only in poor families) and the “universal-risk theory” (the idea that “all women are equally likely” to be battered)).

65. Senators David Boren and William Cohen made statements to this effect during the debate over the first Violence Against Women Act in 1991. 137 CONG. REC. 1314-15 (1991).

66. Rinku Sen, *Between a Rock & a Hard Place: Domestic Violence in Communities of Color*, 2 COLORLINES (1999), available at [http://new.vawnet.org/Assoc\\_Files\\_VAWnet/RockandHardPlace.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/RockandHardPlace.pdf).

67. Richie, *supra* note 60, at 53.

68. *Id.* at 52-53.

white, middle-class women (many of whom were survivors themselves) advocating for change.<sup>69</sup> Professor Barbara Fedders argues:

The ability of the movement to win legislative victories . . . seems premised on its capacity to convince legislators that domestic violence affects middle-class and white women as much or more than low-income women and women of color . . . . Although domestic violence is a universal problem, it gains political significance primarily because it affects white, middle-class women such as those in this movement, those you know, and those who vote.<sup>70</sup>

Battered women's advocates won major legislative victories by convincing policymakers of the universality—whiteness—of domestic violence. But when all victims are depicted as white, the particular needs, challenges, and issues of women who do not fit that description can too easily be ignored as politicians and policymakers consider what legislation to pass and services to fund.<sup>71</sup> Economic assistance, job training, and decent affordable housing may not be concerns for white, middle-class women, but often cause lower income women of color to remain in abusive relationships. The resources that the mothers, sisters, and daughters of the politically powerful might need to escape violence are likely very different than what less well-connected women require.<sup>72</sup>

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69. Barbara Fedders, *Lobbying for Mandatory Arrest Policies: Race, Class, and the Politics of the Battered Women's Movement*, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (1997). Beth Richie notes that the national leadership of the battered women's movement continues to be largely white, to the dismay of many women of color who have dedicated their lives to the movement. Richie, *supra* note 60, at 54.

70. Fedders, *supra* note 69, at 296; *see also* Mandel, *supra* note 55, at 1157 (“[M]any of the gains were made . . . through convincing the government that [domestic violence] was also affecting white middle-class women”). Fedders quotes Mary Jane Cronin, Head of the Federal Law Enforcement Assistance Administration during the Carter Presidency, who stated, “[T]here was a federal response because the problem cuts across class and race. If domestic violence affected only poor women, it would have been dismissed.” Fedders, *supra* note 69, at 297 (quoting SCHECHTER, *supra* note 53, at 192 (emphasis removed)).

71. Many scholars point to the widespread passage of mandatory arrest laws as an example of this phenomenon. While mandatory arrest laws underscore the seriousness of domestic violence and the need to treat such actions as criminal, there is widespread ambivalence within the African American community about employing such laws, which add to the disproportionate incarceration of African American men. As Martha McMahon and Ellen Pence note, “[V]iolence and criminal justice interventions can be experienced differently and have quite different consequences for women in different communities, particularly among those who are marginalized.” McMahon & Pence, *supra* note 54, at 55. As Aya Gruber contends, if domestic violence primarily affected white, middle-class women, then the implementation of mandatory arrest laws should have led to the widespread arrest of white men, rather than the disproportionate jailing of black men that has resulted. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 797 (2007).

72. As Donna Coker notes, “[I]ndividual women's experiences are ignored when criminal justice actors, advocates, and judges presume that the experience of abuse is the same for everyone and that the same remedies will work for everyone.” Coker, *supra* note 38, at 1337.

*C. The Paradigmatic Victim Is Straight*

In its earliest days, the language used in the movement to stop violence against women portrayed victims as straight. The early battered women's movement talked about "wife abuse" rather than "domestic violence" or "intimate partner violence," underscoring the assumption that violence between partners happened only within marriages.<sup>73</sup> By definition, lesbians could not be battered women, because they could not be wives.<sup>74</sup> While the language of the movement has evolved, research on domestic violence continues to focus on violence done to women by men.<sup>75</sup>

Violence in lesbian relationships was also at odds with early feminist theories about domestic violence.<sup>76</sup> Ideologically, seeing lesbians as victims was problematic because battered women's advocates rooted the causes of domestic violence in the patriarchy, viewing violence as yet another manifestation of men's privilege and the oppression of women.<sup>77</sup> This analysis simply does not apply as well to lesbian battering, although some theorists have reconfigured their patriarchal analyses to account for lesbian battering.<sup>78</sup>

The laws of many states similarly fail to account for lesbian battering. In six states, same-sex violence still is not recognized under the laws enabling victims of domestic violence to seek civil protection orders.<sup>79</sup> In a number of other states, the laws do not explicitly enable same-sex partners to petition for relief; as a result, those victims are dependent on individual judges to interpret the law in ways that afford them protection.<sup>80</sup> Prior to the Supreme Court's holding in *Lawrence v. Texas* that private sexual activity between adults cannot be criminalized, lesbians in some states would have had to admit to illegal

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73. Early works on domestic violence included R. Emerson Dobash and Russell P. Dobash's *Violence Against Wives* (1979), Del Martin's *Battered Wives* (1976), and Murray A. Straus's survey, *Wife-Beating: How Common and Why?*, 2 VICTIMOLOGY 443 (1977).

74. Grace Giorgio, *Speaking Silence: Definitional Dialogues in Abusive Lesbian Relationships*, 8 VIOLENCE AGAINST WOMEN 1233, 1255 (2002).

75. Carolyn M. West, *Battered, Black, and Blue: An Overview of Violence in the Lives of Black Women*, in VIOLENCE IN THE LIVES OF BLACK WOMEN, *supra* note 16, at 5, 11 (presenting research on African American women that focused primarily on heterosexual relationships).

76. *See infra* Part III.

77. CLAIRE RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 105-06 (1992); Adele M. Morrison, *Queering Domestic Violence To Straighten Out Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's "Conventional" Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 118 (2003).

78. *See, e.g.*, Morrison, *supra* note 77, at 139. Mary Eaton stresses the importance of developing lesbian-specific theories of domestic violence, rather than attempting to fit lesbian violence into prevailing feminist theories. Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 195-223 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

79. *See* Evan Fray-Witzer, *Twice Abused: Same-Sex Domestic Violence and the Law*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE 20 (Beth Levanthal & Sandra E. Lundy eds., 1999).

80. LORI GIRSHICK, WOMAN TO WOMAN SEXUAL VIOLENCE: DOES SHE CALL IT RAPE? 137-38 (2002); Fray-Witzer, *supra* note 79, at 20-21; Morrison, *supra* note 77, at 95.



sexual conduct to qualify for protective orders.<sup>81</sup> If the face of the paradigmatic victim of violence is that of a white woman, the face of her abuser is certainly that of a man, creating enormous challenges for victims of intra-lesbian violence seeking assistance.

The combination of battered woman syndrome, historical representations of victimhood, gender essentialism, and political expediency as endorsed by the media and popular culture have combined to create the prevailing narrative for victims of domestic violence: Battered women are weak, dependent, passive, fearful, white, straight women who need the court's assistance because they are not able to take positive action to stop the violence against them.

Judges rely on these stereotypes to analyze the cases they hear. They, too, have seen victims represented as white women, with all of the historical baggage that designation carries. The judiciary is still predominately white, male, and middle-class, more likely to envision and sympathize with the women they know—their daughters, their sisters—who are statistically less likely to fight back. Domestic violence trainings that emphasize battered woman syndrome and victims who are passive, dependent, weak, and afraid, reinforce these beliefs. Judges who internalize these messages are looking for a particular kind of victim telling a particular kind of story in protective order cases: a white, straight (likely middle-class) woman telling a story of passivity, dependency, fear, and inability to address the violence done to her without the assistance of the court.<sup>82</sup> To merit the court's assistance, "one must be a victim—a particular kind of victim . . . . An inability to show one's victim status may result in a failure to obtain the assistance one needs."<sup>83</sup> For the "perfectly constructed plaintiff," "a white, married, church-going, tee-totaling, homemaker, with no criminal record—not even a parking ticket,"<sup>84</sup> these

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81. Ellen A. Meyers, *Developing a Successful Community Outreach Program: A Look at Criminal Justice and the Lesbian and Gay Community*, in *A PROFESSIONAL'S GUIDE TO UNDERSTANDING GAY AND LESBIAN DOMESTIC VIOLENCE: UNDERSTANDING PRACTICE INTERVENTIONS* 239, 242 (Joan C. McClennen & John Gunther eds., 1999). The Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), has removed that barrier.

82. See PTACEK, *supra* note 64, at 133 ("The 'ideal victim profile' of a woman seeking protection from battering would describe a white woman who speaks English and has no material needs or who has the means to hire an attorney to seek financial support through the probate court.") Evan Stark argues that this narrative resonates with judges and lawyers "because it emphasizes thematic elements that are widely associated with the sorts of tragedies to which women are believed to succumb . . ." STARK, *supra* note 21, at 139.

83. Morrison, *supra* note 51, at 1085; see also Lori B. Girshick, *No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence*, 8 *VIOLENCE AGAINST WOMEN* 1500, 1505 (arguing that "the stories of lesbians and bisexual women do not sound 'familiar' to court personnel"). Studies of police decisions to arrest underscore this point. Male police officers may give women preferential treatment, but only when those women act in accordance with gender stereotypes. Such treatment may cease, however, "when women violate norms of appropriate feminine conduct and break the bargain." Christy A. Visser, *Gender, Police Arrest Decisions, and Notions of Chivalry*, 21 *CRIMINOLOGY* 5, 8 (1983).

84. Morrison, *supra* note 51, at 1083. This kind of stereotyping hurts women in other areas of the law as well. See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 *CORNELL L. REV.* 688, 692-723 (1998).

stereotypes present no problem. But women who tell a different story might find themselves unable to secure the kinds of assistance that could help them avoid further violence.

### III. THE STORIES OF WOMEN WHO FIGHT BACK

Studies of women who use force against their partners indicate that overwhelmingly large numbers of those women have been battered.<sup>85</sup> In her recent study of women arrested for domestic assaults, sociologist Susan Miller found that ninety-five percent of the women had used violence in reaction to a partner's violence.<sup>86</sup> As Miller explains, "Typically, women's use of force is in response to their current or former partner's violence or can be characterized as a reaction that results from past abuses and their relative powerlessness in the relationship."<sup>87</sup>

Researchers agree that the vast majority of women who use violence do so to defend themselves or their children or to prevent an impending attack.<sup>88</sup> But women cite other reasons as well: to stand up for themselves in an attempt to salvage their self-worth, to get their partners' attention, to earn their partners' respect, to retaliate for threats against their families, and to retaliate for their partners' abusive behavior.<sup>89</sup> Sociologist and battered women's advocate Evan Stark argues that women use violence in order to express their identities as beings independent of their controlling partners. Describing Nathaline

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85. Shamita Das Dasgupta, *Just Like Men? A Critical View of Violence by Women*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 195, 202 (Melanie F. Shepard & Ellen L. Pence eds., 1999) (summarizing research on women who use physical force against their partners).

86. SUSAN L. MILLER, VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN'S VIOLENCE IN RELATIONSHIPS 116-20 (2005). Jane Murphy, Mary Ann Dutton, Lisa Goodman, and Dorothy Lennig report similar findings in a study of women seeking protective orders through the District Court for Baltimore City. Murphy et al., *supra* note 27, at 515, app. A (finding that eighty-two percent of women reported fighting back).

87. MILLER, *supra* note 86, at 130.

88. See, e.g., MILLER, *supra* note 86, at 124; Shamita Das Dasgupta, *A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships*, 8 VIOLENCE AGAINST WOMEN 1364, 1372 (2002); Dasgupta, *supra* note 85, at 202; L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VIOLENCE AND VICTIMS 125, 128 (1994); Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense*, 1 VICTIMS AND VIOLENCE 47, 56 (1986); Rachel Somberg et al., *No Single Profile: The Diversity of Battered Women's Experiences* 13 (unpublished manuscript, on file with author). Michael Johnson and Kathleen Ferraro suggest the term "violent resistance" to describe women's violence that is not motivated by a desire to control their partners, given the parameters of the term "self-defense" under the law. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAM. 948, 949 (2000).

89. Dasgupta, *supra* note 85, at 206-09; see also Dasgupta, *supra* note 88, at 1372; Daniel G. Saunders, *Are Physical Assaults by Wives and Girlfriends a Major Social Problem? A Review of the Literature*, 8 VIOLENCE AGAINST WOMEN 1424, 1434 (2002) (summarizing research on gender equality in intimate partner violence).

Parkman, a thirty-five-year-old African American woman who stabbed her abusive partner the day after he threatened to cut her, Stark writes

The main damage Nate suffered had less to do with physical or psychological trauma—though both were present—than with her feeling that Larry had so circumscribed her capacity to freely act that she was dying as a distinct person . . . . What drove her into the street that night was the existential threat to her standing as a free woman, the fact that Larry intended to subordinate her purposes to his as well as hurt her physically, to make her his thing. This, she could not allow.<sup>90</sup>

Women may also use violence because they lack (or believe that they lack) other options to address the violence against them.<sup>91</sup> Susan Miller has organized women's use of violence into two categories: defensive behavior (the attempt to escape or avoid a violent incident against the woman or her children, typically after the man has already used violence against her) and frustration responses (expressive acts conveying the woman's frustration over her inability to escape the violence or control the violent situation).<sup>92</sup>

Both of the reasons differ significantly from the reasons that men typically resort to violence within relationships. Research amply documents that men, unlike women, use violence to exert coercive control over their partners.<sup>93</sup> Sue Osthoff, director of the National Clearinghouse for the Defense of Battered Women, defines battering as "a systematic pattern of using violence, the threat of violence, and other coercive behaviors and tactics, to exert power, to induce fear, and to control another person."<sup>94</sup> By contrast, very few women who fight back are seeking to exercise control or induce fear in their partners,<sup>95</sup> and even fewer are successful in doing so.<sup>96</sup> In her study of women who had used violence against their partners, Professor Shamita Das Dasgupta found that neither the women nor their partners believed that the women's violence had made their partners fearful for their safety.<sup>97</sup> In fact, one study found that men were more frequently amused and laughed when their partners initiated violence, suggesting that the men did not take their partners' violence seriously.<sup>98</sup> Ironically, women's use of force may lead to escalation of the

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90. STARK, *supra* note 21, at 165-66; *see also id.* at 346 (describing a similar "quest for autonomy" by Bonnie Foreshaw).

91. Saunders, *supra* note 88, at 56.

92. MILLER, *supra* note 86, at 116-20.

93. *See generally* STARK, *supra* note 21.

94. Sue Osthoff, *But Gertrude, I Beg To Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 VIOLENCE AGAINST WOMEN 1521, 1526-27 (2002).

95. *See* L. Kevin Hamberger & Clare E. Guse, *Men's and Women's Use of Intimate Partner Violence in Clinical Samples*, 8 VIOLENCE AGAINST WOMEN 1301, 1302 (2002).

96. Dasgupta, *supra* note 85, at 202.

97. *Id.* at 209-10.

98. Hamberger & Guse, *supra* note 95, at 1319.

violence<sup>99</sup> and make women who fight back more vulnerable to serious injury.<sup>100</sup> Ultimately, Dasgupta concludes that “generally women are quite unsuccessful in achieving their objectives through violence. That is, in most cases, women are able neither to control violence against themselves nor modify their abusive partners’ behaviors according to their own will by using violence against them.”<sup>101</sup>

Women are often ambivalent about using violence against their partners. Although many women who fight back perceive that they have no choice but to use violence to defend themselves or their children,<sup>102</sup> they are nonetheless conflicted about what they have done. While they recognize that their actions may be illegal, they also believe them to be morally justified.<sup>103</sup> But their belief in the morality of their actions does not prevent women who fight back from reacting negatively to having done so. Women who use violence experience higher levels of depression and fear or anxiety than violent men<sup>104</sup> and often feel guilty about their actions.<sup>105</sup>

Women who fight back are more likely than men to admit to using violence and to take responsibility for their violent behavior.<sup>106</sup> These women tend to include a great deal of detail in their stories, including exactly where they struck their abusers and how hard they hit.<sup>107</sup> This willingness to admit to and minutely recount their violence may be tied to how society perceives violence by women. Because women are socialized to refrain from using violence, they may perceive their violence as “a violation of their socially prescribed gender role,” making these “transgressions” more memorable.<sup>108</sup>

Women who fight back undermine societal assumptions about appropriate gender roles and how a battered woman should respond to violence. As Dasgupta argues, “[S]ocieties that believe in the stereotype of feminine passivity and tolerance . . . may perceive a woman who uses violence against her intimate partner as ‘unnatural,’ ‘freakish,’ and ‘criminal by nature’ and deal with her accordingly.”<sup>109</sup> Once a battered woman uses violence, her status as “victim” is imperiled. Sue Osthoff explains, “[A] practitioner may not go so far

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99. LEE ANN HOFF, BATTERED WOMEN AS SURVIVORS 54 (1990); Saunders, *supra* note 88, at 57.

100. Dasgupta, *supra* note 88, at 1372.

101. *Id.* at 1378 (citations omitted).

102. MILLER, *supra* note 86, at 124.

103. *Id.* at 126.

104. Hamberger & Guse, *supra* note 95, at 1303.

105. STARK, *supra* note 21, at 166; Dasgupta, *supra* note 85, at 211.

106. MILLER, *supra* note 86, at 126; Nancy Worcester, *Women’s Use of Force: Complexities and Challenges of Taking the Issue Seriously*, 8 VIOLENCE AGAINST WOMEN 1390, 1401 (2002).

107. McMahon & Pence, *supra* note 54, at 52.

108. Dasgupta, *supra* note 88, at 1377; see also Russell P. Dobash et al., *Separate and Intersecting Realities: A Comparison of Men’s and Women’s Accounts of Violence Against Women*, 4 VIOLENCE AGAINST WOMEN 382, 406-07 (1998); Michael S. Kimmel, “Gender Symmetry” in *Domestic Violence: A Substantive and Methodological Research Review*, 8 VIOLENCE AGAINST WOMEN 1332, 1344 (2002).

109. Dasgupta, *supra* note 85, at 214; see also Harrison & Willis Esqueda, *supra* note 37, at 132 (explaining that women who violate behavioral norms are seen as deviant or wicked).

as to conclude that the woman who used force is the batterer; he or she may simply conclude that, if the woman used violence, she could not be battered.”<sup>110</sup>

To resonate with those who can provide assistance, the narratives of women who fight back must strike a delicate balance. Battered women who fight back may be fearful but are not passive—they actively resist their abusers.<sup>111</sup> While these women tell compelling stories of being abused and of taking action to stop that abuse, those stories may not be enough to persuade hearers that they are, in fact, battered women. These women must also overcome the stereotype that they defy: the weak, passive, and helpless battered woman.<sup>112</sup> Consider, for example, the following exchange between a prosecutor trying the case of a battered woman who killed her abuser and a witness who had known both parties. Responding to the prosecutor’s question about how Dianne reacted when abused by her husband, the witness stated, “You know, Dianne was really calm. You know, Dianne would be really calm until he smacked her and then she’d smack him back. I never seen her do anything to him, you know, it was always him doing it to her, and then she would fight back.” The prosecutor then remarked, “She could probably hold her own, though,” to which the witness replied, “Well, she tried. No, not, well, I don’t think she could hold her own, but she was pretty tough, she’s a pretty tough girl, you know.”<sup>113</sup> The prosecutor used this exchange to bolster his contention that, because Dianne could defend herself, she could not possibly be battered.<sup>114</sup> Explaining their active resistance to judges schooled in battered women syndrome and the paradigmatic victim poses real challenges for women who fight back.<sup>115</sup>

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110. Osthoff, *supra* note 94, at 1527; *see also* Fenton, *supra* note 39, at 27. This problem is more acute for women who have been charged with assaulting their partners. “Battered women who become defendants frequently find that their entire history of victimization gets erased when they are labeled *perpetrators*.” Osthoff, *supra* note 94, at 1529. Susan Miller reports, however, that police officers are beginning to express “a sense of understanding, if not even tacit approval” of the actions of women who fight back. MILLER, *supra* note 86, at 66. Some of the officers Miller interviewed

applaud women’s initiative “because they are not putting up with guys’ shit anymore. Instead of taking it, like the past hundred years, women are giving it back. Which I think is good. I am sick of going to a scene and seeing a battered defenseless woman. And I’m sick of going back to the same scene another day and seeing the same battered defenseless woman.”

*Id.* at 65.

111. MILLER, *supra* note 86, at 30.

112. STARK, *supra* note 21, at 389 (“Battered women often complain that they do not recognize themselves in their representation as pathetic victims of another’s will in the courtroom.”).

113. Ferraro, *supra* note 50, at 116.

114. *Id.*; *see also* STARK, *supra* note 21, at 157 (quoting a prosecutor’s argument that Valoree Day, a battered woman who killed her husband, could not have been abused because she was not “docile, submissive, humble, ingratiating, non-assertive, dependent, quiet, conforming and selfless”).

115. *See, e.g.*, Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN’S STUD. 219, 247 (explaining that victims who do not meet expectations about how battered women should behave may face credibility problems with juries); Ferraro, *supra* note 50, at 117 (arguing that portrayals of battered women as tough and assertive undermine the credibility of battered women with juries).

Social science research suggests that two groups of women are particularly likely to fight back against their abusers: African American women and lesbians.<sup>116</sup> A survey of the reasons that they might fight back is offered here, to give a sense of the diversity of the narratives that women who fight back might tell, if given the chance. Not every theory applies to every woman. But the multitude of theories suggests a vast range of stories that women could bring to courts when seeking protection. The narratives of these women may be particularly hard for courts to assimilate, however, given what they have come to believe about battered women.

#### A. African American Women Who Fight Back

Studies suggest that African American women are more likely than white women to fight back when physically assaulted<sup>117</sup> or psychologically abused.<sup>118</sup> Various theories have been developed to explain that difference, and while the applicability of those theories is a matter of debate in the social science community, their existence and variety highlights the potential for tremendous diversity in the stories of African American women who fight back.

One very basic and concrete reason that African American women are more likely to fight back may be their perception that no outside assistance is available. Some African American women refuse to turn to formal social services because they have had past negative encounters with the social service provision system.<sup>119</sup> Having encountered social service systems that are not culturally competent,<sup>120</sup> and that may even seem hostile,<sup>121</sup> they are unlikely to

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116. The literature on women who fight back is incredibly dynamic. There is some evidence, for example, that despite stereotypes of Asian women as passive and submissive, South Asian women actively resist the violence against them, some (though relatively few) through the use of physical force. Margaret Abraham, *Fighting Back: Abused South Asian Women's Strategies of Resistance*, in DOMESTIC VIOLENCE AT THE MARGINS, *supra* note 63, at 253, 253-55. Because the research on African American women and lesbians is the best developed, they are the groups discussed here; this focus should not suggest, however, that other women are not fighting back.

117. Vicki A. Moss et al., *The Experience of Terminating an Abusive Relationship from an Anglo and African American Perspective: A Qualitative Descriptive Study*, 18 ISSUES MENTAL HEALTH NURSING 433, 447 (1997) (describing outcomes of qualitative study in which ten African American women, as opposed to two white women, described fighting back physically); Carolyn M. West & Suzanna Rose, *Dating Aggression Among Low-Income African American Youth: An Examination of Gender Differences and Antagonistic Beliefs*, 6 VIOLENCE AGAINST WOMEN 470, 487 (2000) (finding rates of physical aggression among African American women ranging from 66.3% to 16.3%, depending on the measure, and describing those rates as higher than rates of physical aggression among white women); *see also* Robert L. Hampton & Richard J. Gelles, *Violence Toward Black Women in a Nationally Representative Sample of Black Families*, 25 J. COMP. FAM. STUD. 105, 106 (1994) (finding a greater use of violence by African American women).

118. West & Rose, *supra* note 117, at 487.

119. Robert Hampton et al., *Domestic Violence in the African American Community: An Analysis of Social and Structural Factors*, 9 VIOLENCE AGAINST WOMEN 533, 534 (2003); *see also* Doris Williams Campbell et al., *Intimate Partner Violence in African American Women*, ONLINE J. ISSUES NURSING (Am. Nurses Ass'n, Silver Spring, M.D.), Jan. 31, 2002, <http://www.nursingworld.org/ojin>.

120. RICHIE, *supra* note 52, at 146; Tricia B. Bent-Goodley, *Perceptions of Domestic Violence: A Dialogue with African American Women*, 29 HEALTH & SOC. WORK 307, 308-09 (2004); Janice Joseph,

avail themselves of those services.<sup>122</sup> Other African American women believe that the supports and services created to assist battered women are intended to be used only by white women.<sup>123</sup>

When African American women are willing to turn to service systems for assistance, their efforts may be thwarted. Particularly for poor African American women living in depressed urban areas, simply reaching the available social services may be impossible.<sup>124</sup> As Dr. Tricia B. Bent-Goodley explains, “Transportation constraints, lack of money to get to appointments, and fear of entering a perceived hostile environment often result in a decreased likelihood of African Americans keeping appointments and fully participating in services.”<sup>125</sup> The inability of African American women to access social services fosters a sense of isolation that discourages them from seeking outside assistance.<sup>126</sup>

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*Woman Battering: A Comparative Analysis of Black and White Women*, in *OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE* 161 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997). The screening, history-taking, and assessment tools used by many social service agencies have been developed and evaluated through work with Caucasian women, which may cause social services providers to miss issues that arise from the different cultural experiences of African American women. Campbell et al., *supra* note 119.

121. RICHIE, *supra* note 52, at 146; Susan F. Grossman et al., *Rural Versus Urban Victims of Violence: The Interplay of Race and Religion*, 20 *J. FAM. VIOLENCE* 71, 72-73 (2005). Although one study found that African American women were more likely to remain in shelters longer than their white counterparts, they ascribed the longer stay to the institutional racism African American women encountered in accessing resources that could help to keep them safe once they left shelter. Grossman et al., *supra*, at 72-73; see also Janice Haaken & Nan Yragui, *Going Underground: Conflicting Perspectives on Domestic Violence Shelter Practices*, 13 *FEMINISM & PSYCHOL.* 49, 49-50 (2003) (presenting the story of a young African American woman who experienced shelter as alien and isolating).

122. *But see* Vetta Sanders Thompson & Anita Bazile, African American Attitudes Toward Domestic Violence and DV Assistance, <http://www.musc.edu/vawprevention/research/attitudesdv.shtml> (last visited Apr. 8, 2008) (arguing that African American women do use social services, but may wait to do so until the violence is life threatening).

123. Shamita Das Dasgupta explains, “[M]any domestic violence shelters in this country state that they are ‘colorblind.’ However, the codes of most shelters have been set by and for White women. Therefore, the statement, ‘We treat everyone the same,’ in actuality can only mean ‘we treat everyone as though she or he is White.’” Dasgupta, *supra* note 88, at 1379; see also RICHIE, *supra* note 52, at 146; Fenton, *supra* note 39, at 54. One study suggests that African American women may be less likely to use social services provided by whites because they “are socialized to appear in control in the presence of Anglo Americans” and therefore may feel uncomfortable presenting themselves as victims. Moss et al., *supra* note 117, at 445.

124. Neil Websdale, *Nashville: Domestic Violence and Incarcerated Women in Poor Black Neighborhoods*, in *DOMESTIC VIOLENCE AT THE MARGINS*, *supra* note 63, at 142, 150-51 (explaining that the fear of the physical spaces in which they live—for example, the inability to get a cab back to their homes—can keep low-income battered women from seeking out resources). Because the experiences of poor women of color in addressing domestic violence are so different from those of the paradigmatic victim, Donna Coker suggests that the poor woman of color should be used as the standard for determining whether domestic violence services are appropriate, responsive, and useful to the needs of battered women. Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 *U.C. DAVIS L. REV.* 1009, 1026-28 (2000).

125. Bent-Goodley, *supra* note 120, at 308.

126. RICHIE, *supra* note 52, at 119. Richie notes, too, that “[w]hen the African American battered women took action to *protect themselves* (as they were socialized to do in their families of origin), they were essentially penalized for not relying on the systems that they felt had failed them in the past.” *Id.* at

While many victims of domestic violence bear the burden of remaining silent about their abuse, African American women may feel particularly pressured to keep their affairs private. African American women may feel that to break the silence is to bring further shame and disapprobation on African American men from the wider society.<sup>127</sup> In communities that stress that “racism always trumps sexism,” African American women are warned that to disclose the violence to authorities would mean “putting another ‘brother’ in prison.”<sup>128</sup> Women who have reported violence by African American men to state actors have been criticized for racial disloyalty and accused of perpetuating and reinforcing negative stereotypes of African American men as violent.<sup>129</sup> Despite the many harms visited upon African American women through its operation,<sup>130</sup> this “political gag order”<sup>131</sup> contributes to African American women’s reluctance to reach out to state systems for help.<sup>132</sup>

Given the culture of secrecy that surrounds domestic violence in many African American communities, African American women are often deeply conflicted about turning to the legal system, and their relationship with the system is an ambivalent one. Many African American women make conscious choices not to call the police or invoke the legal system.<sup>133</sup> Their reluctance, in

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152; *see also* Joseph, *supra* note 120, at 167 (inferring that African American women fight back as a coping response, as opposed to white women, who seek the assistance of social services agencies); Moss et al., *supra* note 117, at 447 (arguing that historically African American women have needed to defend themselves because society has provided little systemic assistance).

127. *See* Jo-Ellen Asbury, *African-American Women in Violent Relationships: An Exploration of Cultural Difference*, in ROBERT L. HAMPTON, *VIOLENCE IN THE BLACK FAMILY: CORRELATES AND CONSEQUENCES* 89, 100 (1987) (pointing to African American women’s reluctance to expose African American men to “ridicule” as a reason for their silence); Carolyn M. West, *Domestic Violence in Ethnically and Racially Diverse Families: The “Political Gag Order” Has Been Lifted*, in DOMESTIC VIOLENCE AT THE MARGINS, *supra* note 63, at 157, 158 (referring to minority community pressure not to speak out on intimate partner violence as a “political gag order”).

128. Yarbrough with Bennett, *supra* note 50, at 643.

129. *See* Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 WIS. WOMEN’S L.J. 259, 264 (2001). For low-income women living in public housing, this problem may be particularly acute. African American women who turn men in to the police are labeled “snitches,” which can make them more vulnerable in the projects. Websdale, *supra* note 124, at 147.

130. As Tricia Bent-Goodley explains:

When the perception that racism is a more serious issue than sexism develops, African American women deny an equally important part of their identity. As these women deny their unique experiences as women to protect their partners, they put themselves at a greater risk of physical harm and do not allow their partners to be held accountable for their behavior. This internal barrier undermines the woman’s mental health, because it denies the differences that she experiences based on gender and creates feelings of confusion, guilt, and shame for differentiating between her needs and that of her partner.

Bent-Goodley, *supra* note 120, at 309 (internal citations omitted).

131. West, *supra* note 127, at 149.

132. As Marilyn Yarbrough and Crystal Bennett explain, “These women have been told by their mothers and grandmothers to be strong, this has happened before, just go on with your life” rather than reach out for assistance. Yarbrough with Bennett, *supra* note 50, at 643.

133. RICHIE, *supra* note 52, at 96. Some studies show that African American women are more likely to call the police for assistance than white women; others suggest the opposite. Belknap & Potter, *supra* note 38, at 562. *But see* Joseph, *supra* note 120, at 166 (finding that significantly more white than African American women reported violence to the police, brought charges in court, or sought restraining



part, stems from the perception that the legal system has not met the needs of battered women of color. As Adele Morrison explains, “[B]ecause of racial privilege, the law better serves white women than women of color. This is not to say that white women are perfectly served, or even well served, by domestic violence law, but that women of color are disserved, or even harmed, by the current legal system.”<sup>134</sup> Kim, a battered African American woman, recounted her decision not to call the police in an interview with sociologist Beth Richie:

Call the police? Never! . . . [I] just never could really trust that they would help me and not just use my 911 call as one more excuse to beat up a Black man . . . I learned early in my life the cops were dangerous to my people. They were to be avoided at all costs.<sup>135</sup>

Even if women like Kim do call the police, a timely response is far from certain. Social scientists have suggested that stereotypes depicting African Americans as more prone to violence than whites have depressed law enforcement and judicial responses to violence in the African American community.<sup>136</sup>

Stereotypes of African American women abound and have the potential to undermine the claims of African American battered women in the courts. Marilyn Yarbrough and Crystal Bennett describe “three common stereotypes ascribed particularly to African American women”: Mammy, Jezebel, and Sapphire.<sup>137</sup> Mammy, derived from the historical depictions of female domestic slaves, is a nurturer, “ready to soothe everyone’s hurt, envelop them in her always ample bosom, and wipe away their tears.”<sup>138</sup> Jezebel, “the bad-black-girl,” uses her sexuality to entrap men and to extract what she wants from them.<sup>139</sup> Yarbrough and Bennett describe Sapphire as “the wise-cracking, balls-crushing, emasculating woman” who “lets everyone know she is in charge.”<sup>140</sup>

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orders). Susan Miller suggests that women of color may be less likely to call the police because of concerns about the treatment of nonwhite men, cultural norms, or the need for the abuser’s income. MILLER, *supra* note 86, at 8.

134. RICHIE, *supra* note 52, at 97; Morrison, *supra* note 51, at 1063-65; *see also* Ammons, *supra* note 60, at 1025 (“The justice system has not rushed to protect black women who have been beaten.”).

135. RICHIE, *supra* note 52, at 95. In Neil Websdale’s study of poor African American women in Nashville, Tennessee, one respondent explained that some African American women will not call the police to the projects because doing so means giving up the very little privacy that these women have, or because the women are involved in other illegal activities. Websdale, *supra* note 124, at 145.

136. Darnell Hawkins argues:

Unless persisting ideological constraints are confronted and challenged, increasing official intervention in domestic violence will merely result in an unequal race-of-victim based pattern of intervention similar to that found in the handling of nonfamily criminal violence. That is, black and poor victims of family violence may be ignored and most prevention efforts targeted at the white middle-class.

Darnell F. Hawkins, *Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Family Violence Among Blacks*, in *VIOLENCE IN THE BLACK FAMILY: CORRELATES AND CONSEQUENCES* 189, 200 (Robert L. Hampton ed., 1987).

137. Yarbrough with Bennett, *supra* note 50, at 635-39.

138. *Id.* at 635-36.

139. *Id.* at 636.

140. *Id.* Black women are often seen as “loud, stubborn, talkative, aggressive, and argumentative,” and some police officers believe the “‘matriarchal myth’ . . . that Black women are naturally aggressive

These stereotypes pervade popular representations of African American women; as a result, “many people find it difficult to appreciate the diversity of African American women and instead impose identities based on negative stereotypes.”<sup>141</sup>

These stereotypes generally harm African American women, but two of them pose particular challenges for battered African American women who fight back. A victim who judges stereotype as a “Jezebel,” for example, might find the credibility of her claims of abuse questioned. The historical link between Jezebel’s promiscuity and dishonesty has meant that “African American women were not, and often are not, portrayed as being truthful and, therefore, they could not be trusted.”<sup>142</sup> And who would believe that the “evil, bitchy, stubborn and hateful”<sup>143</sup> Sapphire was actually a victim of abuse? The strong, angry face Sapphire presents to the world is the diametrical opposite of the paradigmatic victim. A victim labeled a Sapphire-like woman would have a difficult time convincing the legal system of her need for protection even if she took no defensive action; if she fights back, she may have no chance at all.<sup>144</sup>

Studies show that African American women may find their credibility sharply questioned by judges and jurors.<sup>145</sup> “Whether she is plaintiff, defendant, or witness, the African American woman in the courtroom faces numerous

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and domineering,” making the officers less likely to believe claims of abuse. Harrison & Willis Esqueda, *supra* note 37, at 132.

141. Yarbrough with Bennett, *supra* note 50, at 639. Other scholars have pointed out variations on these themes. See, e.g., Allard, *supra* note 37, at 200-04 (discussing images of African American women in the media); Ammons, *supra* note 60, at 1049-56 (listing various stereotypes of African American women); Moore, *supra* note 35, at 302-03 (describing the depiction of African American women as “angry, masculine, domineering, strong, and sexually permissive”); Morrison, *supra* note 51, at 1106 (explaining that when women of color are seen as too strong to be victims, there is no reason for the legal system to protect them). These stereotypes are not simply imposed by the majority culture; they are also accepted by African American women. See, e.g., Moss et al., *supra* note 117, at 445 (discussing African American women who described themselves as strong and as fighters). Some researchers have studied the implications of internalizing these beliefs. See Hampton et al., *supra* note 119, at 548 (discussing a 2000 Bell and Mattis study on the psycho-cultural implications of African American women’s internalization of the belief that they must be strong regardless of the consequences). These stereotypes may also be reflected in court opinions, which “have a potential to de-emphasize the individual story of the legal subject and to emphasize stock stories, which are partially built upon oppressive stereotypes.” Mario L. Barnes, *Race, Sex, and Working Identities: Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 967 (2006).

142. Yarbrough with Bennett, *supra* note 50, at 638.

143. *Id.*

144. RICHIE, *supra* note 52, at 113 (arguing that “racial stereotypes of African American women as aggressive and unfeminine fed into a biased response” from the legal system); see also Natalie J. Sokoloff & Ida Dupont, *Domestic Violence: Examining the Intersections of Race, Class, and Gender—An Introduction*, in DOMESTIC VIOLENCE AT THE MARGINS, *supra* note 63, at 1, 5 (making a similar argument). As Harrison and Willis Esqueda explain, “[R]esistant Black women may be subject to increased derogation and blame, a notion supported by recent research that indicates that resistant Black women are perceived as less truthful than resistant White women, and in some cases as more deserving of abuse than White women.” Harrison & Willis Esqueda, *supra* note 37, at 133. Similarly, Shelby Moore explains that whites “fear black anger.” Moore, *supra* note 35, at 334.

145. See Ronald L. Ellis & Lynn Hecht Schafran, *Achieving Race and Gender Fairness in the Courtroom*, in THE JUDGES’ BOOK 91, 113 (2d ed. 1994) (discussing the bias against black victims of domestic violence).

obstacles to being considered a believable, reasonable person.”<sup>146</sup> By virtue of the color of their skin, argues Professor Linda Ammons, African American women are “suspect, unless they prove otherwise.”<sup>147</sup> African American women who fight back are the most suspect of all: “Black women who dare to resist a domestic assault are less likely to be considered truthful when giving testimony concerning the assault than passive Black women.”<sup>148</sup>

Stories about negative interactions between African American women and the legal system are common. Janet, a battered African American woman who went to court for assistance, described her experience:

When I finally went for help they asked why I waited so long . . . I could tell that the judge didn't believe me, especially because he went on and on about how I “seemed so smart and all.” Now what's that supposed to mean? That he's dumb? I don't want any white judge talking about my man that way. Or did he mean that the sisters . . . are dumb? Either way, it was a put-down that I didn't appreciate at all. So to answer him, *that's* why I didn't go for help sooner.<sup>149</sup>

Such experiences can have long-lasting ramifications; after battered women learn that the systems put in place to address the violence against them are not responsive to their needs, they are less likely to turn to those systems a second time.<sup>150</sup> Given that the legal system is the primary means for responding to domestic violence in American society,<sup>151</sup> the unavailability of that system as a real option for African American women may leave them grasping for other alternatives to address the violence they face. Forced to choose between continuing to be battered and seeking help through a racist system that might find them culpable for the violence against them, African American women may see fighting back as a more attractive alternative.<sup>152</sup>

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146. Yarbrough with Bennett, *supra* note 50, at 647.

147. Ammons, *supra* note 60, at 1042; *see also* Barnes, *supra* note 141, at 945.

148. Harrison & Willis Esqueda, *supra* note 37, at 131-32.

149. RICHIE, *supra* note 52, at 96.

150. For battered women who fight back, that problem is further complicated by the response to their actions. “Battered women may lose faith in the system if they feel that while the state did little to protect them when they were being victimized, it punished them when they stood up for themselves.” Dasgupta, *supra* note 88, at 1375.

151. Over the last thirty years, and particularly since the passage of the Violence Against Women Act (VAWA), the primary response to domestic violence has been through the legal system: in the criminal system, through arrest and prosecution of batterers, and in the civil system, through protective orders and changes to divorce and custody law that were intended to benefit battered women. Violence Against Women Act of 1994, Pub. L. 103-320, 108 Stat. 1902 (Codified as amended in scattered sections of 42 U.S.C.). While it also includes funding for shelters and other victim services, federal VAWA funding has largely been used to support the development of these legal resources through grants to police, prosecutors, court systems and legal advocates for battered women. Goodmark, *supra* note 28, at 9.

152. MILLER, *supra* note 86, at 135. The rise in the number of dual arrests in cases of domestic violence makes these fears quite reasonable. Coker, *supra* note 124, at 1043.

Belief in their strength and the need to present a strong front may also isolate African American women from potential sources of support.<sup>153</sup> In describing her relationship with her abuser, for example, Johnetta stressed her sense of herself as an atypical victim of violence because she fought back.

Part of my problem is that I am a strong Black woman. I am angry, and some people think I am too loud. So even though he beat me almost to death, I beat him too. If I had been as strong as he was, we'd both be in trouble. But since I wasn't as strong, he got away with almost murdering me. It's as simple as that. The broken bones, the scar where he cut my face . . . all of those are because he was stronger outside, and I was stronger inside. By that I mean I'm not a regular battered woman, because he got his share of licks. It wasn't until he started playing the mind games on me that I was really vulnerable to him.<sup>154</sup>

Johnetta, like many African American battered women, had difficulty reconciling her experience with that of a "regular battered woman." Her view of herself as a strong, independent woman clashed with the stereotypes of battered women as passive and weak. Fighting back enables women like Johnetta to express their sense of themselves as strong, resourceful, and self-sufficient.<sup>155</sup> One African American woman who did not fight back felt that she had failed to "live up to" her "birthright" because she did not have a story of retaliating against her partner; her "image of African American women was that they stood up for themselves."<sup>156</sup>

Some African American women are taught from an early age that they need to be able to protect themselves. In her interview with Beth Richie, Selma stated, "I would have *never* done anything like that if I wasn't well trained by my family to take care of myself and if I hadn't learned from my husband that

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153. Beth Richie found that because they felt that they could handle their problems themselves, some African American women were unlikely to use social services, medical services, or battered women's programs. RICHIE, *supra* note 52, at 94-95.

154. *Id.* at 95 (quoting Johnetta, a battered African American woman); *see also* Thompson & Bazile, *supra* note 122, at 4 (describing African American women's strength and sense of responsibility for themselves as cultural values and beliefs that inhibit disclosure of violence).

155. Martha McMahon and Ellen Pence suggest that this need to see oneself as strong and defiant is a particularly American trait. "Adults in U.S. society are expected to be autonomous individuals who can stand up for themselves and who do not just take it when people abuse them. One might even argue that not taking it is part of an idealized American identity." McMahon & Pence, *supra* note 54, at 50. Some African American women, however, see their willingness to fight back as separating them from white women. According to Alison, an African American battered woman, "White girls are gullible. White girls will put up with centuries of abuse. They will not fight back. It is just the way they've been brought up. They are very soft. They are taught to be obedient . . . Black women are a little smarter." Websdale, *supra* note 124, at 148.

156. Moss et al., *supra* note 117, at 448; *see also* AMY LOU BUSCH, FINDING THEIR VOICES: LISTENING TO BATTERED WOMEN WHO'VE KILLED 48 (1999) (describing African American women's rejection of the term "victim" and perceptions of themselves as strong and able to handle anything). Beth Richie notes, "Ironically, because the white battered women did not have the inflated sense of power or self-confidence that the African American women had, their self-esteem and expectations for the future were not barriers to their reaching out for help when they really needed it." RICHIE, *supra* note 52, at 89.

men will do anything to get me, and I'd better try to protect myself when a man was coming to hurt me."<sup>157</sup> African American women whose sense of self is firmly tied to their strength may be reluctant to back down from their abusers and more likely to minimize their victimization,<sup>158</sup> particularly in the face of the pressing problems faced by other family members and friends in the community. According to Juanita, a twenty-six-year-old African American woman, "[S]ince my family and friends always thought I could take care of myself, they never even thought that my problems would be so bad as they were. No, there was so much suffering around, everyone thought mine was lightweight."<sup>159</sup>

The notion of "strength" transcends the physical. African American women are also more economically independent of their partners than white women.<sup>160</sup> With less financial impetus to remain in their relationships, African American women may be less willing to tolerate physical violence and more likely to fight back.<sup>161</sup>

The long history of oppression and violence against black women informs their need to be prepared to protect themselves,<sup>162</sup> but it may also have prompted some to assume "more assertive, more confident . . . more positive . . . and more resilient" personas than they actually feel.<sup>163</sup> The "apparent assertiveness and resiliency" of African American women may also be a function of lack of trust in the systems that are meant to provide assistance.<sup>164</sup> Ironically, that perception of strength—and the sense that therefore these women are not "victims"—may be what prevents African American women from receiving help from these systems; when African American women are seen as too assertive or not sufficiently afraid of their abusers, the doors of shelters and other service providers remain closed.<sup>165</sup>

Historically, African American family life insulated family members first from the depredations of slavery, and later from the brutality of a racist world. African American women may be understandably reluctant to open their families up to the scrutiny of outsiders.<sup>166</sup> For women who believe they are responsible for maintaining family integrity despite the violence done to them,

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157. RICHIE, *supra* note 52, at 114.

158. Asbury, *supra* note 127, at 100-01; West & Rose, *supra* note 117, at 488.

159. RICHIE, *supra* note 52, at 94.

160. West & Rose, *supra* note 117, at 474-75.

161. *Id.*

162. Moss et al., *supra* note 117, at 447; West & Rose, *supra* note 117, at 488.

163. Grossman et al., *supra* note 121, at 79. That façade of control may be intended to shield white people from problems in the African American home. Moss et al., *supra* note 117, at 445.

164. Campbell et al., *supra* note 119.

165. Bent-Goodley, *supra* note 120, at 309 (citing Allard, *supra* note 37, at 193-94); *see also* Grossman et al., *supra* note 121, at 79; Moss et al., *supra* note 117, at 445; West & Rose, *supra* note 117, at 488.

166. Websdale, *supra* note 124, at 145.

leaving an abusive relationship is not a viable option;<sup>167</sup> “[t]o break up their families would just add to the problems of both their own families and the problems of the black community.”<sup>168</sup> Maintaining the family structure may be important not only to challenge outsider perceptions of the weakness of black family ties, but may also be essential to the family’s economic viability. Although African American women are more financially independent of their partners than white women,<sup>169</sup> a family may still need the financial resources that a partner, even an abusive one, has to offer. As Professor Zanita Fenton explains, “African Americans are also disproportionately represented among the poor. Breaking up the family means breaking up the potential resources.”<sup>170</sup> Faced with the choice of breaking up their families or enduring abuse, African American women, particularly poor women, may look to a third option—fighting back.

### B. *Lesbians Who Fight Back*<sup>171</sup>

Lesbians may also be more likely to fight back against their abusers than are heterosexual women,<sup>172</sup> but theories about why these women fight back are scarce.<sup>173</sup> The narratives of battered lesbians suggest three types of explanations for why they may be more likely to fight back: because they are unwilling to seek outside assistance to address the violence against them, because they are unlikely to be believed when they do seek assistance, and because resources to address the violence against them are not as readily

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167. Bent-Goodley, *supra* note 120, at 309; Thompson & Bazile, *supra* note 122. Some African American women believe that abuse means that they have failed in their relationships; rather than leaving those relationships, they respond to the abuse by working harder to establish a sense of order and control over their households. Their failure to stop the abuse, to make their relationships “work,” led to feelings of failure and self-blame. RICHIE, *supra* note 52, at 75.

168. Fenton, *supra* note 39, at 49; *see also* Ammons, *supra* note 60, at 1054; Asbury, *supra* note 127, at 101.

169. West & Rose, *supra* note 117, at 475.

170. Fenton, *supra* note 39, at 50.

171. I am using the term “lesbian” because it is the term that most often appears in the literature on battering involving same-sex women partners. I recognize, however, that the term, and some of the research, may be inconsistent with current queer theory literature.

172. *See* Becky Marrujo & Mary Kreger, *Definition of Roles in Abusive Lesbian Relationships*, in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS, *supra* note 54, at 28 (noting that thirty-four percent of lesbians reported fighting back against their partners); Lydia Walker, *Battered Women’s Shelters and Work with Battered Lesbians*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 73, 76 (Kerry Lobel ed., 1986).

173. Like heterosexual women, lesbians often fight back to prevent further abuse. Cory Dziggel, *The Perfect Couple*, in NAMING THE VIOLENCE, *supra* note 172, at 62, 64, 66 (describing Dziggel’s experiences as a battered lesbian who fought back against her abuser). Lydia Walker suggests a few reasons for why battered lesbians may be more likely than other women to fight back: because they are more likely to have self-defense training, because there is less size disparity between female partners, and because the lesbian community is more open to the idea of fighting back and self-defense (and may even be dismissive of women who fail to fight back, discussed *infra*). Walker, *supra* note 172, at 76; *see also* Nomi Porat, *Support Groups for Battered Lesbians*, in NAMING THE VIOLENCE, *supra* note 172, at 80, 83 (arguing that lesbians may be more likely to fight back because of their self-defense training).

available. While no one explanation captures the experiences of all women in same-sex relationships, these theories may provide insight into what motivates particular women to fight back and underscores the need to move away from the paradigmatic victim to a more individualized and contextual assessment of victim stories.

### 1. *Why Battered Lesbians Don't Ask Outsiders for Help*

Battered lesbians may be reluctant to seek outside assistance—from family, friends, the lesbian community, or the larger community—to end the violence against them. As a result, they may find themselves trapped within violent relationships, in which fighting back may be the only viable option to attempt to stop the violence.

Because domestic violence was widely perceived as male violence against women, lesbians involved with the early battered women's movement hoped that their relationships would be immune from such violence.<sup>174</sup> In the ideal, lesbian relationships were thought to be “based on nonviolence and egalitarianism.”<sup>175</sup> Acknowledging lesbian battering meant “shattering a utopic vision of a peaceful, women-centered world.”<sup>176</sup> Lesbians who reported intimate partner violence were sometimes considered traitors, airing the community's dirty laundry before a homophobic society.<sup>177</sup> The myth of the lesbian utopia discouraged some lesbians from addressing woman-on-woman violence within the community,<sup>178</sup> and may have silenced women who otherwise would have sought assistance. The lesbian utopia may have operated in the same way that the “gag rule” does in African American communities; by refusing to acknowledge the existence of violence, the community sought to insulate itself from criticism by the majority.<sup>179</sup> For individual battered lesbians, however, the lesbian utopia may have felt more like a prison.<sup>180</sup>

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174. Meyers, *supra* note 81, at 241.

175. Girshick, *supra* note 83, at 1503. Girshick notes that admitting lesbian violence also opens women up to the accusation that they are as violent as men, a particularly virulent argument in recent years. *Id.* at 1512.

176. Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbians and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273, 286 (1993); see also JANICE L. RISTOCK, NO MORE SECRETS: VIOLENCE IN LESBIAN RELATIONSHIPS 3 (2002) (attributing resistance to talking about domestic violence within the lesbian community to an effort to keep focus on male violence, as well as hesitancy to invite negative stereotyping of lesbians).

177. Mary Lou Dietrich, *Nothing Is the Same Anymore*, in NAMING THE VIOLENCE, *supra* note 172, at 155, 162.

178. GIRSHICK, *supra* note 80, at 49.

179. See Lola Butler, *African-American Lesbians Experiencing Partner Abuse*, in PROFESSIONAL'S GUIDE TO UNDERSTANDING GAY AND LESBIAN DOMESTIC VIOLENCE, *supra* note 81, at 181, 194 (“Historically, women and Blacks have kept members of their groups in line as a means of self-defense and maintaining self-respect by defending the course they themselves have chosen.”).

180. As one battered lesbian explained, “I think it changed my feelings about trusting the community, trusting other women. If I ever had ideas about a utopian vision, those certainly were and have been shattered.” RENZETTI, *supra* note 77, at 86.

Battered lesbians may also have felt constrained from reporting their abuse by pressure from within the lesbian community to appear strong and unafraid.<sup>181</sup> According to Barbara Hart, one of the mothers of the battered women's movement, "As a lesbian community, we identify with the power, control and anger of lesbians who batter. . . . We view lesbians who are battered as weak sisters."<sup>182</sup> Some battered lesbians reported that their friends viewed violence as a normal part of problem solving; one battered lesbian recounted her friend's advice that "a good fist fight would clear the air."<sup>183</sup> Battered lesbians who did seek assistance were dismissed or ridiculed by the community. "Victim" is used as a pejorative: "Don't be such a victim. You're acting like a victim."<sup>184</sup> When those strong women did fight back, however, the guilt they felt as a result of doing so may have kept them from seeking help.<sup>185</sup>

Homophobia may prevent battered lesbians from seeking outside assistance. In 1986, in the first published book on lesbian violence, Kerry Lobel noted that by acknowledging that domestic violence occurred within lesbian relationships, "we risk further repression,"<sup>186</sup> the fear that acknowledging domestic violence within the lesbian community would prompt further societal condemnation continues two decades later.<sup>187</sup> The silence of battered lesbians about abuse in their relationships maybe a function of the justifiable fear that such violence will be used to excuse further discrimination against and hatred of lesbians.<sup>188</sup>

Abusers may use homophobia to prevent their victims from reporting. The abuser may threaten to reveal a closeted victim's sexual orientation to her family, friends, and coworkers if she discloses the abuse or seeks assistance.<sup>189</sup> The abuser may also attempt to convince the victim not to "out" her by asking

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181. Nancy Hammond suggests that the lesbian community may hold victims responsible for their abuse because they have failed to assume power, a tenet of lesbian feminist culture. "We take pride in our strength and fortitude as individuals, and in our ability to survive and grow even stronger. It is hard for our friends to see us, strong and tough-minded women that we are, as victims of abuse . . ." Nancy Hammond, *Lesbian Victims and the Reluctance To Identify Abuse*, in NAMING THE VIOLENCE, *supra* note 172, at 190, 194-95.

182. Barbara Hart, *Preface* to NAMING THE VIOLENCE, *supra* note 172, at 9, 14.

183. RENZETTI, *supra* note 77, at 103.

184. Dietrich, *supra* note 177, at 158.

185. RENZETTI, *supra* note 77, at 109.

186. Kerry Lobel, *Introduction* to NAMING THE VIOLENCE, *supra* note 172, at 1, 7.

187. RISTOCK, *supra* note 176, at 3; Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1108-09 (2000).

188. Janice L. Ricks et al., *Domestic Violence Among Lesbian Couples*, in HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES, *supra* note 59, at 451, 455-56; *see also* Tod W. Burke et al., *A Cross-National Comparison of Gay and Lesbian Domestic Violence*, 18 J. CONTEMP. CRIM. JUST. 231, 236 (2002) (explaining that perceptions of negative societal attitudes towards homosexuality may depress the same-sex domestic violence reporting rate).

189. RISTOCK, *supra* note 176, at 8; Kristen Kuehnle & Anne Sullivan, *Gay and Lesbian Victimization: Reporting Factors in Domestic Violence and Bias Incidents*, 30 CRIM. JUST. & BEHAV. 85, 87-88 (2003).



for help.<sup>190</sup> Additionally, if the victim has “internalized society’s negative perceptions of homosexuality,” the “shame and doubt” that she feels—and the abuser’s reinforcement of those feelings through the message that because she is queer, she deserves to be battered—may keep her from reporting abuse as well.<sup>191</sup>

Homophobia may contribute to the isolation of battered lesbians. Battered lesbians may be less likely to seek the assistance of friends or family, in part because those potential sources of support may be homophobic.<sup>192</sup> Battered lesbians may not be able to turn to their own communities for support either; they may worry about confidentiality or be unable to access resources unavailable in their immediate surroundings.<sup>193</sup> According to psychologist Nancy Hammond, “The lesbian victim who is isolated from other lesbians—because of geographical location, fear of coming out, or lack of knowledge about how to find other lesbians—is faced with far greater loneliness in her victimization.”<sup>194</sup> Isolation may be an even greater problem for African American lesbians, who may be “[r]ejected by a heterosexist society and by their own ethnic community for engaging in ‘aberrant’ behavior.”<sup>195</sup> Ironically, isolation may make some battered lesbians bond even more closely to their abusive partners.<sup>196</sup> Being isolated can make victims believe that their partners are the only people they can rely on and trust; batterers may use that belief, and the fear that no other resources exist, to keep victims in the relationship.<sup>197</sup>

## 2. *Battered Lesbians Are Unlikely To Be Believed*

When battered lesbians report the violence done to them, they often face disbelief from those in whom they confide, resulting in assistance that is ineffectual at best, nonexistent at worse. Confronted with responses ranging from skepticism to flat denial, battered lesbians may fight back to attempt to abate the violence within the relationship instead.

Violence against women has been framed in terms of patriarchy, misogyny, sexism, and male dominance, leaving little theoretical room for female perpetrators of intimate partner violence.<sup>198</sup> Feminist theories on the causes of

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190. Lundy, *supra* note 176, at 286.

191. Jablow, *supra* note 187, at 1108.

192. *Id.* at 1107; RENZETTI, *supra* note 77, at 100. Other reasons battered lesbians gave for not turning to family were because these potential sources of support did not know that they were lesbians or did know but disapproved of their partners. *Id.*

193. Girshick, *supra* note 83, at 1510.

194. Hammond, *supra* note 181, at 194.

195. Butler, *supra* note 179, at 191 (citing J. Hiratsuka, *Ousiders: Gay Teens, Straight World*, NASW NEWS, Apr. 1993, at 3).

196. Hammond, *supra* note 181, at 194.

197. Waldron, *supra* note 54, at 45.

198. See RISTOCK, *supra* note 176, at 4; Girshick, *supra* note 83, at 1515.

domestic violence cast violence as a male trait,<sup>199</sup> women are viewed as “more controlled, more gentle, better communicators, less violent, and more trustworthy than men.”<sup>200</sup> As a result, battered lesbians often face hostility and disbelief when they report being abused by their partners. Despite research to the contrary, battering in lesbian relationships is frequently described as mutual violence, with both partners being equally powerful and equally culpable.<sup>201</sup> One reason for this characterization is the lack of a male abuser to whom primary aggressor status can be attributed. Psychologist Amorie Robinson writes, “In same sex relationships, gender cannot be used to distinguish between the aggressor and victim. Consequently, mental health professionals, researchers, and police have often perceived lesbian battering as an ‘equal fight’ or mutual battering.”<sup>202</sup> Batterers may encourage this characterization, arguing that any use of violence, defensive or otherwise, constitutes abuse, and use the label “mutual batterer” to minimize their own actions.<sup>203</sup> Battered lesbians who feel guilty about taking defensive action may accept this mischaracterization of violence.<sup>204</sup> According to Barbara Hart

It is as if they have concluded that absent any violence they can with clarity identify themselves as victims of the abuser, but once they have been violent, especially if it has worked in the immediate situation to stop the batterer, they are compelled to see themselves as equally culpable—as batterers—and as obligated to fight back every time or otherwise to accept the ultimate responsibility for the battering.<sup>205</sup>

Framing the violence as mutual and describing it as a “cat fight” allows system actors to dismiss the stories told by battered lesbians as overblown and unrealistic, and therefore unworthy of belief, or involving violence too trivial for the court’s time.<sup>206</sup> A victim’s inability to see herself as a victim because

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199. Eaton, *supra* note 78, at 199.

200. Walker, *supra* note 172, at 75; see also Morrison, *supra* note 77, at 139 (arguing that the notions of victim and perpetrator are gendered female and male, regardless of the sex of the actual victim or perpetrator).

201. Joan C. McClennen, *Domestic Violence Between Same-Gender Partners: Recent Findings and Future Research*, 20 J. INTERPERSONAL VIOLENCE 149, 151 (2005).

202. Amorie Robinson, “*There’s a Stranger in this House*”: African American Lesbians and Domestic Violence, in VIOLENCE IN THE LIVES OF BLACK WOMEN, *supra* note 16, at 125, 128. Lydia Walker asks, “[W]hy is it easier to believe that somehow a battered lesbian is part of the ‘violence problem’ than to believe that a heterosexual woman is part of the ‘violence problem?’” Walker, *supra* note 172, at 76; see also Barbara Hart, *Lesbian Battering: An Examination*, in NAMING THE VIOLENCE, *supra* note 172, at 173, 187 (“We know that some non-lesbian women who are battered by men are violent. The fact of their violence does not compel us to reach a conclusion that they are not battered.”).

203. Hart, *supra* note 202, at 184-85; Ricks et al., *supra* note 188, at 453.

204. Giorgio, *supra* note 74, at 1242; Robinson, *supra* note 202, at 130.

205. Hart, *supra* note 202, at 184.

206. See Giorgio, *supra* note 74, at 1242 (describing a protective order case in which a judge refused to distinguish the abuser from the victim, despite a police report and photographs establishing the abuse, and awarded the women mutual orders of protection, admonishing them to “try to get along”); see also RISTOCK, *supra* note 176, at 3 (“[O]utside the woman’s movement . . . there is a tendency to trivialize violence between two women as a ‘cat-fight.’”); Jane A. Younglove et al., *Law Enforcement Officers’ Perceptions of Same Sex Domestic Violence: Reason for Cautious Optimism*, 17 J.

she has used violence may prevent her from conveying the kind of coherent narrative that the court wants to hear.<sup>207</sup>

Some have suggested that battered lesbians may fight back more often because of their parity in size and strength to their partners.<sup>208</sup> But misperceptions about women's "roles" within their relationships based on differences in size and appearance can cast doubt on victims' stories of abuse. Bluntly put, batterers are not always butch. (Nor are butch women always large and strong.) But size and physical appearance may serve as proxies for masculinity, and therefore an assumed decreased likelihood of victimization, much like race does for African American women. "Many battered lesbians are women of substantial physical prowess and power; women who are objectively very much more powerful than their assailants. They are women who choose not to use this power to control the perpetrator or would do so only to protect themselves or stop the batterer."<sup>209</sup> Nonetheless, the perception that batterers are butch (and therefore bigger and stronger) and victims femme (and therefore smaller and weaker) makes it more difficult for larger, more physically powerful women to persuade others that they have been abused.<sup>210</sup> One important criterion people use to assess battered lesbians' "'worthiness' as victims" is their physical size and gender presentation relative to that of their partners.<sup>211</sup> Larger butch women abused by their smaller femme partners have described the difficulties they faced in securing assistance, as well as the shame they felt "because of the assumption made on the basis of their butch identity or appearance that they must be the one who is abusive."<sup>212</sup> Judges, too, are susceptible to these prejudgments, equating gender presentation and size with status as batterer or victim. Judges assessing the credibility of parties appearing before them may find it difficult to believe that butch women could ever be the victims of violence—let alone of violence done by their femme partners—especially in instances where the victims are larger and tougher looking than the batterers.

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INTERPERSONAL VIOLENCE 760, 764 (2002) ("The major stereotypes most often mentioned in the context of same sex domestic violence include[s] . . . violence minimized as 'cat fights.'").

207. See Hart, *supra* note 202, at 186 (describing how the confusion battered lesbians experience when trying to escape violent relationships may make it difficult for service providers to assist them).

208. Linda M. Peterman & Charlotte G. Dixon, *Domestic Violence Between Same-Sex Partners: Implications for Counseling*, 81 J. COUNSELING & DEV. 40, 44 (2003).

209. Hart, *supra* note 202, at 185; see also Dziggel, *supra* note 172, at 64-65 (describing being abused by her partner despite being "a lot stronger than she is"). See generally Alma Banda Goddard & Tara Hardy, *Assessing the Lesbian Victim*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE, *supra* note 79, at 193 (outlining a model process for assessing who is the victim in an abusive same sex relationship).

210. Ricks et al., *supra* note 188, at 453-54.

211. RENZETTI, *supra* note 77, at 105; see also Hammond, *supra* note 181, at 195 ("It is hard for our friends to see us, strong and tough-minded women that we are, as victim of abuse from partners who may be physically smaller.").

212. RISTOCK, *supra* note 176, at 50.

### 3. Access to Resources To End the Violence

Battered lesbians may have difficulty accessing resources to address interpersonal violence. This lack of viable options may force them to remain in abusive relationships and fight back to forestall further violence.

Battered lesbians often face tremendous challenges in their attempts to access resources to address the violence they experience. Nomi Porat explains, “No single group of battered women has been as rejected from services, disbelieved, and labeled ‘divisive’ as battered lesbians.”<sup>213</sup> Despite increases in federally funded services for battered women,<sup>214</sup> resources like shelters are still scarce in many communities.<sup>215</sup> Some shelter residents and staff express discomfort at the idea of living and working with lesbians.<sup>216</sup> Even professionals who are open to assisting battered lesbians may feel precluded from doing so by the homophobia of the residents or the organization.<sup>217</sup> As a result of these attitudes, many lesbians stay away because they perceive mainstream domestic violence services and shelters as the province of heterosexual women.<sup>218</sup>

Service providers often buy into a gendered theory of violence—the idea that violence done by women cannot be as serious as that perpetrated by men—and the myth of mutuality.<sup>219</sup> Service providers may be less willing to expend scarce resources on women whose victimization seems trivial to them. Providers may also make judgments about a woman’s need for assistance based on her outward appearance. In her study of battered lesbians, Janice Ristock found that “service providers are more likely to respond positively to battered women if they conform to stereotypes of ‘respectable femininity.’”<sup>220</sup> Butch lesbians, then, need not apply for assistance.<sup>221</sup> For African American lesbians, race adds an additional layer of complexity to this problem. Some African

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213. Porat, *supra* note 172, at 80.

214. Press Release, Nat’l Network To End Domestic Violence, Incredible VAWA and VOCA Funding Victory (July 26, 2007) (on file with author).

215. Press Release, Nat’l Network To End Domestic Violence, New Report Shows Large Demand for Domestic Violence Services and Short Supply of Resources to Meet Victims’ Needs (Jan. 30, 2008) (on file with author).

216. RENZETTI, *supra* note 77, at 96. Mainstream shelters may also “deny lesbians protection for fear of losing funding, out of ignorance of the dynamics, belief in myths, and/or hesitation of lesbian staff being outed.” Joan C. McClennen, *Partner Abuse Between Lesbian Couples: Toward a Better Understanding*, in PROFESSIONAL’S GUIDE TO UNDERSTANDING GAY AND LESBIAN DOMESTIC VIOLENCE, *supra* note 81, at 77, 86. For a discussion of how service providers can better serve battered lesbians, see generally Christine A. Helfrich & Emily K. Simpson, *Improving Services for Lesbian Clients: What Do Domestic Violence Agencies Need To Do?*, 27 HEALTH CARE FOR WOMEN INT’L 344 (2006).

217. Hammond, *supra* note 181, at 196.

218. Girshick, *supra* note 83, at 1509; Ricks et al., *supra* note 188, at 455. Claire Renzetti describes an ironic situation in which lesbians have negative shelter experiences despite the fact that so many activists in the battered women’s movement are lesbians. RENZETTI, *supra* note 77, at 93.

219. Giorgio, *supra* note 74, at 1240; VanNatta, *supra* note 19, at 428.

220. RISTOCK, *supra* note 176, at 101.

221. GIRSHICK, *supra* note 80, at 55.

American lesbians have found that professionals use race as a proxy for masculinity when assessing violence between women. Because African American women are perceived as stronger and rougher—more masculine than their white partners<sup>222</sup>—African American lesbians battered by white partners may find persuading service providers of their need for assistance difficult.

Being a woman can enable the lesbian batterer to prevent her victim from accessing services. The batterer, using her gender to claim victim status, may have already applied for or be receiving services from the sole provider in the area.<sup>223</sup> The batterer who, after separation, learns that her victim is living in shelter or participating in a program may use her gender to gain entry to the victim's safe space.<sup>224</sup> Worse yet, the batterer may be employed by that service provider.<sup>225</sup> All of these obstacles can reinforce the battered lesbian's belief that her options are limited and prevent her from seeking outside assistance. According to Joan McClennen, "The inability to receive helpful, responsive professional services and protection contributes to victims' maintaining long-term relationships with their perpetrators, as they remain silent about their abuse."<sup>226</sup>

Fighting back may further jeopardize the battered lesbian's ability to access services. Admitting to the use of violence may lead to the recharacterization of the victim as a batterer, rendering her ineligible for shelter, counseling, and other assistance.<sup>227</sup>

#### 4. *The Legal System and Battered Lesbians*

In her landmark study of domestic violence in the lesbian community, Claire Renzetti tells the stories of two women who sought police assistance:

[O]ne woman wrote . . . that the officers who responded to her call for help insulted her by calling her a "queer devil." She wrote that they told her she deserved trouble because she is a lesbian . . . . During the interviews, another woman said: "I called the police, but nothing was done about it. I kept thinking, 'No one cares because I am a lesbian.' The police basically took the attitude, 'So two dykes are trying to kill each other; big deal.'"<sup>228</sup>

Battered lesbians may not perceive the police as helpful. Given the history of homophobia within the police community, battered lesbians may be

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222. Eaton, *supra* note 78, at 205; Giorgio, *supra* note 74, at 1243.

223. RISTOCK, *supra* note 176, at 99; Ricks et al., *supra* note 188, at 455.

224. Sandra Lundy notes that "few shelters seem willing or able to provide the careful screening required to ensure that the lesbian batterer will not gain access to the victim." Lundy, *supra* note 176, at 288.

225. RENZETTI, *supra* note 77, at 93.

226. McClennen, *supra* note 201, at 151; *see also* Robinson, *supra* note 202, at 128-29 (explaining that lack of resources may prevent battered African American lesbians from terminating relationships).

227. VanNatta, *supra* note 19, at 432.

228. RENZETTI, *supra* note 77, at 91.

understandably wary of requesting police assistance.<sup>229</sup> In Renzetti's study, only nineteen of the one hundred women she surveyed called the police; of those nineteen women, fifteen characterized the assistance they received as "a little helpful" or "not helpful at all."<sup>230</sup> Studies suggest that police are less likely to intervene in same-sex domestic violence cases.<sup>231</sup> Police may be unwilling to intervene because they perceive the violence as mutual or because they minimize the violence that women commit.<sup>232</sup>

Lesbians may be even less likely to seek assistance through the courts than they are to call the police; in Renzetti's study, only two percent of the women surveyed said they would find the legal system or courts helpful in resolving their problems.<sup>233</sup> This reluctance to turn to the courts reflects both a general sense that the courts are not helpful to battered women (even straight women) and specific concerns about the treatment of lesbians.<sup>234</sup>

Renzetti's inquiry presupposes that lesbians can access civil remedies. As previously discussed, some state laws explicitly exclude lesbians from protection order laws; others do so implicitly, by virtue of the relationships covered by the statute.<sup>235</sup> Even where court remedies are available, however, the prospect of appearing in a civil court can be daunting. Sandra Lundy, an attorney who frequently represents gay and lesbian clients, recounts, "I know from experience that litigating openly queer cases in civil court is never easy. You can be sure that somehow, somewhere, when you least expect it, homophobia will rear its ugly head in the courtroom, derailing your arguments, upsetting your client, making it impossible to be heard."<sup>236</sup>

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229. Burke et al., *supra* note 188, at 234. Fear of both racist and heterosexist responses may prevent battered lesbians of color from asking for help. Waldron, *supra* note 54, at 48.

230. RENZETTI *supra* note 77, at 91; *see also* McClennen, *supra* note 216, at 86 (describing law enforcement as "neither empathetic nor helpful" for abused lesbians). Recognizing this problem, some communities have worked diligently to improve police response to same-sex domestic violence. The District of Columbia created a special unit to respond to such calls, headed by an openly gay police officer. Carl A. Fillichio, *The New Beat: The Washington Metropolitan Police Department's Gay and Lesbian Liaison Unit Is Transforming Law Enforcement and Redefining the Concept of "Community" Policing*, PUB. MANAGER, Sept. 22, 2006, at 56; *see also* Amy Shomer, *Lesbian Domestic Violence: Our Tragic Little Secret*, 22 LESBIAN NEWS 24 (1997) (discussing improvements in the treatment of victims after training West Hollywood and Los Angeles police departments on same-sex domestic violence).

231. Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. FAM. VIOLENCE 363, 364 (2005).

232. RISTOCK, *supra* note 176, at 99. *But see* Younglove et al., *supra* note 206, at 770 (concluding that "despite any one individual police officer's stereotypes and prejudices about gay men and lesbians, as a group the officers were at least aware of the necessity to appropriately characterize an incident of in-home violence. . . . [T]he gay and lesbian community need not automatically assume that law enforcement can never serve as a resource in combating domestic violence.").

233. RENZETTI, *supra* note 77, at 124.

234. *Id.* at 123.

235. *See supra* notes 79-81 & accompanying text.

236. Sandra E. Lundy, *Equal Protection/Equal Safety: Representing Victims of Same-Sex Partner Abuse in Court*, in SAME-SEX DOMESTIC VIOLENCE: STRATEGIES FOR CHANGE, *supra* note 79, at 43. Lundy continues:

Yet in the years that I have been representing same-sex victims in Massachusetts civil courts, I have witnessed countless abominations: the judge who addresses the butch lesbian victim as

Because of most courts' unfamiliarity and discomfort with same-sex domestic violence, judges may demand more evidence of the violence,<sup>237</sup> proof that may be impossible to provide given the private nature of battering. Others minimize the violence, or treat victims in a patronizing manner, as did one San Francisco judge, who allegedly told a battered lesbian and her attacker, "[N]ow ladies, that's no way to have a relationship."<sup>238</sup> In Massachusetts, the myth of mutual abuse frequently leads to the issuance of inappropriate mutual restraining orders,<sup>239</sup> sending the victim the message that the judge does not believe her story and that she is not entitled to any greater protection than her abuser. When orders are granted, those orders may not be strictly enforced, making their worth questionable.<sup>240</sup>

Even when judges and courtroom staff are respectful of the victim, battered lesbians may nonetheless be "subjected to snickers, jeers, or worse by others in the courtroom."<sup>241</sup> Court staff may also be unwilling to acknowledge lesbian battering. After being attacked by her former partner, Mary Lou Dietrich sought legal assistance. Desperate for protection, she found the experience draining and disappointing: "Monday, I went to the office of the district court clerk to fill out papers for a protective order. The clerk went into a small tizzy when she realized this was not a conventional case of domestic violence."<sup>242</sup> Faced with those challenges, it is unsurprising that many battered lesbians do not see the court system as a viable source of assistance.

#### IV. THE IMPORTANCE OF OWNING NARRATIVES

Notwithstanding the dominant image of the paradigmatic victim, battered women do fight back. The theories about why battered women fight back are neither comprehensive nor applicable to every woman. They provide a sense of the range of possible stories that women who fight back could tell if given the space to do so, and contrast sharply with the stock victim narrative that

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"sir" . . . the countless times that battered lesbians . . . who seek a civil protective order encounter just one more experience of humiliation and abuse . . . I understand why some in our community urge queer people to bypass the court system entirely . . .

*Id.* at 44. See also GIRSHICK, *supra* note 80, at 139 ("When women in same-sex relationships seek legal avenues, they take a public risk of exposing themselves to homophobia, biphobia, and harassment . . ."). Lundy argues, however, that refusing to use the system both compromises the safety of victims and concedes victory to those who would keep victims of same-sex domestic violence from using the system. Lundy, *supra*, at 44-45.

237. Lundy, *supra* note 236, at 49-50.

238. Morrison, *supra* note 77, at 147 n.300 (referring to a "well-known story within the community of advocates working against same-sex domestic violence in the San Francisco, California area during the mid to late 1990s").

239. Lundy, *supra* note 176, at 296-97.

240. RENZETTI, *supra* note 77, at 92.

241. Lundy, *supra* note 236, at 51; see also Lundy, *supra* note 176, at 294 ("[An] attorney . . . has described the court system as 'a horror show with a circus-like atmosphere when lesbian abuse cases are brought to court.'").

242. Dietrich, *supra* note 177, at 157.

decision-makers expect to hear. On some level, it doesn't matter why battered women fight back—only that they do, and that their stories are heard by those in a position to provide assistance. Because theirs is not a story that courts are conditioned to hear, however, it is a story that advocates frequently discourage their clients from telling. Revealing that a battered woman has used physical violence against her abuser may blind the judge to her need for protection. Advocates thus ask their questions narrowly and prepare their clients carefully, omitting any mention of the force victims use. Victims' stories go untold in the name of securing a protective order.

So what? Why is this careful tailoring of women's stories a problem for either the battered woman, whose odds of receiving assistance improve, or for the advocate, who has achieved what she believes to be the client's goal?

The stories of battered women who fight back are remarkably diverse. They are stories of fear, frustration, anger, protectiveness, self-image, racism, homophobia, lack of options, and lack of resources. In the hands of advocates, however, those stories frequently get distilled down to the story of the paradigmatic victim, the stock narrative, minus any violence the woman might have done, no matter what her reason. The choice to exclude violence from the narratives of battered women who fight back is logical from an instrumental perspective. But the failure to tell judges the unedited stories of battered women who fight back has ramifications for both battered women and advocates. The inability to tell their stories may prevent battered women from healing and exacerbate doubts about battered women's credibility. The silencing of battered women's voices undermines their autonomy and highlights a troubling trend in the battered women's movement: replacing women's stories and experiences with professional judgments about what is best for battered women.

#### *A. Editing the Stories of Women Who Fight Back*

Battered women who fight back tell stories that judges do not expect to hear. Given this element of surprise, coupled with concerns about judges' perception of the credibility of battered women—particularly African American women—it is hardly surprising that advocates edit women's violence out of their stories.

This Article began with the proposition that narratives help us to organize and understand our world.<sup>243</sup> Those stories, over time, coalesce around familiar themes and characters, and those stock narratives, or skeletons, frame how we come to view unfamiliar people and situations. Deviating from the stock

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243. "The need for stories is hardwired into our brains, for stories are central to human memory." Andrew A. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 434 (1996).



narrative may create cognitive dissonance for the hearer: “New stories, stories not part of the common culture, will . . . have difficulty being heard.”<sup>244</sup> The legal universe is constructed on these stock stories; skeletons “are part of a line of precedent that reflects a universalized narrative.”<sup>245</sup> We create similar skeletons of people. “Our culture,” Professor Mark A. Fajer explains, “contains a wide variety of assumptions, both good and bad, about categories of people. Although not everybody believes in the strongest versions of these assumptions—that every member of the group strongly displays the characteristic—most people understand that our society connects certain traits with certain categories.”<sup>246</sup> One obvious connection of a category and a trait in the context of domestic violence is battered women and passivity.

It is hardly surprising that lawyers organize their cases around these stock characters and stories, seeking to situate their clients’ narratives within the skeletons of past successes. The failure to conform can be disastrous for litigants. Pre-existing understandings of group characteristics impede true understanding when a group member exhibits characteristics that are markedly different—like fighting back. In the court context, the inability to overcome a pre-existing understanding of “battered woman” as “passive” could easily preclude the woman who fights back from being able to persuade a judge that she needs protection; the judge would instead create a story that reflects his own beliefs about how battered women are expected to behave, and rule accordingly. The lawyer’s role is to prevent the judge from reconstructing the client’s story in a way that undermines the client’s goals for the representation.<sup>247</sup> For a victim of violence, if the goal is to secure a protective order, the lawyer must attempt to persuade the judge of a narrative that fits the narrow bounds of what is actionable under the law. If the woman’s goal is to publicly tell a story that may be difficult for the judge to hear, though, the lawyer’s role might be to create space for that story, notwithstanding the impact on the outcome of the case. One woman’s decision to tell a different story can pose a danger for other litigants as well. As Professor Mary Coombs explains in the context of rape victims, “[U]nsuccessful narrative structures help reconfirm the very . . . myths that make future cases hard to win.”<sup>248</sup> When unconventional narratives are not persuasive, later litigants who tell similar stories may find it difficult to prevail.

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244. *Id.* at 435.

245. Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 911 (1992). These narratives have traditionally been told from a white, male perspective. Regina Graycar, *The Gender of Judgments: Some Reflections on “Bias,”* 32 U.B.C. L. REV. 1, 4 (1998).

246. Mark A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847 (1994).

247. Coombs, *supra* note 7, at 289.

248. *Id.* at 291.

Battered women enter the courtroom at a disadvantage. Social science research establishes that women are generally perceived as less credible than men (and occasionally, as no more credible than children).<sup>249</sup> The claims of battered women are viewed with a great deal of suspicion; the credibility of battered women is challenged at every turn. Judges often share their cynicism about battered women's claims with their colleagues; the judicial grapevine buzzes with the received wisdom that women seek protective orders only to gain advantage in divorce and custody proceedings.<sup>250</sup> The materials produced to aid judges with their determinations reflect this incredulity; in one bench book dedicated to family law matters, judges are told to view the claims of battered women with a healthy dose of skepticism.<sup>251</sup> While it is rare to see such advice in print, advocates and judges have both described the disbelief with which battered women's claims are received in certain contexts.<sup>252</sup>

Judicial doubt intensifies when women describe how they fight back against their abusers. While the stories that clients tell their lawyers "reveal a broad spectrum of human character,"<sup>253</sup> stories that challenge judicial pre-existing understandings of victim behavior are likely to raise doubts about the victim's credibility.<sup>254</sup> Women who fight back enter the courtroom with their credibility in question by virtue of their failure to comply with the prevailing victim stereotype.<sup>255</sup> As evidenced by the stories told above, women who fight back are not seen as needing protection, and their claims are routinely downplayed (particularly in the cases of lesbian victims) or dismissed.

In heterosexual couples, arguments about similarities in the rates of violence among men and women may be at play as well. An entire literature disputing the prevalence of men as perpetrators of interpersonal violence has

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249. Ellis & Schafran, *supra* note 145, at 110.

250. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1122 (2001).

251. See Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L.Q. 211, 218-19 (2002); Susan Scott, Judge, Superior Court of N.J., *Advocating for Victims of Domestic Violence*, Panel Discussion at Rutgers Law School (Oct. 7, 1998), in 20 WOMEN'S RTS. L. REP. 73, 76-77 (1999).

252. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 662-63 (2003) (arguing that judges are skeptical of battered women's claims in custody cases); Susan Scott, *supra* note 250, at 76 (describing the belief of judges that women may lie in protective order hearing proceedings to evict men from their homes).

253. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 525 (1994).

254. Fajer, *supra* note 246, at 1863.

255. Kohn, *supra* note 33, at 734, 742; see also Carolyn Copps Hartley, "He Said, She Said": *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 539 (2001) ("[I]f jurors accept the commonly held myths about domestic violence . . . they may 'fill in the blanks' with an unrealistic view of the violent relationship, and their evaluation of the evidence may be based on misconceptions and prejudices . . ."). As Mary Coombs notes, "The range of 'credible' stories is narrower than the range of true ones." Coombs, *supra* note 7, at 280.

emerged,<sup>256</sup> some see this literature as a backlash against the gains that the battered women's movement has made over the past thirty years.<sup>257</sup> Backlash or no, doubters have succeeded in pressing the public case for proportionality—the proposition that within relationships, men and women are equally violent.<sup>258</sup> Despite the reasoned responses to these claims (that men's violence is more serious, more damaging, and more likely to be a means of controlling their victims),<sup>259</sup> those preaching proportionality have made some inroads into society's understanding of what interpersonal violence is. When judges with whom the proportionality argument resonates hear that women have fought back, they may be likely to simply categorize those women as violent, rather than exploring the context for women's violence and the justification for its use.

Given the private nature of domestic violence and the frequent lack of evidence other than the victim's testimony, advocates might be tempted to edit unhelpful details out, “to spin the victim's demeanor as consistent with the myth of the helpless battered woman” to convince judges of the credibility of women who fight back.<sup>260</sup> The failure to reinterpret the narrative in a manner that meshes with a judge's preconceptions could prevent the client from securing the relief she seeks—the relief that she asked the advocate to help her obtain.<sup>261</sup>

### B. Voice and Validation

The process of coming to court to seek protection is not undertaken lightly by most victims. Having been assaulted by someone she likely loved and trusted, the battered woman then must decide whether to make that violence public by sharing it with court staff, judges, and advocates. She may come to

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256. See, e.g., Linda Kelly, *Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791, 794-800 (2003); Murray A. Straus, *Women's Violence Towards Men Is a Serious Social Problem*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 55 (Donileen R. Loseke et al. eds., 2005); Martin Fiebert, *References Examining Assault by Women on Their Spouses or Male Partners: An Annotated Bibliography*, [www.csulb.edu/~mfiebert/assault.htm](http://www.csulb.edu/~mfiebert/assault.htm) (last visited Feb. 26, 2008).

257. Walter S. DeKeseredy & Molly Dragiewicz, *Understanding the Complexities of Feminist Perspectives on Woman Abuse: A Commentary on Donald G. Dutton's Rethinking Domestic Violence*, 13 VIOLENCE AGAINST WOMEN 874, 874 (2007).

258. See, e.g., Fiebert, *supra* note 256; Straus, *supra* note 256, at 65-68.

259. See, e.g., DeKeseredy & Dragiewicz, *supra* note 257, at 1; see generally Kimmel, *supra* note 108 (arguing that claims about gender symmetry fail to thoroughly analyze gender identity and ideology); Suzanne C. Swan & David L. Snow, *The Development of a Theory of Women's Use of Violence in Intimate Relationships*, 12 VIOLENCE AGAINST WOMEN 1026 (2006) (arguing that claims of gender symmetry are simplistic and misleading because they do not properly contextualize women's violence).

260. Kohn, *supra* note 33, at 735.

261. Cf. Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretic of Practice Movement*, 61 BROOK. L. REV. 889, 916 (1995) (discussing this issue in the context of poverty law).

court knowing that taking that step is likely to anger her abuser further or to change their relationship irrevocably. Calculating all of the variables—her needs, her fear, her love for her partner, and so many more—she decides to tell her story. It is essential that she find a listener willing to hear and accept that story.

Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned “reality” that does not match their perceptions . . . . [T]here are few things more disempowering in law than having one’s own self-believed story rejected, when rules of law (however fair in the abstract) are applied to facts that are not one’s own, when legal judgments proceed from a description of one’s own world that one does not recognize.<sup>262</sup>

A judicial determination that her story is not credible can be crushing for a battered woman who summons the courage to come before the court and describe her abuse. Such a ruling rejects her reality, recreates her life in a way that clashes with her own experiences, and ultimately, denies her the court’s protection. Once dismissed, these women may be less likely to seek the assistance of the courts again.<sup>263</sup>

Given the high stakes for women seeking the court’s assistance, the compunction battered women and their advocates feel to tell stories that jive with the court’s preconceptions about victims of violence makes perfect sense. But the failure to allow or to encourage battered women to tell their stories as they see fit has a price as well.

The stories we tell give us the opportunity to define ourselves.<sup>264</sup> Self-definition can be particularly important for marginalized groups, whose identities have been constructed by the dominant culture as a means of silencing and oppressing them. Professor Richard Delgado writes, “Members of out-groups can use stories in two basic ways: first, as means of psychic self-preservation; and second, as a means of lessening their own subordination. . . . A principal cause of the demoralization of marginalized groups is self-condemnation. They internalize the images that society thrusts on them . . . .”<sup>265</sup>

When we edit the stories of battered women, we lie about who they are and how they perceive the world around them. When those stories are accepted by others as truth, women are forced to live that lie.<sup>266</sup> For the battered woman who fights back, that lie—that she is the passive, weak, dependent stereotypical victim—contradicts the actions that she has taken to protect herself and can

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262. Kim Lane Scheppelle, *Forward: Telling Stories*, 87 MICH. L. REV. 2073, 2079-80 (1989).

263. T.K. Logan et al., *Protective Orders: Questions and Conundrums*, 7 TRAUMA VIOLENCE & ABUSE 175, 185 (2006).

264. Taylor, *supra* note 8, at 1475-76.

265. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2436-37 (1988).

266. Gilkerson, *supra* note 245, at 875; Kohn, *supra* note 33, at 735.

undermine her self-image and self-worth as well as her standing in her community.

The failure to tell the stories of women who fight back not only denies the experiences of the individual women, but also undermines the credibility of the women who will come after them seeking assistance from the courts. Until judges grow accustomed to hearing the diversity of battered women's stories, they will continue to look askance at non-conforming narratives. Skilled advocates can help judges to understand these stories, working with clients to shape and present their narratives in ways that judges might accept. But given the dearth of representation for victims of domestic violence, few women have such advocates. Women without counsel "cannot benefit from the techniques of 'demeanor repackaging'" used to make the stories of women who fight back more palatable to judges.<sup>267</sup> When advocates counsel women who fight back to edit their stories rather than helping judges to reformulate their notions of who a battered woman is, they deny unrepresented women the opportunity to gain from the telling of their clients' stories as well. The failure to tell these narratives may even increase the danger to all women who fight back. As domestic violence advocates and scholars Martha McMahon and Ellen Pence argue,

Women who fight back become increasingly vulnerable to their abusers if the advocacy community does not recognize their actions as legitimate responses to being beaten. The idealized image of the perfect victim and the naive notion that there is a healthy or proper way of being abused makes women who fight back . . . more vulnerable to both the abuser and the institutions to which they turn for help.<sup>268</sup>

When advocates are unwilling to accept that women fight back and to present fighting back as a coping strategy, they are complicit in the silencing of their clients and in the creation of additional hurdles for other women.

### *C. Narrative Reconstruction: Implications for Advocates*

The silencing of women who fight back is particularly ironic given the theoretical foundations of advocacy for battered women. Recognizing that battered women had been denied agency and authority in their relationships, a belief in a woman's right to self-determination was one of the cornerstones of the nascent battered women's movement.<sup>269</sup> The movement's focus on the

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267. Kohn, *supra* note 33, at 735.

268. McMahon & Pence, *supra* note 54, at 71.

269. Miccio, *supra* note 36, at 257, 264; *see also* STARK, *supra* note 21, at 79 ("Shelters were opened . . . in which safety was a means to empowerment and collective empowerment was an instrument to challenge systemic sexual inequality . . ."). As Kris Miccio writes, "Women's choices were not pathologized . . ." Miccio, *supra* note 36, at 286.

empowerment of battered women attracted advocates to the work, particularly formerly battered women, who were among the first to establish shelters and draw attention to the needs of victims of violence.<sup>270</sup> As the movement has become more professionalized, however, “sisters” have become clients,<sup>271</sup> and the voices of battered women have been muted in favor of deference to the judgment of the social workers, counselors, lay advocates, and lawyers working with them.<sup>272</sup> One unintended consequence of the credentialing of the battered women’s movement may be a failure of these professionals to acknowledge the diversity of battered women’s stories.<sup>273</sup>

The increasing professionalism of the battered women’s movement has coincided with a shift away from respect for women’s choices.<sup>274</sup> This shift is reflected in a number of policies embraced by many domestic violence advocates, chief among them mandatory arrest and “no drop” prosecution.<sup>275</sup> Those policies imply a belief that battered women cannot make rational choices at times of crisis and that professionals’ judgment should be substituted for the women’s own good.<sup>276</sup>

The pressure advocates exert to edit the stories of women who fight back constitutes the same sort of substituted judgment. It underscores advocates’ assumptions, based on their experiences, that women who fight back will not be eligible for relief unless their stories echo the prevailing narrative. It devalues the rational and legitimate choice that a woman makes to fight back. Editing a woman’s decision to fight back out of her story suggests to the woman that her decisions are unjustifiable, her actions aberrant. Battered women fight back to preserve their autonomy and sense of self;<sup>277</sup> we denigrate those choices when

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270. See SCHECHTER, *supra* note 53, at 56.

271. Susan Schechter describes how the professionalization of some battered women’s shelters fundamentally changed the nature of the interactions between service providers and residents in those shelters, shifting the balances of power in those relationships. *Id.* at 106-10.

272. Kathleen Waits, *Battered Women and Their Children: Lessons From One Woman’s Story*, 35 HOUS. L. REV. 29, 80-81 (1998); see also McMahon & Pence, *supra* note 54, at 57-58 (“Professionalization and specialization of U.S. advocates’ relationships to battered women . . . contributed to institutionalized responses to domestic violence.”).

273. Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 44-45 (1990).

274. This is certainly true among lawyers. See, e.g., Edward S. Snyder & Laura W. Morgan, *Domestic Violence Ten Years Later*, 19 J. AM. ACAD. MATRIMONIAL. L. 33, 47-50 (2004) (“If the attorney determines that domestic violence is present, the first goal is to stop the violence and help the client be safe. The most valuable tool in keeping a client safe is the civil protective order . . . Although there may be economic ramifications in filing for a protective order, an attorney must realize that a victim could be swayed by the consequences to the abuser. The attorney must encourage the victim to focus upon thwarting further abuse.”).

275. Mandatory arrest refers to policies which remove discretion for arrest from police, requiring them to make an arrest in domestic violence cases whenever they have probable cause. “No drop” or victimless prosecution allows prosecutors to pursue domestic violence cases without the assistance or approval of the victim. See generally Miccio, *supra* note 36 (providing background on these policies and questioning their effectiveness).

276. *Id.* at 303.

277. See, e.g., STARK, *supra* note 21, at 166 (discussing one woman’s experience fighting back).

we stifle that portion of their narratives. Each time an advocate counsels a woman to tailor her story without appreciating that decision or giving her the opportunity to tell her story as she chooses, that advocate turns her back on the principles that undergird the battered women's movement and does violence to her client.

Attorneys have tremendous power in shaping the stories of their clients;<sup>278</sup> even if the lawyer hews closely to the story told by the client (and not all do), it is the lawyer's voice, the lawyer's choice of words, the lawyer's tone and inflection and pacing that structure the narrative heard by the court. Lawyers can misuse that power in a number of ways: by silencing client voices, by omitting particular kinds of narratives, by presenting only narratives that are acceptable to the legal system, and by requiring client obedience to the lawyer's translation of the story.<sup>279</sup> When lawyers rewrite client stories without client input or approval, they take from clients the power to decide how they want to be presented and exclude the client from the strategic choices that will shape her case.<sup>280</sup>

Reconstructing client narratives in ways that are not consistent with their choices, feelings, and perspectives on the violence is disempowering for battered women. A battered woman is disempowered when, "rather than having faith in the validity of her story, she is counseled to retell the incident to make it more suitable for the [legal system]."<sup>281</sup> M. Joan McDermott and James Garofalo identify "guiding the victim in shaping and retelling her story to make it a better case for the prosecution" and "counseling and advising a victim of domestic violence in a manner that suggests that the professional knows better than she does what is in her own best interest" as potential sources of disempowerment for battered women.<sup>282</sup> This reshaping is disempowering, they argue, because it suggests that women's "own stories lack the legitimacy of real, prosecutable criminal victimization. Ironically, the practice of conveying to victims the idea that 'you're only a victim if . . . ' is the very practice that the women's movement has fought long and hard against for victims of domestic battery and sexual assault."<sup>283</sup> This disregard for women's lived experiences

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278. See Sally Frank, *Eve Was Right To Eat the "Apple": The Importance of Narrative in the Art of Lawyering*, 8 YALE J.L. & FEMINISM 79, 87 (1996); Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 331 (2006).

279. See generally Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) (arguing that a lawyer's telling of his client's story often falsifies its normative content and loses the client's own narrative).

280. See Miller, *supra* note 253, at 564-65; John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer To Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85, 100-01 (1999).

281. M. Joan McDermott & James Garofalo, *When Advocacy for Domestic Violence Victims Backfires: Types and Sources of Victim Disempowerment*, 10 VIOLENCE AGAINST WOMEN 1245, 1250 (2004).

282. *Id.* at 1251.

283. *Id.* at 1259.

may make them feel “absent, impotent, even desperate”<sup>284</sup>—a far cry from what most advocates hoped to achieve when they began working with battered women.

In one final irony, sometimes the reframing simply cannot contain the client’s lived experience. Sociologist Evan Stark describes how one battered woman, Emily D., initially resisted her attorney’s pressure to present herself as a passive victim. Although Emily later relented, the stock victim story simply could not be squared with how Emily presented—“aggressive, demanding, even ‘rude.’”<sup>285</sup> As Stark recounts, “The more Emily D. was advised by her attorneys to behave like the stereotypic victim the court expected, the more inappropriate her behavior became.”<sup>286</sup> The lawyers’ determination to substitute their judgment for Emily D.’s ultimately undermined the client’s case.<sup>287</sup> Even when clients assent to the editing of their stories, when those stories are not consistent with the client’s experiences as she understands and expresses them, that conflict can manifest itself in ways that detract from her credibility. Lawyers who counsel clients to change their stories in order to help them “win” might, in fact, be achieving just the opposite result.

How advocates structure narratives has ethical implications as well.<sup>288</sup> The ethical rules that govern the profession require lawyers to zealously advocate for their clients, but does that zeal justify editing client stories to better meet the expectations of the court? The definition of zealous representation becomes crucial here.<sup>289</sup> If zealous representation is defined as winning the client’s legal case, editing may be justifiable. As Professor Cathy Lesser Mansfield argues, storytelling may be instrumental: Clients engage lawyers to produce particular results for them, regardless of the violence done to their stories in the process.<sup>290</sup> Even if the lawyer edits the client narrative within the context of the legal system, the client’s story remains “intact and within the client’s control.”<sup>291</sup> When lawyers fail to exercise their professional judgment in crafting client narratives, Mansfield contends, they give clients only the illusion

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284. Stark, *supra* note 32, at 1011.

285. *Id.* at 1013.

286. *Id.* at 1013-14; see also STARK, *supra* note 21, at 352 (describing the alternate narratives used during the trial of Bonnie Foreshaw and the poor fit of the victim narrative in her case).

287. Stark, *supra* note 32, at 1014-15.

288. For a discussion of narrative and the rules of ethics, see generally Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL’Y & L. 117 (2002).

289. Michelle Jacobs considers a similar issue in the context of representing the poor. Jacobs argues that the definition of zealous representation must be different when representing indigent clients because of the particular challenges posed by the representation. Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97 (1995). Similarly, zealous representation must be defined differently when representing battered women because of the unique issues raised by representation.

290. Mansfield, *supra* note 261, at 895. Mansfield argues that reinterpreting the client’s story is “not falsification of the client’s normative reality, but facilitation of client story toward client goal. . . . It empowers client narrative by selectively relating interpreted client narrative appropriate to serving the purpose for which the story is told in the first place.” *Id.* at 903.

291. *Id.* at 907.



of control, essentially abandoning their clients to what may be a hostile process.<sup>292</sup> Particularly where the failure to interpret allows the court unfettered access to “the negative realities of the client’s life,” the lawyer abdicates her role by failing to “erect this interpretive barrier between the client and the decision-making entity.”<sup>293</sup>

But if zealous representation means presenting the client’s case in the most complete and authentic way possible—regardless of effect on the outcome—such editing becomes a more dubious proposition.<sup>294</sup> Editing to fit a stock story, Professor Christopher Gilkerson argues, “*transforms* the client’s narrative into a story that best fits the story law tells about a person in the client’s general circumstance and position”—a decision over which the client has little control, given “the disparities of power and knowledge between lawyer and client.”<sup>295</sup> Gilkerson notes that the client’s goal may not be winning the case—the traditional measure of success—but rather presenting her story as she experienced it.<sup>296</sup> If the client is more interested in controlling how the story is told than the effect on the hearer, zealous representation must mean enabling her to tell the story of her choosing.

This question of editing or not editing and its effect on winning or losing a case sets up a Catch-22 for victims, however. She may choose to tell the story of fighting back against her abuser, and risk judicial skepticism and disbelief; alternatively, she may edit her story and deny herself the opportunity to give voice to her experience, thereby branding her actions as deviant. Editing victims’ stories reinforces the stereotype of the paradigmatic victim, making it more difficult for women to tell stories that fail to conform. Victims of violence should not have to choose between telling their chosen stories and receiving protection. By working together to change judicial perceptions of victims of violence, advocates and battered women can try to make room for all of the stories that battered women have to tell.

## V. REWRITING THE VICTIM NARRATIVE

As advocates, we must find ways to create space for the narratives of women who fight back. One crucial aspect of creating that space is helping judges understand that the paradigmatic victim speaks for very few battered women, and not at all for women who fight back. For years, advocates have relied on judicial education to broaden judicial perspectives on the experiences

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292. *Id.* at 905.

293. *Id.* at 916.

294. Mitchell, *supra* note 280, at 101.

295. Gilkerson, *supra* note 245, at 912-13. Such editing is also at odds with the principles of client-centered representation that many advocates for the disempowered spouse. *See* Mitchell, *supra* note 280, at 103-04.

296. Gilkerson, *supra* note 245, at 916.

of battered women, with questionable success. The time has come to try something new. Telling counterstories that show judges the diversity of battered women's experiences may help us to make that space.

Judicial education—defined as training provided by experts on issues judges might confront in their cases—is frequently touted as the remedy for a legal system that is unresponsive to battered women's claims. If only judges were presented with more information on these issues, the thinking goes, they would be more receptive to and protective of battered women.<sup>297</sup> If judges understood that some battered women use fighting back as a strategy for warding off violence and the other reasons that women may feel compelled to use violence, they might look at these cases differently.

Perhaps. But the battered women's movement has been doing judicial education for many, many years now, and still battered women and their advocates document daily the injustices battered women face when they seek protection.<sup>298</sup> The extent to which that education has been successful in making judges more sympathetic to the claims of battered women is open to debate. Judicial education reaches only a small percentage of all of the judges in the country who are hearing domestic violence cases. Voluntary education programs tend to be self-selected; judges interested in the area, who need the training the least, are the most likely to attend.<sup>299</sup> Mandatory judicial education creates resentment towards the subject matter and sometimes the trainers, who frequently come from the advocacy community.<sup>300</sup>

What is clear is that judicial education has made an impact in helping to create and maintain the rigid stereotypes of battered women that judges continue to expect. The essentializing of battered women is a byproduct of the indoctrination of judges in learned helplessness and the battered woman

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297. See, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 33, 44-45 (1999); Katie J. Land, *Toward More Effective Judicial Education in Issues of Family Violence*, 9 *BUFF. WOMEN'S L.J.* 31, 31 (2000); Lundy, *supra* note 176, at 304-05. The battered women's movement still sees judicial education as essential; the House of Representatives recently authorized five million dollars to train judges on domestic violence, largely at the behest of the advocacy community. See Press Release, Nat'l Network To End Domestic Violence, *supra* note 214.

298. For example, I receive daily e-mails including newspaper stories documenting how domestic violence continues to be dismissed by courts.

299. See, e.g., Earl G. Penrod, *Judicial Education in Indiana: An Overview and a Proposal for Change*, 40 *VAL. U. L. REV.* 409, 418 (2006).

[T]ime on the bench for some judges is accompanied by a level of intellectual snobbery that results in an inability to fully appreciate the value of continuing and continuous education. Having 'seen it all' over the years, these judicial officers are unable or unwilling to recognize that there might be something to learn beyond the local courtroom. They not only fail to appreciate how much new information there is to learn, they also fail to understand that much of what they presently know is inaccurate.

*Id.*

300. This observation is based on years of experience as a provider of judicial education, both as a member of the advocacy community and as a staff member for an organization dedicated to judicial training, and the comments I heard from judges participating in those trainings.

syndrome,<sup>301</sup> no “Domestic Violence 101” training is complete without some coverage of these concepts. Trainings tend to generalize and simplify for the sake of brevity and understanding; by distilling the discourse down in this way, judges are offered only the most basic, easily digested understanding of what domestic violence is and how a vast range of women experience it.<sup>302</sup>

Even if judges received the ideal training—the highest quality trainers and most up-to-date, comprehensive information on the diversity of battered women’s experiences<sup>303</sup>—judicial education still would be unlikely to change the prevailing stereotypes of battered women, because that training would not comport with what judges experience on a day-to-day basis in their courtrooms. In a culture in which women’s own violence is largely suppressed in their narratives, judges would be asked to change their views on victims of domestic violence in ways that conflicted with the stories they heard from women seeking orders of protection. Without hearing from women who fight back and nonetheless seek protection in their courtrooms, judges might simply dismiss the information they received from trainers as at best incorrect, and at worst biased. Training cannot be effective so long as it clashes with judges’ experiences of their caseloads. Judges are unlikely to change if the stories that they hear do not change.

Beyond formal training programs, then, how can advocates for battered women educate judges to look beyond the paradigmatic victim? Advocates can bring the cases of women who fight back and other non-conforming victims of violence before the courts. They can help clients tell the stories they want to tell and explain why, despite fighting back, those women should be entitled to the protection of the courts. Lawyers can appeal cases when necessary, fighting for binding precedent that acknowledges that women who fight back are entitled to protection. They can create “disorienting moments”<sup>304</sup> for judges, prompting them to question what they think they know about domestic violence and who victims of violence are. Telling counterstories is the kind of education that might actually create a more hospitable environment for women who fight back.

The creation of the stereotypical battered woman is not solely a function of what the courts have come to expect, but also of what the advocacy community has chosen to present to those systems despite its increasing awareness of the

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301. My thanks to the participants in the AALS Clinical Legal Education Conference Works-in-Progress session, who provided me with this insight.

302. Kathleen Mahoney suggests a number of improvements in judicial education around gender bias issues, and points to the Wester Judicial Education Centre in Canada as a model for improving judicial education. Mahoney does not provide any empirical data measuring this improvement or point to any concrete changes in the quality of judicial decisionmaking as a result of the training. Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 814-19 (1996).

303. Given the constraints of time, money, and qualified trainers, making such training available to all of the judges hearing domestic violence cases is highly implausible.

304. Jane Harris Aiken, *Clients as Teachers*, 16 WASH. U. J.L. & POL’Y 81, 85 (2004).

diversity of battered women. This narrowing of the range of acceptable victims began during the early years of the movement, and continues each time that an advocate edits a client story because she believes that, otherwise, the client cannot prevail. Our failure to allow clients to tell unedited narratives has created the barriers that non-stereotypical victims—African American women, lesbians, women who fight back—face when they seek assistance. Particularly for unrepresented women, who have no advocates to craft acceptable stories, the results have been devastating.

To the extent that we as advocates doubt that our clients' stories will be credible or persuasive, we perpetuate untruths about our clients who fight back—that they are not believable, that they are wantonly violent, that they are not victims of abuse. Why should judges change their minds about these women and reassess the stories they tell if advocates have no faith in those stories either?

We must be willing to tell counterstories—alternate narratives that subvert the received wisdom and describe our clients' authentic experiences with their violent partners. Counterstories “destroy . . . the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”<sup>305</sup> If narratives are responsible for producing stereotypes and paradigms, counterstories can show judges that “the factual universe on which legal decisions are based can be too narrow.”<sup>306</sup> As Professor Christopher Gilkerson argues,

Lawyers can correct universalized narratives only when they assert advocacy stories as alternatives to prevailing stock stories that do not fit the client's narrative. Systematic juxtaposition of client and universalized narratives is a method that can demonstrate the incompleteness (and thus falsity) of universalization by highlighting the absence and importance of the client's perspective. Client narratives therefore hold the potential to make judges aware of and acknowledge the perspective of those excluded.<sup>307</sup>

Counterstories carry the potential to transform judicial practice because they force decision-makers to confront “the human lives their decisions affect”;<sup>308</sup> the hope in telling such stories is that judges will view their work “through a more empathic lens.”<sup>309</sup> Counterstories bring into stark relief the gulf between

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305. Delgado, *supra* note 265, at 2413; *see also* Delgado, *supra* note 8, at 563 (criticizing the “inner circle of about a dozen white, male writers” on antidiscrimination law who “only infrequently cite a minority scholar”).

306. Baron & Epstein, *supra* note 9, at 185.

307. Gilkerson, *supra* note 245, at 920; *see also* Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 916 (1997) (describing how dominant narratives reinforce oppression and how counterstories break that oppression); Hayman & Levitt, *supra* note 9, at 433 (arguing that counterstories drive critical inquiry into how well stock narratives reflect reality).

308. Hayman & Levitt, *supra* note 9, at 435.

309. *Id.*

judicial assumptions about battered women and the real women seeking the court's protection. Faced with the juxtaposition of the paradigmatic victim and the real plaintiffs telling very different stories, judges may have to rethink the stereotypes on which they rely. One counterstory might be easy for a judge to reject, but regular exposure to these stories should make a judge question his or her beliefs about battered women.

Collaboration between lawyer and client is essential in the construction of counterstories.<sup>310</sup> Power imbalances are inherent in the attorney/client relationship; to redress that imbalance, "room for client voice . . . must be carved out of lawyer-dominated space."<sup>311</sup> The need for collaboration also addresses the concern about the instrumentality of client stories. The decision to tell a counternarrative must be the result of discussion about the goals of the representation and the advocate's approach to her work with battered women, as well as thoughtful counseling about how the legal system is likely to view the client's claims. Through that conversation, the advocate and client must decide what empowerment means for that woman, particularly if they believe that testifying to how she fought back and winning her case are mutually exclusive goals.<sup>312</sup> Advocates should share their experiences with the legal system, not only to give the client a sense of what she might face should she decide to tell her own story, but also to provide the client with a sense of the importance of her story within the larger context of the legal system and of the battles that women without counsel face when they tell unmediated narratives. Battered women might be more willing to share their stories regardless of the consequences if they understood how doing so could benefit the women who come after them. The advocate and the client must discuss short and long-term goals, not only around what the legal system can offer by way of immediate protection, but also in terms of additional legal options, how her choices will affect her family and other relationships, how telling her story relates to her sense of herself, and any other concern that the client puts on the table. Only after these discussions have taken place can the client make an informed choice about how to formulate her legal narrative. Creating space for that choice, and

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310. This collaboration is particularly important to lawyers who have adopted a client-centered approach, an approach embraced by many advocates as consistent with the goals of empowering battered women. See V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996).

311. Alfieri, *supra* note 279, at 2140; see also Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544-45 (1987/88) (arguing that lawyers are not well trained in helping clients to find space for their stories).

312. Cathy Mansfield contends that "given the choice between presentation of full story regardless of its impact on legal outcome, and presentation of interpreted story, distilled for legal content, I believe most clients would choose presentation of a distilled story." Mansfield, *supra* note 261, at 928. The lawyer has no right to make that assumption; the power to make that choice should be the client's, despite Mansfield's assertion that to allow the client that choice abdicates the lawyer's role. *Id.* at 929.

providing context for making the choice, recognizes the client's autonomy and underscores the advocate's commitment to empowerment, both for her own client and for the battered women she cannot represent.<sup>313</sup>

The lawyer must also recognize that the client may not yet have found her voice. Traumatized, defiant, angry, grieving the loss of the relationship, ashamed of her action or inaction, the client's story may change depending on the emotions she feels and the acceptance or resistance she meets as she begins to articulate her narrative. Her story may be in transition, and may remain in flux over the life of the case.<sup>314</sup> Professor Leslie Espinoza cautions, "[L]awyer interaction with a client who has been abused should allow the client the space to construct a story in her own time."<sup>315</sup> The lawyer must avoid the temptation to make the initial client story the "one 'true' story" and adhere to that narrative regardless of how the client's understanding of her story evolves over time.<sup>316</sup>

Moving away from the paradigmatic victim through counterstories is neither quick nor easy. Some have asked whether, given the many pitfalls it poses for battered women, it is worthwhile to attempt to tell these stories in the legal system at all. The dearth of other avenues to address violence, however, and the benefits that can accrue to those who are successful in bringing legal claims, both by way of protection and by way of the validation that can come from telling a story and having the system respond positively as a result, makes it imperative that advocates attempt to create a forum for the stories of women who fight back in the legal system.<sup>317</sup> Judges "must first be convinced of some inadequacy in the old" story before being open to a new one; as a result, "[s]tory change is . . . both difficult and incremental."<sup>318</sup> But the difficulty of the endeavor is hardly a reason to continue to perpetuate a stereotype that does not reflect, and indeed undermines, the experiences of battered women who fight back and ask the legal system for protection.

#### CONCLUSION

In Professor Janice Ristock's work on lesbian abuse, she writes that she "seeks to tell troubling tales."<sup>319</sup> Too often, however, advocates for battered women substitute safe stories for troubling tales, editing the violence that their

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313. Miccio, *supra* note 36, at 317-18 (stressing the importance of respecting battered women's decisionmaking in respecting autonomy).

314. Espinoza, *supra* note 307, at 908.

315. *Id.*

316. *Id.* at 913-14.

317. I have suggested elsewhere that lawyers have an ethical duty to work from within the system to make the kinds of changes that will ultimately provide better results for battered women. See Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999, 1022-23 (2007).

318. Taslitz, *supra* note 243, at 435.

319. RISTOCK, *supra* note 176, at 28.

clients do out of the stories that they tell judges. While those omissions may be instrumental, helping women to attain the short-term goal of securing the court's protection, in the long run such omissions undermine the opportunities available to women who fight back by enabling the paradigmatic victim to remain the gold standard for the court system. By telling counterstories we can show judges the variety and complexity of the stories of battered women and provide spaces in which those stories can be heard.

Ristock admonishes, "We need to continually ask . . . How else can this story be told? What difference would that make?"<sup>320</sup> Let's rewrite the story of the battered woman that began this article. Imagine that she had counsel, and that her counsel had told her how difficult it might be to get a protective order if she disclosed that she had fought back. But also imagine that she and her counsel discussed a number of other things as well: her struggle as an African American woman to be free of violence, her need to assert her strength and her independence, her concerns about other women being abused, and the inability of judges to see strong African American women as victims of violence. After that conversation had happened, how would her story sound? Not only "I will not allow him to beat on me," but "I hit back to keep him from beating me worse" and "I need this protective order to show him I'm serious about not being abused." It's impossible to know whether the court would have been willing to hear her. But if judges did hear her story, and the voices of the innumerable women like her, they might begin to listen.

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320. *Id.* at 181.