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## The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power

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# THE PASSIONS OF BATTERED WOMEN: COGNITIVE LINKS BETWEEN PASSION, EMPATHY, AND POWER

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## I. INTRODUCTION

Empathy involves both cognition and emotion.<sup>1</sup> On a cognitive level, empathy requires taking another's perspective and understanding that person's feelings.<sup>2</sup> Sometimes empathy also includes sharing another's emotions. We understand some experiences and readily share some emotional reactions, and fail to understand or share others.<sup>3</sup> Judges, lawyers, jurors, and other

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\* Professor of Law, DePaul University College of Law. I thank Jean Bax, Avani Kamdar, and Judy Lukosen for research assistance. I thank Michelle Oberman and Andrea Lyon for extremely helpful comments on an earlier draft. I thank the Dean of the DePaul College of Law, Teree Foster, for generous summer support.

1. See, e.g., Tamara M. Haegerich & Bette L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, 24 LAW & HUM. BEHAV. 421, 422 (2000).

2. *Id.*

3. *Id.*

members of the judicial system, being human, will inevitably be able to empathize with some parties and witnesses more than others.

Empathy is the result of complex cognitive processes and therefore subject to a number of biases associated with the ways in which we process information and emotions. We often tend to empathize with those who have power, rather than those without power. We tend to see members of "other" groups as more uniform and more different from ourselves than they are. We tend to see some emotions as inevitable or incredible for some people in some situations.

Empathy plays crucial roles in both shaping law and affecting outcomes in litigation. The legal system is a system of rules and procedures participants use when seeking legal affirmation of their viewpoints. The ability or inability to empathize with someone is often the basis for either recognition or denial of a tort action to redress an injury or of a defense in such an action. Similar points could be made about all areas of law and hold whether the law is made by judges or by legislators. An obvious example is the availability of the heat-of-passion defense to reduce murder to manslaughter in situations in which lawmakers can empathize with the defendant.

This symposium celebrates the recent publication of a collection of essays on the roles emotions play in law: *The Passions of Law*, edited by Susan Bandes.<sup>4</sup> Several essays note problems of the type I discuss here. In her introduction, Susan Bandes argues that judges inevitably make decisions on the basis of selective empathy and their own values.<sup>5</sup> And in her contribution, Cheshire Calhoun explores the notion of outlaw emotions, emotions that are regarded as inappropriate or impossible for some people in certain situations.<sup>6</sup> Calhoun considers the inability of many to see romantic love in same-sex relationships as an illustration of this phenomenon as well as an explanation of why most Americans cannot imagine same-sex marriage.<sup>7</sup>

None of the essays in Bandes' collection discuss the difficulties faced by battered women in the courtroom, many of which are related to problems almost all of us face in understanding battered

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4. THE PASSIONS OF LAW (Susan A. Bandes ed., 1999).

5. Susan A. Bandes, *Introduction*, in THE PASSIONS OF LAW 1, 6 (Susan A. Bandes ed., 1999).

6. Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in THE PASSIONS OF LAW, 217, 223-25 (Susan A. Bandes ed., 1999).

7. *Id.* at 234. Judges share the common perception that marriage is impossible for two women or two men. See Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two are Better than One*, 2001 U. ILL. L. REV. 1, 2-8.

women. Judge Posner does, however, make two points that suggest judges are likely to have difficulty understanding battered women and their emotions.

In this article, I first discuss problems associated with selective empathy, particularly the problems it poses for battered women. In the second section, I discuss problems with Posner's contribution to *The Passions of Law*, given the experiences of battered women. In the third section, I describe some of the ways in which cognitive biases interfere with our ability to perceive others' emotions accurately. I argue because of various cognitive problems leading to bias in judgments of battered women, judges and juries consciously need to foster empathy for women in abusive situations. In the fourth section, I discuss the diversity of battered women and two quite ordinary passions of battered women — anger and jealousy, passions which any reasonable person in such a situation would likely feel but which are not permitted to "real" battered women.

In the fifth section, I use actual cases, particularly that of Sylvia Flynn, to illustrate problems battered women who have killed face as a result of these biases. In the sixth section, I explain why Sylvia's actions make sense as those of a battered woman, despite her failure to conform to every stereotype of battered women. In the seventh section, I explore in depth the problems faced by Sylvia at the trial level and suggest changes that might decrease the bias battered women face in the legal system. Finally, in section eight, I provide a short summary of these reforms.

## II. POSNER AND PASSION

In his contribution to Bandes' *The Passions of Law*, Judge Posner discusses emotions in the context of violence against victims who are almost always women (and often battered women) victimized by men,<sup>8</sup> and in doing so, demonstrates a profound failure to empathize with women who are the victims of male violence. Posner begins this section of his essay by noting that law is not *pro* or *con* emotions: "The significance of the emotional component of behavior regulated by law is bound to depend . . . on

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8. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1335 (1997).

In the cases I have studied, men are by far the most frequent victimizers, and women the most frequent victims. But that does not mean that only women are killed; indeed, it is often the man helping the woman leave — the sheriff or the mover or the lover — who dies.

*Id.*

the purpose of the particular law."<sup>9</sup> Posner uses criminal law to illustrate his point and sees the purpose of criminal law as limiting dangerous activity.<sup>10</sup> He then explores the appropriate level of punishment in emotional murders, for example, homicides committed in the heat-of-passion:

It could be argued . . . that the more "emotional" the crime, the more rather than the less severe the punishment should be because a greater threat of punishment may be necessary to deter in those circumstances. But not only do the greater ease of catching the emotional criminal and the lesser risk that he will repeat the crime (because it is situation-specific and the situation is unlikely to recur) tend to offset the need to ratchet up the punishment to assure deterrence; in addition, most crimes of passion involve an element of provocation on the part of the victim, and provocation may provide a reason for lighter punishment. Although the lighter punishment increases the likelihood of crimes against provokers by reducing the expected punishment cost of such crimes, it reduces that likelihood by increasing the expected cost of provocation (the provoker is more likely to be attacked, since the expected punishment cost of the attacker is less, and knowing this may be less likely to provoke). If the latter effect predominates, a reduction in the severity of punishment in cases of provocation will reduce the amount of crime.<sup>11</sup>

Posner assumes two things here: first, that if the victim desists from provocation, there will be no killing and therefore, less crime, and second, that deterrence of provocation is appropriate.

In fact, provocation often consists of a woman trying to leave a miserable or violent relationship. In a widely read 1997 article, Victoria Nourse reports on an empirical study of modern heat-of-passion manslaughter cases from 1980 to 1995.<sup>12</sup> Nourse found that in jurisdictions limiting heat-of-passion manslaughter to specific categories (such as the four widely accepted in the nineteenth century: adultery, mutual combat, false arrest, or violent assault),<sup>13</sup> infidelity *and* separation were both present in the facts of a significant number of cases; in eighteen percent of the cases in which the defendant succeeded in obtaining jury instructions on

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9. Banes, *supra* note 4, at 312.

10. *Id.*

11. *Id.* at 313.

12. Nourse, *supra* note 8, at 1332.

13. *Id.* at 1341.

heat-of-passion, there was separation as well as infidelity.<sup>14</sup> In only eleven percent of the cases was there infidelity alone.

Results in jurisdictions following the Model Penal Code (MPC), which replaces the traditional categories with "extreme emotional duress,"<sup>15</sup> are even more troubling. For cases in MPC jurisdictions in which the defendant went to the jury with an instruction on manslaughter, twelve percent involved simple infidelity, thirty-seven percent involved departure and infidelity, and twenty-six percent involved simple departure.<sup>16</sup> Thus, "[a] significant number of the reform cases . . . involve no sexual infidelity whatsoever, but only the desire of the killer's victim to leave a miserable relationship."<sup>17</sup> In many of these cases, there was evidence that the "provocation" actually consisted of a battered woman attempting to divorce her abusive husband or break up with an abusive boyfriend.<sup>18</sup> In other cases, the "provocation" was that a woman wanted out of a (nonviolent) relationship she no longer considered satisfactory.<sup>19</sup>

In mixed jurisdictions, using a "reasonable man" standard which, depending on the specific jurisdiction, can be more or less like either the traditional or MPC approach or something in between,<sup>20</sup> seventeen percent of cases in which the defendant reached the jury with a manslaughter instruction involved only departure, and no infidelity. Thirty-four percent involved both, and only three percent involved simple infidelity.<sup>21</sup>

Obviously, if the potential provoker simply stays in a violent relationship there will be continuing crimes of violence. In these cases, Posner's analysis is misguided on its own terms. But even if the case is more prosaic — one in which a woman merely wants to end a non-violent relationship — it by no means follows that the criminal law should give her an incentive to stay in the relationship. A person should be able to end an unsatisfactory relationship without risking her life. We should be interested in deterring provocateurs from provoking only when the provocation is

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14. *Id.* at 1349.

15. *Id.* at 1340 n.52.

16. *Id.* at 1349.

17. *Id.*

18. For example, see the cases described in detail in Nourse, *supra* note 8, at 1343. See also cases described *supra* notes 6-9.

19. Nourse did not report on how many of the cases in her sample involved evidence suggesting pre-separation violence by the defendant. See Nourse, *supra* note 8, at 1348 ("physical violence" coding refers to defendant's claim that he was provoked by her violence).

20. *Id.* at 1341-42.

21. *Id.* at 1349.

something we want to deter independently of the heat-of-passion defense. Further, a man who kills a woman who simply wants to leave an unsatisfactory relationship may well do so again in the future if another woman tries to leave him.

Posner completely fails to consider the consequences for women — particularly those in violent relationships — of the legal system's acceptance of the heat-of-passion defense. This is especially troubling given the fact that abusive men are often extremely jealous and see infidelity where there is none. Posner's failure to grasp the implications of his analysis for women seems associated with his greater ability to empathize with the male defendant in passion murders.<sup>22</sup> Posner does not see provocateurs as women who want to end (and should have a right to end) relationships (which are often miserable or even violent), but as beings who *should* be deterred. He does this without even pausing to consider what actions are considered provocative, what it is that the potential provocateurs are being deterred from, or why they might be justified in doing what they want to do. In contrast, Posner readily empathizes with the passion defendant, seeing him as provoked by the victim rather than as retaliating when she attempts to break free of a bad or abusive relationship.

Thus, Posner demonstrates a bias in favor of the (emotional) defendant and against the absent (provocative) victim. Ironically, his general position, stated a little later in the same essay, is that judges should use empathy to bring to the forefront those absent from the courtroom (the victim of the violent crime). In the passage making this point, Posner begins by agreeing that judges inevitably use emotions in reaching decisions, and he argues that indignation and empathy are two emotions essential for judges.<sup>23</sup> He regards indignation as necessary because some widely-accepted moral rules — such as intercourse with human corpses — are grounded, not in reason, but in indignation, an emotion.<sup>24</sup> He sees empathy as important, not to understanding the situation of the litigants before a judge, but to counteract the availability heuristic. In Posner's words, we tend "to give too much weight to vivid immediate impressions, such as sight over narrative, and hence to pay too much attention to the feelings, the interests and the humanity of the parties in the courtroom and too little to absent persons likely

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22. The defendant is male in the vast majority of Nourse's cases. *See supra* note 8.

23. Richard A. Posner, *Emotion versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 308, 310-11 (Susan A. Bandes ed., 1999).

24. *Id.* at 322.

to be affected by the decision.”<sup>25</sup> Judicial empathy — for those not present — is appropriate to counteract this cognitive bias.

Posner fails, however, to use judicial empathy to counteract the bias favoring those present in his own discussion of the heat-of-passion cases, cases in which the defendant in the courtroom is usually a man and the (absent) victim a woman (or a man helping her leave).<sup>26</sup> Part of the problem is that Posner has a thin understanding of the many cognitive biases — not just the availability heuristic — which inevitably affect judicial reactions. I now turn to discuss other cognitive biases that can distort judgment in ways detrimental to battered women.

### III. COGNITIVE BIASES, EMOTIONS, AND EMPATHY

Empathy, like other complex emotions, has a cognitive basis. It requires a cognitive understanding of the situation of the other person<sup>27</sup> as well as the ability to imagine and understand their emotional response.<sup>28</sup> When we see “others” as different from ourselves, we are likely to imagine that their emotional reactions are different from what ours would be. We are likely to imagine their emotions in terms of stereotypes we hold about such people rather than in terms of how reasonable people (like ourselves) would feel in their situation.

#### A. *Ingroups, Outgroups, and the Power of Stereotypes*

Contemporary research in social psychology explains much discrimination, not in terms of intentional acts, but in terms of (often unconscious) cognitive processes. People tend automatically to categorize others as members of ingroups and outgroups and to “feel, think, and behave toward [particular members of the category] the same way they . . . feel, think, and behave toward members of that social category more generally.”<sup>29</sup> Categories come with stereotypes of how we expect members to behave and feel, resulting in biased “perceptions, interpretations, recollections, and evalua-

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25. *Id.* at 323.

26. See Nourse, *supra* note 8.

27. Posner, *supra* note 23, at 329 n.21.

28. See *supra* text accompanying note 2.

29. Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 320 (2001) (quoting SUSAN T. FISK, MONICA LIN & STEVEN NEUBERG, *THE CONTINUUM MODEL: TEN YEARS LATER IN DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY* (Shelly Chaiken & Yaacov Trope eds., 1999)).



tions.<sup>30</sup> Biases are inherent in our cognitive processing (which requires categorization), and “occur independently of decision makers’ group interests or their conscious desire to favor or harm others.”<sup>31</sup> Given the importance of cognition to empathy, we can expect these biases to skew our empathetic reactions to others.

Laboratory experiments reveal when people are categorized into groups on any basis, the result is biased perceptions of differences.<sup>32</sup> These results hold even when the basis for categorization is trivial or silly. If participants are being told they are being grouped according to their tendency to over (or under) estimate the size of dots, for example, they tend to “perceive members of their group as more similar to them, and members of other groups as more different from them, than when those same persons are simply viewed as noncategorized individuals.”<sup>33</sup> Further, participants prefer (if given a choice) to receive information about their similarity to members of their own group and about the differences between themselves and members of the other group.<sup>34</sup> Group members are also more likely to see differences among members of their own group than among members of the other group. Outgroup members tend to be perceived as homogenous.<sup>35</sup>

Grouping people, things, and events into categories is a normal and necessary cognitive process; without it the world would be a wilderness of discrete phenomena. As sociologist Barbara Reskin explains:

Stereotypes are unconscious habits of thought that link personal attributes to group membership. Stereotyping is an inevitable concomitant of categorization: As soon as an observer notices that a “target” belongs to a stereotyped group (especially an outgroup), characteristics that are stereotypically linked to the group are activated in the observer’s mind, even among people who consciously reject the stereotypes.<sup>36</sup>

Reskin distinguishes between descriptive and prescriptive stereotypes, both of which contribute to cognitive biases. Although,

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30. *Id.*

31. *Id.*

32. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1191-92 (1995).

33. *Id.* at 1191-92.

34. *Id.*

35. *Id.*

36. Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 322-23 (2001).

as the term suggests, descriptive stereotypes merely describe characteristics shared by members of a group, observers tend to interpret information in a manner consistent with stereotypes and to fail to notice inconsistent information.<sup>37</sup> Prescriptive stereotypes describe "how members of a group are supposed to be, based usually on descriptive stereotypes of how they are."<sup>38</sup> Observers tend to evaluate behavior of group members in terms of the standards set by prescriptive stereotypes.<sup>39</sup>

Thus, both descriptive and normative stereotypes bias "in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."<sup>40</sup> As indicated above, stereotypes are inevitable and useful. Sometimes they are also accurate. But when inaccurate, stereotypes are nevertheless likely to be applied. Nor are they easily dislodged: "People unconsciously pursue, prefer, and remember 'information' that supports their stereotypes (including remembering events that did not occur), and ignore, discount, and forget information that challenges them."<sup>41</sup>

Because empathy (like other complex emotions) involves cognition, these cognitive processes bias our ability to empathize with others. We are likely to see members of an outgroup as homogenous and as more different from ourselves than they really are. We are likely to discount or ignore information inconsistent with descriptive stereotypes, and judge members of an outgroup in terms of prescriptive stereotypes.

Battered women are a paradigmatic outgroup. In any legal proceeding — whether a custody dispute,<sup>42</sup> a tort action, or a criminal prosecution of a batterer or of a battered woman who has killed — other participants in the action are likely to see the battered woman as quite different from themselves and as similar or identical to other battered women. Even battered women tend not to identify as such.

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (quoting Krieger, *supra* note 32, at 1188).

41. *Id.*

42. For a description of problems battered women face in custody actions, see Pamela J. Jenkins, *Contested Knowledge: Battered Women as Agents and Victims*, in *WITNESSING FOR SOCIOLOGY: SOCIOLOGISTS IN COURT* 93, 93-94 (Pamela J. Jenkins & Steve Kroll-Smith, eds., 1996).

### B. *The Fundamental Attribution Error*

Another cognitive bias likely to cause serious problems in cases involving battered women is the fundamental attribution error: we tend to think that a person's behavior is reflective of her or his basic personality rather than the result of her or his situation.<sup>43</sup> Four reasons have been advanced for this bias:

First, perceivers may display the bias because they lack awareness of the situational forces that influence behavior. Second, perceivers may display the bias because they underestimate the power of the situation to influence behavior. Third, perceivers may display the bias because expectations influence their perceptions of the behavior. Fourth, perceivers may display the bias because they lack the cognitive resources or motivation necessary to fully consider how the situation may have influenced the actor's behavior.<sup>44</sup>

The first situation arises in cases involving battered women when decision-makers do not know the relationship was violent or do not know the extent of the violence.<sup>45</sup> The fourth situation occurs in many cases involving battered women: decision-makers often lack the cognitive ability or motivation "necessary to fully consider how the situation may have influenced the actor's behavior."<sup>46</sup>

The second and third situations can also be present in cases involving battered women, but require more extended discussion. In the second scenario, observers overestimate the extent to which character, rather than situation, explains behavior. Anyone who has taught a class involving domestic violence has seen the power of this bias when students insist they would never be trapped in a violent situation. We all want to believe that it is something about the battered woman that explains her predicament — something we do not share — rather than see her as a reasonable human being responding to terror.

The third reason acknowledges that decision-makers' expectations may skew their perceptions. Stereotypes of battered

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43. Douglas S. Krull et al., *The Fundamental Attribution Error: Correspondence Bias in Individualist and Collectivist Cultures*, 25 PERS. & SOC. PSYCHOL. BULL. 1208, 1208 (1999).

44. *Id.* at 1209.

45. See, e.g., *Patricia Ann S. v. James Daniel S.*, 190 W. Va. 6 (1993) (disallowing evidence of violence by family law master leads to physical and psychological abuse victim's loss of custody of two of three children to abuser).

46. *Id.*

women are likely to be particularly problematic in this context. If decision-makers believe that battered women are all alike and are also all different from themselves, they are likely to require that any "real" battered woman conform to their stereotypes and be wholly passive, never angry or jealous, and entirely dependent on and controlled by her abusive partner. Any woman who fails to conform to these expectations is likely to be seen as having acted because of her character, which is not that of a "real" battered woman.

### *C. Power, Patriarchy, and Cultural Scripts*

In a hierarchical society, the feelings of those with higher social status tend to be recognized and considered important.<sup>47</sup> Cultural scripts — influenced by the stories we hear many times a day in the mainstream media as well as by dominant values and beliefs — teach us to empathize with the emotions of those with power and to regard the emotions of subordinates as less important and understandable.<sup>48</sup>

Martha McCluskey explores this point in an article describing the privilege enjoyed by members of fraternities at Colby College in 1977 when she was a student and horrific levels of sexual harassment were the norm.<sup>49</sup> In her words:

When I was a Colby student, going to class meant getting up early and sneaking out the freight tunnel to avoid the fraternity pledges on the hall who blocked the doorways and held dorm women captive until we watched them pull their pants down. It meant risking the daily trauma of "frat row" (the central thoroughfare of the campus that was lined with seven fraternity houses), where we faced a gauntlet of fraternity men who drenched us with buckets of water, chased us with large nets, threw beer and other objects at us, yelled sexual insults at us, and rated us as sex objects. Once, on her way across campus, one of my roommates suffered a broken ear drum when she was hit on the head and knocked off her bicycle by an object thrown at her from a fraternity balcony.

Campus life meant eating lunch to the sounds of women screaming in pain blasting from stereos from the tightly

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47. See, e.g., ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 172 (1983); see also Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261, 283-91 (1992) (discussing fraternity violence against women and tendency of media and others to see men's feelings in reaction to complaints as important and women's claims as trivial).

48. Spelman, *infra* note 71, at 271.

49. McCluskey, *supra* note 47, at 278-80.

shuttered Lambda Chi house during "hell week." It meant returning to our dorm rooms to find notes on our doors from fraternity pledges containing sexual insults directed at us by name. It meant waking up at night to find our fraternity pledge classmates breaking into our dorm rooms in their underwear, or maybe just smashing telephones and furniture in the halls. It meant living with posters in my dormitory lounge listing which fraternity pledge on my hall was named "da balls" of the week and reporting whether he had accomplished sufficient sexual harassment of dorm women to earn his title.<sup>50</sup>

In 1984, the college banned fraternities.<sup>51</sup> Six years later, problems continued:

Early [in 1990], the college had faced increasing problems of fights, hazing, and vandalism in the dorms, reportedly caused by Lambda Chi pledging activities. In March of 1990, the state police were called to investigate a disturbance in a grange hall. They discovered a group of fifty or more male Colby students who said they were participating in a Lambda Chi initiation ritual. A document signed by a list of pledges described the ceremony establishing brotherhood through a process of spanking, sliding naked on beer-soaked plastic, and severing the heads of cows and chickens.<sup>52</sup>

The students were punished: graduating seniors were not allowed to march in the graduation ceremonies, and others were suspended for a single semester.

Litigation followed, with the Maine Civil Liberties Union representing the fraternity students.<sup>53</sup> Colby College prevailed in the litigation. After all, as one Justice noted at oral argument, if Colby College must (under the Maine Civil Rights Act) admit those it wishes "to exclude (fraternities), then [the Maine Civil Rights Act] would also require Colby's fraternities to sacrifice *their* associational values to tolerate those *they* want to exclude (women)."<sup>54</sup>

McClusky uses the media frenzy surrounding the dispute to make her point about emotions:

Our society tends to interpret privileged white men's particular emotional attachments as rational, universal principles, and to

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50. *Id.* at 278-79 (citations omitted).

51. *Id.* at 267.

52. *Id.* at 269 (citations omitted).

53. *Id.* at 270.

54. *Id.* at 273 (citations omitted).

discount others' particular emotional attachments as personal feelings. In the dominant ideology, privileged men's feelings are principled; women's feelings are personal.<sup>55</sup>

Media accounts urged readers to imagine the feelings of the punished fraternity brothers, not those "who had been terrorized by Lambda Chi."<sup>56</sup> For example, one article began by asking readers: "Are you now, or have you ever been a member of a non-sanctioned Greek letter association while attending Colby College in Waterville? If the answer is yes, don't admit it . . . unless you want to be blackballed from your own graduation or suspended for a semester."<sup>57</sup>

In another, the author imagined hearing a son on the football team (most of the Lambda Chi brothers punished were on the football team) telling his father that he had been kicked out of school for joining a fraternity.<sup>58</sup> He considered this "wildly absurd."

To play football without trying to win is more offensive to me than any amount of hazing, beer drinking, or wolf whistles.... [L]osing is bad for a young man's soul.... [Colby's football] program will become a laughingstock, all because a gang of bleeding heart liberals decided fraternities are akin to the Khmer Rouge and L.A. street gangs.<sup>59</sup>

McClusky quotes a law review article concerning the case which suggests that men are more disadvantaged than women because evidence of "widespread campus gang rape" indicates "that college men suffer from lower self-confidence than women."<sup>60</sup> Reports on the dispute, both in the popular media and in legal journals and law reviews, constantly ignored or trivialized evidence of violence and severe harassment by fraternity members.<sup>61</sup>

As another example of the "selective emphasis on protecting privileged men's feelings," McClusky uses the controversy surrounding Clarence Thomas' confirmation to the Supreme Court after Anita Hill's description of how he had sexually harassed her:<sup>62</sup> "Sensational imagery magnified the harm to Thomas from the

55. *Id.* at 282.

56. *Id.* at 283.

57. *Id.* (quoting *Frat Action May Violate Civil Rights*, ME. TIMES, Apr. 27, 1990, at 7).

58. *Id.* at 283-84.

59. *Id.* at 284 (quoting Tom Hanrahan, *The Surreal State of Colby Football*, CENT. ME. MORNING SENTINEL, Apr. 24, 1990, at 13).

60. *Id.*

61. *Id.* at 285-87.

62. *Id.* at 287.

accusations while bizarre speculations and contortions of the evidence discounted and distanced the harm to Hill from any sexual harassment."<sup>63</sup> Here too, the principled side was identified as the male (though not white, he was defended by powerful white males) and the emotional side as his attacker.<sup>64</sup> McClusky concludes: "Both the Colby case and the Thomas hearings show how the male-biased perceptions that dominate legal and popular culture magnify harm to privileged men and minimize harm to others."<sup>65</sup>

One can also put this point in terms of cultural scripts that both make sense of (make credible) the claims of the powerful and make the claims of those who have been harmed by the powerful incomprehensible and incredible.<sup>66</sup> Women and men become visible and invisible under different conditions in patriarchal culture. Women are invisible when they do something well, such as "raising children into healthy adults or coming up with a brilliant idea at a business meeting."<sup>67</sup> Men, on the other hand, become invisible when their behavior is socially undesirable and raises questions about the appropriateness of male privilege.<sup>68</sup> Similar points can be made about visibility and race or class. An African-American man who has committed a violent crime is likely to be quite visible as yet another violent *black* man, though not visible as a violent *man*.<sup>69</sup> We tend to perceive and understand the world around us in ways consistent with basic cultural beliefs and expectations. Our culture is patriarchal, and these beliefs and expectations are formed by patriarchal narratives — stories that make sense of the world around us in terms consistent with our version of patriarchy. In this culture, it is extremely difficult to protect women or children from sexual violence and abuse because women and children who complain about such violations tend not to be believed.<sup>70</sup>

Those with lower status are expected to be more emotional, but they are expected to be more emotional in certain ways: women and others in subordinate positions are, for example, expected to smile

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63. *Id.* at 288-89.

64. *Id.* at 289.

65. *Id.* at 291.

66. For an analysis of the biases in the criminal justice system's response to rape associated with cultural scripts, see Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (1992).

67. ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 156 (1997).

68. *Id.*

69. *Id.* at 157.

70. See, e.g., Symposium, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459 (1998).

and cry more than men but are not expected to be angry.<sup>71</sup> Allison Jaggar uses the term "outlaw emotions" to refer to subordinate's inappropriate (according to the dominant culture) emotions.<sup>72</sup> When a member of a subordinate group expresses an outlaw emotion, her assertion is likely to be found incredible (her report cannot be accurate), unreasonable (her response was inappropriate and can therefore be ignored), or unimportant (even if true and reasonable, her response is of little weight).

Men are expected to be angry and their anger is easily understood, while women are not expected to be angry.<sup>73</sup> Elizabeth Spelman explains that women's anger at men is inappropriate because "[t]o be angry at him is to make myself, at least on this occasion, his judge — to have, and to express, a standard against which I assess his conduct."<sup>74</sup> Denial of the reality and legitimacy of women's anger is a way to deny women agency.<sup>75</sup> The cultural denial of anger to women is part of women's systemic subordination because "the existence and expression of anger [is] an act of insubordination."<sup>76</sup>

These cultural biases make it difficult to empathize with battered women. Indeed, their anger is not likely to be perceived as credible. Battered women are a relatively powerless group — they are not expected to be angry. Further, their anger suggests they see themselves as moral agents with the capacity and the right to stand in judgment of the men in their lives.

In this section, I have discussed a number of cognitive biases: (1) our tendency to categorize others as members of ingroups and outgroups and to assume that all members of an outgroup are more similar to each other than they are and more different from ourselves than they are; (2) our tendency to overestimate the extent to which a person's behavior reflects fundamental personality characteristics and to overestimate the extent to which it reflects the situation in which the person finds herself or himself; (3) our

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71. See, e.g., Calhoun, *supra* note 6, at 224; Elizabeth V. Spelman, *Anger and Insubordination*, in *WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY* 263, 264 (Ann Garry & Marilyn Pearsall eds., 1989).

72. Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in *WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY* 129, 144 (Ann Garry & Marilyn Pearsall eds., 1989).

73. *Id.* at 143-44; MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 3-4 (1983); Spelman, *supra* note 71, at 264; Catherine Lutz, *Emotion, Thought, and Estrangement: Emotion as a Cultural Category*, 1 *J. SOC'Y CULTURAL ANTHROPOLOGY* 287, 299 (1986).

74. Spelman, *supra* note 71, at 266.

75. *Id.* at 267.

76. *Id.* at 270.



tendency to stereotype individuals who we see as members of groups and to turn descriptive stereotypes into prescriptive stereotypes; (4) our tendency to empathize with the emotions of the powerful and to deny that the powerless feel emotions considered inappropriate for them by their culture; and (5) our tendency to deny that those in subordinate positions can be angry, and legitimately so. Each of these biases will cause problems for battered women in courtrooms, as explored below.

#### IV. BATTERED WOMEN, ANGER, JEALOUSY, AND DEPENDENCE

The stereotype of battered women is that they are — passive victims wholly controlled by their abusers. They have learned to be always, and only, helpless and passive victims. They are not angry or jealous, but sad and fearful (unless they enjoy violence directed at themselves). They are completely isolated socially and without friends. They are entirely dependent on their batterers financially and in all other ways.

In the previous section, I explored how difficult it is in our culture to understand and empathize with the anger of women because, in general, anger is an “outlaw emotion” for women, to use Allison Jaggar’s term.<sup>77</sup> Because of stereotypes of battered women as passive and fearful, anger is likely to be particularly difficult for us to recognize, understand, and empathize with when expressed by battered women. Although our culture does generally recognize that women can be jealous,<sup>78</sup> for battered women jealousy is also an “outlaw emotion.” If battered women are wholly passive and dependent, seeking always and only to please their abusers, then they cannot be jealous.

Reality is, of course, far more complex. Battered women are far more like “us” (non-battered people) than we would like to believe and are often angry and jealous. In a study of couples in Seattle,<sup>79</sup> Neil Jacobson and John Gottman observed arguments of severely violent couples and compared them to arguments of other couples.<sup>80</sup>

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77. Jaggar, *supra* note 72, at 144.

78. Spelman, *supra* note 71, at 264.

79. NEIL JACOBSON & JOHN GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 18 (1998).

80. *Id.* at 19-20. Couples were recruited “mostly through public-service announcements in the local media.” *Id.* at 24. They were paid “at least \$160 for their participation.” *Id.* at 26. They videotaped couples after asking them to discuss an issue causing conflict in their marriage. *Id.* at 27. They also used electronic sensors to measure arousal during the argument. *Id.*

Consistent with stereotypes of battered women, Jacobson and Gottman found that severe violence “is always accompanied by emotional abuse, is often accompanied by injury, and is virtually always associated with fear and even terror on the part of the battered woman.”<sup>81</sup> They also found, however, that many battered women fought back verbally, and that those who did were more likely to leave their batterers within the two-year follow-up period.<sup>82</sup> They found battered women “resourceful, courageous, and in many ways heroic.”<sup>83</sup>

They discovered that battered women are angry: “Most people get angry when they are insulted and degraded. So do battered women.”<sup>84</sup> Indeed, they found that “the battered women were just as angry, if not angrier, than their husbands were.”<sup>85</sup> They report:

In fact, battered women appear to respond during arguments — both violent and nonviolent — much as one would expect. When you’re being abused, you are bound to be scared, but you are also bound to be angry. We saw much effort on the part of battered women to contain their anger, but it tended to leak out anyway.<sup>86</sup>

Anger is a normal emotion for anyone in such a situation; it is an emotion experienced by human beings when they are physically or psychologically abused.

Battered women often challenge their partners about behavior they consider inappropriate.<sup>87</sup> They often fight back verbally and

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81. *Id.* at 25. Jacobson and Gottman designed the study so as not to put battered women at greater risk:

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

*Id.* at 26. They also called the wives after the study was completed to determine whether their participation resulted in any violence. *Id.* at 27. In no case was there any indication that the study had caused violence.

82. *Id.* at 28, 32.

83. *Id.* at 33.

84. *Id.* at 64.

85. *Id.* at 66.

86. *Id.* at 66-67.

87. *Id.* at 59-60.

sometimes even physically.<sup>88</sup> Battered women who stay in relationships have not given up hope that their partner will change:

They are holding on to a dream that they have about what life could be like with these men. They love their husbands and they have developed a sympathy for them and their plight in life. They hope that they can help their men become normal husbands and fathers. These dreams can be powerful and are very hard to give up.<sup>89</sup>

In addition to continuing love, some relationships involve traumatic bonding, which occurs when love and violence are combined: "There is a very strong bond created by the violence being paired with love . . . and it makes leaving very difficult."<sup>90</sup>

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

Judy opened a letter from a doctor documenting that Dave had been tested for sexually transmitted diseases. When she confronted him about it, Dave taunted her: "Why do you think? Because I fucked some other chicks." She began to sob, and yelled, "How could you?" He kept taunting her: "Don't you get it? I'm bored!" She pressed him for details, and he finally admitted that he had slept with "some chick in the back of my truck." Judy lost her temper. She began yelling and swearing at him. She was enraged and flooded by feelings of being betrayed, unappreciated, and unloved.<sup>91</sup>

Sexual humiliation "was a dominant theme" in Dave's relationship with Judy.<sup>92</sup> If Judy refused to do something sexual because she found it "degrading or disgusting," he would "threaten to have affairs."<sup>93</sup>

Jacobson and Gottman describe another couple for whom the batterer's infidelities were an aspect of his emotional abuse for

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

89. JACOBSON & GOTTMAN, *supra* note 79, at 51 (1998).

90. *Id.* at 167.

91. *Id.* at 126.

92. *Id.* at 150.

93. *Id.*

many years: Roy and Helen.<sup>94</sup> Once, after Helen and Roy moved to a new town for a fresh start:

Helen bought Roy a \$75 necklace. They were sitting in a bar when she gave it to him. She had quit drinking, but he was drunk. In walked one of his ex-lovers. Roy disappeared for about half an hour, and when Helen asked him where he had been, he said that he had given this woman the necklace and ten dollars, and in return he received fellatio from her.<sup>95</sup>

Battered women feel jealousy just like other people in relationships feel jealousy when a partner is unfaithful. But for battered women, the response to infidelity is complicated by his deliberate use of his infidelity to hurt her.

Many battered women support their partners economically. Helen, one of the most "severely battered women" in the Jacobson-Gottman sample,<sup>96</sup> was a hotel receptionist; her husband Roy was an unemployed "alcoholic and heroin addict."<sup>97</sup> Another couple in the Jacobson-Gottman sample was Martha and Don. When the study began, Martha had been severely beaten by Don twenty times in the preceding year, but she worked as a mental health case worker.<sup>98</sup> Not only did Martha have a job, she had friends; one beating followed her going out to dinner with a friend after work.<sup>99</sup> Indeed, Gottman and Jacobson report that not all batterers are emotionally dependent on the woman they abuse.<sup>100</sup> These emotionally independent batterers "encouraged their wives to be independent."<sup>101</sup>

In the earlier discussion of cognitive biases, I stressed our need to see battered women as different from ourselves and to deny that they can feel anger or jealousy. Battered women respond emotionally very much like others. When demeaned, humiliated, and beaten, they become angry and often express their anger. Sometimes they start fights, as Judy did when she confronted Dave about his being

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

95. *Id.* at 99.

96. Roy had broken Helen's back on one occasion and her neck on another. He caused eight miscarriages by refusing to use birth control and beating her whenever she became pregnant. *Id.* at 52.

97. *Id.* at 52, 131 (discussing Cheryl, another woman who was severely abused physically as well as psychologically, who "worked and had a respected profession").

98. *Id.* at 114.

99. *Id.* at 71.

100. *Id.* at 30.

101. *Id.*

tested for sexually-transmitted diseases.<sup>102</sup> Moreover, they are not always economically dependent on their partners, nor are they always socially isolated.

## V. OUR CLIENTS' STORIES AND SYLVIA'S STORY

### A. *Our Clients' Stories*

In the 1990s, I was involved in the Illinois Clemency Project for Battered Women. We filed clemency petitions for a number of women in prison for killing or injuring or trying to hire someone to kill an abusive spouse.<sup>103</sup> When we were first organizing the project, Margaret Byrne, who became the Director of the Project and who had filed a number of such clemency petitions in the past, warned us that the women we would represent would be far from perfect, that we would be working with "bad facts."<sup>104</sup>

Most of our clients did have "bad facts."<sup>105</sup> Many of our clients had substance abuse problems of one kind or another. Alcohol and drugs are used by many women who face domestic violence, and alcoholism and drug abuse are "bad facts." Some clients had been feisty, far from passive, and fought back verbally or physically.<sup>106</sup> These are normal and healthy responses but "bad facts." Some had a boyfriend in the background. Although they may have desperately needed a boyfriend's support, this was yet another "bad fact."<sup>107</sup> Some had been angry and jealous of abusers, who had used infidelities to hurt them, but when a woman is on trial for murder, her anger and jealousy are very "bad facts."<sup>108</sup> Some used vulgar language and had been less than perfect ladies. Living under a regime of abuse and terror does not produce perfect ladies, but failing to be one is a "bad fact."<sup>109</sup>

As we prepared petitions, I came to know the stories of a number of women and gained greater understanding of exactly how and why the legal system had repeatedly failed them. Over the

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102. Many other examples of battered women raising issues likely to lead to a fight are given throughout JACOBSON & GOTTMAN, *supra* note 79.

103. We were successful in obtaining the release of four women and the commutation of another woman's sentence. The vast majority of our petitions were, however, turned down.

104. Personal Experience, Illinois Clemency Project for Battered Women (1993-1994) (on file with author).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

years since, I have often wondered why the disputes in the law journals over issues relevant to battered women who kill have so little resonance in terms of how our clients ended up in prisons following convictions.

Two major problems stand out. First, and this was the only problem for the vast majority of our clients: they were represented by public defenders who had not asked about domestic violence and they (our clients) plead guilty in exchange for a murder conviction with a sentence of twenty or thirty years in prison.<sup>110</sup> In one particularly dramatic set of cases, a mother and daughter received twenty and twenty-eight years, respectively, in exchange for guilty pleas to attempted murder. They were represented by a single public defender (despite conflicts of interest between them).<sup>111</sup> The public defender interviewed them *together* once or twice for about fifteen minutes on the edge of a courtroom.<sup>112</sup> He asked nothing about violence or abuse, though the daughter had been sexually abused by the man they sought to kill (who was uninjured and ended up with custody of another child when the mother went to jail). In fact, she had been sexually abused from the time she was six until she was a young adult, and the mother had been brutally abused for well over a decade.<sup>113</sup> Many women who have been abused are likely to be hostile or passive when interviewed by defense counsel. Many are unlikely themselves to bring up the issue of abuse. In many cases, what is necessary is careful and sensitive probing by defense counsel who are aware that abuse may be a factor in any case in which a woman has killed or injured (or hired someone to kill or injure) an intimate partner. Needless to say, this does not always happen.

In another case, our client did tell her public defender that her husband had consumed a couple of thousand dollars of cocaine that weekend, was coming at her with a crazed look, and that she killed him in self-defense.<sup>114</sup> Her public defender told her that the autopsy report showed he was clean.<sup>115</sup> When we had a doctor look at the autopsy report, we discovered that although he did not have *cocaine* in his blood, he did have a large quantity of the substance into which cocaine *breaks down* after being ingested.<sup>116</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

In sum, the major problem for most of our clients was they were represented by public defenders who spent little time on their cases and convinced them to accept a guilty plea of murder or attempted murder with a sentence of twenty to thirty years. It was of no matter whether experts testified in terms of a syndrome or in terms of the experiences of battered women. Nor did it matter whether the immanence required for self-defense could encompass a sleeping spouse, another recent controversy.<sup>117</sup> All that mattered was that they were poor, could not afford high-powered private attorneys, and were represented by public defenders with no resources to pay for investigators and far too little time.

A very, very few of our clients did have trials.<sup>118</sup> But even for these women, the controversies in the law reviews and journals seemed off the mark.<sup>119</sup> The biggest problem, it seemed to me, was how easy it was to make a battered woman who has killed or attempted to kill her batterer look bad given the prosecutor's ability to make just about any argument, no matter how unfair and prejudicial because of its appeal to biases and cultural scripts.<sup>120</sup>

For example, for one of our clients (Janice),<sup>121</sup> who did go to trial, the evidence of abuse was incontrovertible.<sup>122</sup> She had kept a diary for years detailing the abuse, and the diary could not have been written between the time of the killing and the time of her arrest.<sup>123</sup> Yet the prosecutor was allowed to argue that a recent law school graduate, a feminist in defense counsel's office, had fabricated the allegations of domestic violence.<sup>124</sup> This client had been subject to unspeakable abuse for years.<sup>125</sup> During that time, she had had four abortions, each a combination of physical and emotional abuse by her husband Steven.<sup>126</sup> Janice had one child and desperately wanted another one.<sup>127</sup> Steven repeatedly convinced her that *now* was the right time, and she would become pregnant.<sup>128</sup> After she was pregnant, he would then insist that *now* was not the

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117. Two issues that have provoked considerable scholarly commentary in recent years. See *infra* notes 503-04 and accompanying text.

118. Personal Experience, Illinois Clemency Project for Battered Women (1993-1994) (on file with author).

119. *Id.*

120. *Id.*

121. *Id.* Not her real name.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Not his real name.

127. *Id.*

128. *Id.*

right time and tell her to get an abortion (unless she wanted him to perform an abortion on her himself, which he had done to another woman in the past). Of course, Janice got an abortion each time.<sup>129</sup> The prosecutor turned this abuse against her, arguing that her four abortions showed that she had no regard for human life.<sup>130</sup>

Our clients also seemed to face a double-bind in terms of class. If poor, they were unable to afford a private lawyer and unlikely to proceed to trial — indeed, it was unlikely that anyone would ever hear of their abuse at the hands of the deceased.<sup>131</sup> But if middle class — and able to hire a lawyer, though not necessarily a very good one, let alone one with experience in such cases — they looked bad because, after all, they had options.<sup>132</sup> Surely, a woman with a portable sauna in her garage did not need to kill to escape an abusive situation.<sup>133</sup>

The Clemency Projects cases were not, of course, a random sample representative of what generally happens to women who kill or attempt to kill their abusers. We did not see the cases in which the system responded more appropriately: those in which the prosecutor did not charge the woman with a crime, or in which defense counsel did a great job and either succeeded in obtaining an acquittal or a reduced charge in exchange for a plea. In Cook County, the public defender's office has a special task force devoted to first degree murder cases with a reduced caseload, and many of those attorneys are as good or better than any private attorney. But even in Cook County, women who have killed abusers face problems, as illustrated by the fact that three of our clients, all described above, were represented by Cook County public defenders who did *not* do an adequate job.<sup>134</sup>

Based on our clients' (admittedly non representative) experiences, I would urge that if all battered women who kill are to have a fair trial with the opportunity to make a claim of self-defense, two things are absolutely necessary. First, we must fund the public defender system more adequately, so that defenders have fewer cases and resources for investigation.<sup>135</sup> It is one thing for

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. The mother and daughter, see *supra* text accompanying notes 111-13, and the woman who explained that her abuser had consumed \$2,000 worth of cocaine before lunging at her, see *supra* text accompanying notes 114-16, were all represented by lawyers from the Cook County Public Defender's Office.

135. No such resources are available at the present time, though prosecutors have the



prosecutors to have so many cases that they must convince their clients to accept whatever deal is offered. There is no meaningful consent when a person is too poor to hire their own lawyer, knows nothing of the legal system, and is assured by the public defender that this is the best that can be done.

Second, we need to limit the kinds of arguments prosecutors can make in cases in which battered women have killed or hired someone to kill an abusive partner. It is so easy to make a battered woman look like a bad woman, a reality that should not be surprising given the many cognitive biases which are likely to interfere with our ability to understand and empathize with a woman who has been in an abusive relationship, as discussed earlier.<sup>136</sup>

In the remainder of this section, I use the facts of a recent New Jersey case to illustrate this second set of problems. Although there is no reported decision, the case has the advantage of being covered by Court TV with daily summaries of the trial. The case attracted a fair amount of media attention, including "20/20's" airing of a 911 tape recorded when the woman called the police asking for an escort just before going home and killing her husband.<sup>137</sup> We therefore know more about the facts and background of this case than we do about recorded cases, when we read only what judges have chosen to tell.

### *B. Sylvia's Story*

Born around 1943, Sylvia Ashby grew up in Virginia.<sup>138</sup> Her father was a violent disciplinarian who abused Sylvia's mother and beat Sylvia so severely that her mother insisted she "marry at 14 just to get of the house."<sup>139</sup> Sylvia never graduated from high school.<sup>140</sup> By the time she met John Flynn, she had been married and divorced five times.<sup>141</sup>

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police to serve as their investigators.

136. See *supra* text accompanying notes 109-35.

137. The police gave her no escort; they called the husband and sounded quite sympathetic to his plight.

138. Court TV Online, *Trial Opens with Conflicting Portraits of Sylvia Flynn* (Sept. 25, 2000), at [http://courttv.com/trials/flynn/092500\\_ctv.html](http://courttv.com/trials/flynn/092500_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day One of Flynn Trial] (on file with author); Court TV Online, *Mistress Testifies about Defendant's Jealous, Obsessive Behavior* (Sept. 27, 2000), at [http://courttv.com/trials/flynn/092700\\_ctv.html](http://courttv.com/trials/flynn/092700_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Three of Flynn Trial] (on file with author).

139. Day One of Flynn Trial, *supra* note 138; Day Three of Flynn Trial, *supra* note 138.

140. See Day One of Flynn Trial, *supra* note 138.

141. Carol Gorga Williams, *Police Allege Man Posed as a Doctor*, ASBURY PARK PRESS, Oct.

Around 1962, she and her second husband had a son, Paul Searce.<sup>142</sup> Her second husband divorced Sylvia and received custody of Paul, claiming that she abandoned the child.<sup>143</sup> After the divorce, Paul saw his mother on weekends until some point in the 1970s when she moved out of town with John Flynn, who was to be her sixth husband.

Her third husband died in an automobile crash.<sup>144</sup> Although she told friends that the couple's two-week old son John Wesley Barker, III, also died in the crash, he survived. Sylvia "turned him over to" her dead husband's sister and allowed her to adopt him.<sup>145</sup> According to the adopting mother, Sylvia never visited the child though she was free to do so.<sup>146</sup> According to Sylvia, the adopting mother would not allow her to visit.<sup>147</sup>

Sylvia and John Flynn began dating in 1970, though they did not marry until 1997.<sup>148</sup> At the beginning of the relationship, "he was a dashing salesman."<sup>149</sup> They had both been divorced and "vowed that theirs would be the one to last."<sup>150</sup>

John Flynn "was a self-employed salesman who experienced several business setbacks and declared bankruptcy in 1995."<sup>151</sup> Sylvia owned her own beauty shop.<sup>152</sup> According to Sylvia and many others, John abused her physically and psychologically throughout their relationship. He was "belligerent and obnoxious and condescending, and a womanizer," said Lynne Ferraro, a friend and client of Sylvia Flynn. A neighbor described him as 'disrespectful, derogatory, and insulting,' his sister labeled him violent' and 'out of control,' and a former fishing pal called him 'degrading and demoralizing.'<sup>153</sup>

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5, 2000, at B4.

142. *Id.*; Court TV Online, *Defense's Own Expert Offers Tepid Support for Flynn* (Oct. 2, 2000), at [http://courttv.com/trials/flynn/100200\\_ctv.html](http://courttv.com/trials/flynn/100200_ctv.html) (last visited Oct. 23, 2000) [hereinafter *Day Five of Flynn Trial*] (on file with author).

143. *Police Allege Man*, *supra* note 141; *Day Five of Flynn Trial*, *supra* note 142.

144. *Police Allege Man*, *supra* note 141.

145. *Id.*

146. *Id.*

147. *Id.*

148. Court TV Online, *Victim or Victimizer? N.J. Jury Must Decide* (Sept. 22, 2000), at [http://courttv.com/trials/flynn/092200\\_ctv.html](http://courttv.com/trials/flynn/092200_ctv.html) (last visited Oct. 23, 2000) [hereinafter *Case Background of Flynn Trial*] (on file with author).

149. ABC News, *Betrayed by the Police; Woman Kills Husband after not Being Able to Get Help From Police*, 20/20, June 2, 2000.

150. *Id.*

151. *Case Background of Flynn Trial*, *supra* note 148.

152. *Id.*

153. *Id.*

Dorothy and Steven Hart, John's sister and brother-in-law, experienced John's violence first hand during a 1995 dispute in a nursing home over how best to care for Dorothy and John's elderly mother.<sup>154</sup> Steven Hart, who had multiple sclerosis and walked with a cane, was thrown against a wall by John Flynn during this altercation.<sup>155</sup> Steven recorded the event on audio tape.<sup>156</sup> On the tape, Steven can be heard saying: "Please do not get physical."<sup>157</sup> John Flynn (as he picked Steven Flynn "up by the lapels, and tossed [him] across the hallway") responded: "Get your ass to the wall, you understand."<sup>158</sup> Steven then says (on the tape): "Call the police. Call the police now. Call 911 because my brother-in-law just threw me against the wall and is now assaulting his sister."<sup>159</sup> According to Steven: "He was totally out of control. He was absolutely going nuts."<sup>160</sup> After Steven signed a complaint with the police against John, John "left a threatening message of his [Steven's] answering machine, calling Hart a 'dead man.'"<sup>161</sup>

Dorothy and Steven Hart's son reported that John Flynn had beaten "him and his younger siblings with a belt when they were teenagers in the 1970s "for no apparent reason."<sup>162</sup> John had been drinking heavily.<sup>163</sup> Frank Hart, John's nephew and godson, said: "he wasn't a nice guy, even to his relatives. He was a mean person. He was a monster."<sup>164</sup>

Leonard Belcaro, an ex-police officer, had been a fishing buddy of John Flynn's and had served on the board of a fishing club with him.<sup>165</sup> Len eventually "broke off his friendship with John when he became disgusted with how badly he treated Sylvia."<sup>166</sup> But "to his horror, John started harassing him [Len] with phone calls and threats."<sup>167</sup> Belcaro received a number of threatening calls from John, culminating in one night when John called "15 to 20 times

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154. *Id.*

155. *Id.*

156. ABC News, *supra* note 149.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Court TV Online, *Witnesses Paint Husband as Madman, Wife as Victim* (Sept. 28, 2000), at [http://courttv.com/trials/flynn/092800\\_ctv.html](http://courttv.com/trials/flynn/092800_ctv.html) (last visited Oct. 23, 2000) [hereinafter *Day Four of Flynn Trial*] (on file with author).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. ABC News, *supra* note 149 (Tom Jarriel speaking).

167. *Id.*

between midnight and three o'clock in the morning."<sup>168</sup> John Flynn "said that he was going to blow up my house, he said he was going to blow up my boat."<sup>169</sup> Belcaro took his off-duty gun (from when he had been a police officer) and "went outside in the backyard and I sat there and I waited for John."<sup>170</sup>

Over the years, a number of people — including John's sister Dorothy Hart<sup>171</sup> — saw Sylvia with signs of physical abuse such as bruises and black eyes.<sup>172</sup> Dorothy Hart described John as "always 'in the abusive mode' with Sylvia Flynn, constantly berating her with vulgar names."<sup>173</sup> According to Dorothy, Sylvia "was totally subservient to him. She just cringed when he spoke."<sup>174</sup> Both Steven and Dorothy Hart recalled a Thanksgiving dinner at John's house in 1980.<sup>175</sup> John was displeased with something, likely the food, and "slung profanities at his wife, grabbed her and pushed her back into the kitchen."<sup>176</sup>

Phyllis Roberts, one of Sylvia's clients and a friend, recalled seeing Sylvia "with bruises on three occasions in the late 1980s and early 1990s. One was so severe . . . that she gasped when Flynn removed her dark glasses."<sup>177</sup> Roberts also witnessed John verbally abuse Sylvia.<sup>178</sup> Once when she "tried to intervene," John "told her, 'You shut your f\*\*\*ing mouth, bitch or else'" and Sylvia begged Roberts never to interfere in their arguments again, explaining that "he'll only take it out on me later."<sup>179</sup> Roberts urged Sylvia to leave, but Sylvia "replied, 'He'll only come after me. He'll kill me, I know he will.'"<sup>180</sup>

John Flynn routinely demeaned Sylvia in front of others. According to Roberts, John once "reduced his wife to tears at the wedding of a mutual friend."<sup>181</sup> Sylvia asked him to dance. John "snapped, 'I don't dance with fat cows' and then compared her to his

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168. *Id.* (speaker not identified but testimony at trial indicates that this was Leonard Belcaro); see Day Four of Flynn Trial, *supra* note 161.

169. Day Four of Flynn Trial, *supra* note 161.

170. ABC News, *supra* note 149.

171. Day Four of Flynn Trial, *supra* note 161.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

other girlfriends and mocked her poor grammar."<sup>182</sup> Another witness reported that Sylvia was "roundly mocked by her husband for her poor grammar."<sup>183</sup> One month prior to the shooting, "John Flynn said loudly at a party for his son's wedding that he was planning to divorce his wife."<sup>184</sup>

John Belcaro, the ex-police officer who was harassed and threatened by John Flynn, as described above,<sup>185</sup> recalled seeing Sylvia reduced to tears at a dinner party at his house. According to Belcaro, "Flynn hurled insult after insult at his wife until she dissolved in tears. He said he watched Flynn look on as the other women at the party comforted Sylvia . . . [Belcaro] looked at him and he just settled back in his chair with a smirk and a look on his face like he'd accomplished something."<sup>186</sup>

John Flynn was sexually abusive as well. According to Sylvia, he routinely raped her.<sup>187</sup> And his own sexual infidelities were a form of psychological abuse. According to Sylvia, he had "affairs with a dozen different women."<sup>188</sup> According to his secretary, he had as many as twenty-four affairs "during the two-year period she worked for him and made travel arrangements."<sup>189</sup>

Sylvia's brother reported that John, who he considered "controlling and overbearing," isolated his sister from her family.<sup>190</sup> Leonard Ashby "said it broke his mother's heart that Flynn would never let his sister visit the family at holidays."<sup>191</sup>

Sylvia tried to escape a number of times. Twice during the 1970s, Sylvia's son David Searce and his father moved Sylvia Flynn from the home she shared with John in Philadelphia to her family's home in Virginia.<sup>192</sup> On both occasions, John tracked her down and persuaded her to return with him.<sup>193</sup> The first occasion was in December, 1976; David, then 14, cried "but she said she had to

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182. *Id.*

183. *Id.*

184. Court TV Online, *Defendant Threatened to Kill Her Husband if he tried to Leave, Relative Says* (Sept. 26, 2000), at [http://courttv.com/trials/flynn/092600\\_ctv.html](http://courttv.com/trials/flynn/092600_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Two of Flynn Trial] (on file with author).

185. See *supra* text accompanying notes 167-70.

186. Day Four of Flynn Trial, *supra* note 161.

187. Case Background of Flynn Trial, *supra* note 148.

188. *Id.*

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

190. Day Three of Flynn Trial, *supra* note 138.

191. *Id.* On cross-examination, Ashby admitted that he only knew about John causing the problem from his sister. *Id.*

192. Day Five of Flynn Trial, *supra* note 142.

193. *Id.*

go."<sup>194</sup> During the second attempt a year later, when John arrived in the area, Sylvia "hid herself in the attic."<sup>195</sup> According to David, Sylvia emerged from her hiding place only when Sylvia's mother "phoned, saying John Flynn was at her house and was refusing to leave."<sup>196</sup> John had some problem with his toupee and wouldn't go out in public until Sylvia went to her mother's, "fixed the toupee, and accompanied John Flynn back home."<sup>197</sup>

Sylvia's friend Lynn Ferraro "urged Flynn to get a divorce, and helped her move out of the house and into the home of another friend in 1997 when John Flynn was away on business. When he returned, however, he harassed the friend until she insisted Sylvia Flynn leave."<sup>198</sup> It may have been at this time that John left this message on the home of someone with whom Sylvia was staying: "[t]here's a warrant being sworn out against you, personally, lady, and Sylvia. And I think you're in a lot more trouble for harboring a fugitive than you realize. I'm sorry for you."<sup>199</sup> According to Sylvia's friend Lynn Ferraro: "He had abused her friends so much with threats and telephone calls that nobody could, you know, nobody could take a chance on letting her in."<sup>200</sup> Sylvia said she tried to escape four times, but we do not know the details of the fourth attempt.

Although not all batterers display the cycle of violence in which abuse is followed by remorse, John Flynn did. According to Sylvia, he would beat and rape her and then "cry and beg my forgiveness, but then he would do it again the next week."<sup>201</sup> After raping her, he would insist that she sleep in his arms.<sup>202</sup>

In January of 1997, Sylvia pointed a gun at John but it jammed (it did apparently go off, but no one was hurt).<sup>203</sup> At some point, presumably in reference to this incident, Sylvia told her friend Lynn Ferraro that "she had fired a gun into the ceiling of the home 'to get him to stop hitting her.'"<sup>204</sup>

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Day Four of Flynn Trial, *supra* note 161.

199. ABC News, *supra* note 149 (playing answering-machine tape on the air of John leaving this message at the home of a friend with whom Sylvia was staying).

200. *Id.*

201. Case Background of Flynn Trial, *supra* note 148.

202. ABC News, *supra* note 149.

203. Day Two of Flynn Trial, *supra* note 184.

204. Day Four of Flynn Trial, *supra* note 161.

On May 16, 1997, Sylvia Flynn filed domestic violence charges against John Flynn.<sup>205</sup> John told the police "it was Sylvia, not him, who was violent."<sup>206</sup> "He claimed that several months earlier, his companion had attempted to shoot him with a handgun, and the weapon discharged a bullet into the ceiling."<sup>207</sup> He reported this incident and surrendered the gun to the prosecutor's office on May 16, 1997, the same day Sylvia filed charges of domestic violence against him.<sup>208</sup>

In September, 1997, shortly after their marriage on August 12, Sylvia came to the police station to report that John "had beaten her with a shoe and shoved her head through a kitchen wall."<sup>209</sup> That fall, she "had a restraining order against him, but had it rescinded a month later. The charges against Flynn were dropped when he agreed to get counseling."<sup>210</sup> But he never went.<sup>211</sup> He was supposed to meet with "Valerie Brown, a psychiatric social worker, in December 1997 . . . to determine if he needed marriage or couples counseling," but Sylvia, not John, showed up.<sup>212</sup> Brown reported that Sylvia "said John Flynn had hit her only once in the last two years," a version inconsistent with what Sylvia "had given authorities in May 1997."<sup>213</sup> Although Valerie gave Sylvia some information about a shelter, according to Brown Sylvia was not "terribly interested."<sup>214</sup> Brown regarded Sylvia as "so imbedded in the conflict of the marriage that she really didn't want to get out."<sup>215</sup> Brown would later tell the jury at Sylvia's murder trial that Sylvia did not "present the typical 'markers' of battered woman's syndrome, which she described as helplessness, hopelessness, isolation from family and friends and financial dependence."<sup>216</sup>

In August of 1998, Sylvia opened John's mail and discovered that "he was carrying on an affair with a New York woman named

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205. Case Background of Flynn Trial, *supra* note 148.

206. *Id.*

207. *Id.*

208. Carol Gorga Williams, *Jury is Selected in Fatal Shooting of Spouse*, ASBURY PARK PRESS, Sept. 21, 2000, at B2.

209. Case Background of Flynn Trial, *supra* note 148.

210. *Id.*

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

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

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

Linda Chiecko.<sup>217</sup> When John called from California, "Flynn confronted him and demanded that he end the relationship. He was irate, and promised her 'a beating' when he returned home."<sup>218</sup> He also said: "When I get home, I'm going to kill you."<sup>219</sup> Linda Chieko was traveling with him in California.<sup>220</sup>

On Saturday, August 15, 1998, Sylvia Flynn, a grandmotherly-looking woman of 57 — killed her husband John Flynn, 55.<sup>221</sup> He had returned from California early that Saturday morning.<sup>222</sup> According to Sylvia, she spent Friday night in a locked spare room "before she left to go shopping,"<sup>223</sup> though a neighbor reported seeing "her sitting on her front porch drinking coffee at 9:15 a.m."<sup>224</sup>

While Sylvia was out shopping that Saturday, John called her on her cell phone to invite her home for an "anniversary dinner."<sup>225</sup> Sylvia believed the dinner was a "hoax, and that her husband wanted to lure her home to beat her."<sup>226</sup> She did not go home immediately, though records indicated that she called home six times after receiving John's invitation, and left a message on Linda Chiecko's answering machine "asking if she should go to the anniversary dinner cooked by 'my husband, your boyfriend.'"<sup>227</sup> At some point on that Saturday, Sylvia told Lynn Ferraro that she was "scared to go home again. [She had] no where to sleep."<sup>228</sup>

At her friend George Werner's urging,<sup>229</sup> Sylvia called the police and asked for an escort home.<sup>230</sup> On the tape of the call, Sylvia can be heard saying: "He threatened my life. I'm scared to go home again. I have nowhere to sleep."<sup>231</sup> Ed Byrnes, the dispatcher, called John instead:

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217. Case Background of Flynn Trial, *supra* note 148.

218. *Id.*

219. ABC News, *supra* note 149. It is not clear whether these are two versions of the same threat made in a single phone call or different threats in made in one or more phone calls.

220. Court TV Online, *Flynn Escapes Murder Conviction but is Found Guilty of Lesser Charge*, at [http://courttv.com/trials/flynn/verdict\\_ctv.html](http://courttv.com/trials/flynn/verdict_ctv.html) (last visited Oct. 23, 2000) [hereinafter *Verdict of Flynn Trial*] (on file with author).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* Their second wedding anniversary had been three days earlier, when John was in California with Chiecko.

226. *Verdict of Flynn Trial*, *supra* note 220.

227. Case Background of Flynn Trial, *supra* note 148.

228. ABC News, *supra* note 149.

229. *Id.*

230. Case Background of Flynn Trial, *supra* note 148.

231. ABC News, *supra* note 149; Day One of Flynn Trial, *supra* note 138.



Mr. Flynn: Hello.

Mr. Byrnes: Is this Mr. Flynn?

Mr. Flynn: Speaking.

Mr. Byrnes: Hi, how are you doing? Ed Byrnes, Brick Township Police Department.

Mr. Flynn: Yeah.

Mr. Byrnes: Your wife called here, wanted us to bring her home.

Mr. Flynn: What's her problem?

Mr. Byrnes: I don't know.

Mr. Flynn: Is she drunk?

Mr. Byrnes: She doesn't sound sober.

Mr. Flynn: That's what I thought.

Mr. Byrnes: But she wants to come home and she called us for some reason.

Mr. Flynn: There's no reason why she can't come home. Just tell her to come home. I don't want the police here again.

[break in play of tape — not clear whether something is skipped]

Mr. Flynn: This broad is something else. She's drunk half the time.

Mr. Byrnes: Mmmm. OK, I'll contact her and I'll have her go on home.

Mr. Flynn: OK.<sup>232</sup>

Ed Byrnes then called Sylvia back.

Mr. Byrnes: I just spoke to your husband.

Ms. Flynn: You did?

Mr. Byrnes: And there's absolutely no reason why you can't go home.

Ms. Flynn: Because I'm scared to go home. I'm afraid he'll kill me. I'm afraid he'll beat me up.

Mr. Byrnes: I spoke to him and he says there's absolutely no problem why you can't go home, in fact he wants you to come home.<sup>233</sup>

After the shooting, Sylvia said Byrnes' statement — that he had spoken with John and that everything was all right, she could go home — reassured her and that she would not otherwise have returned home.<sup>234</sup>

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232. ABC News, *supra* note 149.

233. *Id.*

234. *Id.*

According to Sylvia, she crept quietly into the house, but John "saw her passing by his home office and shouted, 'You bitch, you called the police on me again.'"<sup>235</sup> At one point she told investigators that her husband "was reaching for her throat when she closed her eyes and emptied the gun."<sup>236</sup> At another point, she explained that he started getting up from his desk chair when she closed her eyes and fired.<sup>237</sup> Sylvia shot six bullets at him, one missed, one hit his left arm, one his head, and three entered his upper chest.<sup>238</sup> Sylvia explained, "I knew he was going to beat the hell out of me or kill me again. I just couldn't take no more."<sup>239</sup> Sylvia went to the police station, turned over the gun and reported that she had killed her husband.<sup>240</sup> After the shooting, Sylvia repeatedly affirmed her love for John Flynn.<sup>241</sup>

For several weeks after the shooting, Sylvia stayed with Leonard Belcaro, the ex-police officer who had been harassed and threatened by John.<sup>242</sup> She turned down a plea bargain "which required her to plead guilty to aggravated manslaughter and serve a little more than 10 years in jail before becoming eligible for parole."<sup>243</sup>

Prior to opening arguments at Sylvia's trial, the press reported that the prosecution would argue that she murdered John Flynn out of jealousy — she knew John intended to leave her for his mistress and didn't want anyone else to have him if she couldn't.<sup>244</sup> Prosecutors also said that evidence on Battered Woman Syndrome "should not be presented to the jury because there was no history of abuse."<sup>245</sup> Rather, Sylvia was "a woman scorned" and angry "over her husband's affair with Linda Chieko."<sup>246</sup> Also in pre-trial press reports, the prosecution indicated that they would call cousins of John's who would testify that Sylvia had said she would kill John if the affair did not end — and that she would "beat a conviction" if she did so.<sup>247</sup> Finally, reported the press, the state "is likely to argue

235. Case Background of Flynn Trial, *supra* note 148; ABC News, *supra* note 149.

236. Case Background of Flynn Trial, *supra* note 148.

237. ABC News, *supra* note 149.

238. Case Background of Flynn Trial, *supra* note 148.

239. ABC News, *supra* note 149.

240. Case Background of Flynn Trial, *supra* note 148.

241. *Id.* At the time of the killing, they shared a home in Brick Township, "a large sprawling suburb in Ocean County," New Jersey. Day Five of Flynn Trial, *supra* note 142.

242. Day Four of Flynn Trial, *supra* note 161.

243. Case Background of Flynn Trial, *supra* note 148.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

that the physical evidence supports an ambush rather than self-defense."<sup>248</sup>

In his opening statement, Sylvia's lawyer William Farley "described a life marred by abuse" with a father who "beat her so severely that her mother insisted her daughter marry at 14 just to get out of the house."<sup>249</sup> He described her 28-year relationship with John Flynn as "invested with abuse," noting that Sylvia "endured 'verbal, physical, emotional and sexual abuse' from her husband, and [that] when she tried to get away, he pulled her back with force of tears or remorse."<sup>250</sup> He argued that she acted out of self-defense: "Almost three decades of abuse put Sylvia Flynn in fear for her life."<sup>251</sup>

The prosecutor, Michel Paulhus, "told jurors that the evidence reflected murder not abuse and that the 'physical evidence' would show [that] John Flynn was seated and facing away from his wife when she shot him."<sup>252</sup> According to Paulhus, Sylvia had been trying to "rewrite history because she's trying to get away with murder."<sup>253</sup> The truth, he asserted, is that Sylvia "was jealous and angry about her husband's mistress;" she threatened to shot both of them, and she "delivered on half of that promise" by killing her husband on August 15.

On the first day of the trial, after the opening arguments, the prosecution began its case, presenting evidence about Sylvia's confrontation with John about his adultery while he was in California, his rage and promise to beat her on his return, her claim that she spent Friday night cowering in a locked spare room, her call for help before returning home on the fifteenth, her confession to the police after the shooting, and her assertion that John had been lunging at her when she shot him.<sup>254</sup> And an expert in forensic pathology testified that the bullets that caused John's five gunshot wounds "were each fired on the same downward angle."<sup>255</sup> A neighbor testified that he saw Sylvia drinking coffee on her front porch at 9:15 a.m. Saturday morning, rather than "cowering in fear in the spare bedroom Saturday before she left to go shopping."<sup>256</sup>

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248. *Id.*

249. Day One of Flynn Trial, *supra* note 138.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

On the second day of the trial, the prosecution called Rod Englert, an expert at reconstructing crime scenes, who explained to jurors "that the blood splatter indicated Flynn was fully sitting in his chair, facing straight ahead with his hands at his sides when he was struck" and that he had not been "rising out of the chair to beat her" when the bullets hit.<sup>257</sup> On cross, Englert did admit "that John Flynn may have swiveled the chair to face the door prior to the shots."<sup>258</sup>

According to a number of witnesses for the prosecution on the second day of the trial, Sylvia was "an equal partner in an admittedly horrible marriage."<sup>259</sup> Judith Flynn, the wife of one of John's cousins, who claimed to have been friends with Sylvia for over twenty years, testified that Sylvia and John "were horrible to each other," hurling insults and profanities at each other even in public."<sup>260</sup> Sylvia, Judith reported, talked "openly about the couple's sex life, his mistresses and her plan to kill him" and told Judith that she had threatened "Chiecko with late night telephone calls and even [told] Chiecko's son that his mother was a 'filthy whore.'"<sup>261</sup> Judith described a conversation she had had with Sylvia about a month before the shooting:<sup>262</sup> "She told me that John had it in his head that he was going to leave her for [mistress Linda Chiecko], but that he wasn't. She said she'd see him dead first."<sup>263</sup>

Judith reported having "urged her friend to leave the marriage, but she always demurred, saying she [Sylvia] would not be able to give up her home and possessions."<sup>264</sup> Judith testified that although she had often asked Sylvia whether John hit her, Sylvia "said no every time but one."<sup>265</sup> That one time was in January of 1997, but according to Judith, Sylvia "later admitted [that] he [John] had only knocked a gun from her hand . . . when she pointed it at him."<sup>266</sup> Judith's son testified that Sylvia had bragged to him about "trying to shoot her husband."<sup>267</sup>

Robin Panella, John Flynn's secretary, "also testified about that 1997 shooting."<sup>268</sup> She described arriving for work "at the couple's

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257. Day Two of Flynn Trial, *supra* note 184.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

home one morning, smelling gunpowder, and hearing John Flynn say: "[t]his f\*\*\*ing bitch tried to shoot me."<sup>269</sup> Two employees of the prosecutor's office testified that several months after this incident, "Flynn turned the gun into authorities and told them that his wife had pulled the gun on him."<sup>270</sup> This incident would have occurred *after* Sylvia filed domestic violence charges against him in May of 1997.<sup>271</sup>

The last part of the second day of the trial was rather dry, as Paulhus "read aloud 70 pages of grand jury testimony in order to show jurors that Sylvia Flynn had offered different explanations of the shooting."<sup>272</sup>

On the third day of the trial, the prosecution called Linda Chieko — John's mistress and a slim, attractive, blond English teacher with two Master's degrees who lived in Manhattan — to the stand. Chieko described John Flynn, whom she met in a Manhattan restaurant in February of 1997, as "a total gentleman, beyond nice, respectful, kind, and a good friend" and said that he was never abusive."<sup>273</sup> Chieko reported that Sylvia had stalked, harassed, and threatened her, often in vulgar language and after drinking.<sup>274</sup> When Linda asked John why Sylvia was doing this, he told her first that "the woman was an ex-girlfriend who could not get over him" and later that she had moved in with him "as a 'financial arrangement' because he was short of cash."<sup>275</sup> Linda said that she and John were both afraid of Sylvia, and that she fled her home in fear after John's death.<sup>276</sup> Linda did admit, on cross-examination (after an initial denial) that she had left a profanity-laced message on Sylvia Flynn's answering machine. Chieko explained that she was "very irate" that Flynn had placed a harassing call to her adult son, Michael."<sup>277</sup> Apparently, Sylvia kept that tape; the defense read a transcript of a message in which "Chieko called Flynn a string of vulgar names and said she is a 'loser' who 'belongs in the gutter.'"<sup>278</sup> Chieko apologized in court for sinking to Sylvia's level: "I did get

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269. *Id.*

270. *Id.*

271. *See supra* text accompanying notes 205-12.

272. *Id.*

273. Day Three of Flynn Trial, *supra* note 138.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

down to her level, and I'm sorry I did because that's not me usually."<sup>279</sup>

The prosecution called Valerie Brown next, the psychiatric social worker<sup>280</sup> who met once with Sylvia in December of 1997, when Sylvia appeared to explain why John would not be coming for counseling (as he had agreed to do when the charges of domestic violence against him were dropped).<sup>281</sup> Brown "testified that she did not observe any signs of Battered Woman's Syndrome in Flynn despite a lengthy discussion of the couple's troubled marriage." According to Brown, Sylvia "was so embedded in the conflict of the marriage that she really didn't want to get out."<sup>282</sup> During cross, "Brown said [Sylvia] Flynn did not seem to present the typical 'markers' of battered women's syndrome, which she described as helplessness, hopelessness, isolation from family and friends and financial dependence."<sup>283</sup>

The defense began its case on the third day of the trial, opening with "two witnesses who knew Sylvia Flynn as a victim of violence": a police officer and Sylvia's older brother.<sup>284</sup> The jury heard the testimony of the police officer who had taken Flynn's statement in September of 1997 after the incident in which John had "slammed her head through a wall, pushed her to the ground and beat her with a shoe."<sup>285</sup>

Next was Leonard Lee Ashby, Sylvia's older brother, who described their horrific childhood with a "violent disciplinarian" as a father, a man who beat both Sylvia and himself (Leonard Lee Ashby) with the buckle end of the belt until they were bruised and bleeding and who also abused his wife.<sup>286</sup> Ashby described John Flynn as "controlling and overbearing" and recounted that it "broke his mother's heart that Flynn would never let his sister visit the family at holidays."<sup>287</sup> On cross, "Ashby said that his knowledge about the lack of holiday visits came only from his sister and not from any discussions with John himself."<sup>288</sup>

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279. *Id.*

280. Williams, *supra* note 212.

281. Day Three of Flynn Trial, *supra* note 138; see *supra* text accompanying notes 210-16.

282. *Id.* Before ending the presentation of its case, the prosecution also called (as a hostile witness) Marilyn Lago. When confronted "with an investigator's report that quoted her as saying Flynn gave her a different account of the shooting than the one now being advanced by the defense," Marilyn Lago stated that "the report was simply wrong." *Id.*

283. Williams, *supra* note 212.

284. Day Three of Flynn Trial, *supra* note 138.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

On the fourth day of the trial, the defense presented a number of witnesses who portrayed Sylvia "as a good-hearted soul who suffered mightily at the hands of a sadistic husband" in an effort to rebut the prosecution's claim that she "cooked up tales of abuse after she killed her husband" out of jealousy.<sup>289</sup> A number of people testified to seeing bruises on Sylvia over the years.<sup>290</sup>

Lynne Ferraro (who called John Flynn "belligerent and obnoxious and a womanizer," and described Sylvia's 1997 attempt to leave and John's harassment of the person with whom she stayed), the neighbor (who described him as "disrespectful, derogatory, and insulting"), his sister (who called him "violent" and "out of control"), and a former fishing pal and ex-police officer, Leonard Belcaro (who called him "degrading and demoralizing"),<sup>291</sup> all testified,<sup>292</sup> as did six people who witnessed Sylvia with bruises and black eyes over the years.<sup>293</sup> In the lobby of the courthouse, Leonard Belcaro assured reporters that Sylvia, who had "stayed with his family for 'three weeks after the shooting' was not the person the prosecution was making her out to be."<sup>294</sup>

Lynn Ferraro testified "that in the week before the shooting, she felt tensions and the potential for violence were escalating. She talked to Flynn again about getting a divorce, but she [Sylvia] told her [Lynn] that her husband refused."<sup>295</sup> According to Lynn's testimony, "John told her he would never give her a divorce, that he would kill her before he gave her anything."<sup>296</sup> According to Lynn, on Friday, August 14 (the day before John's death), "Sylvia was convinced John Flynn was going to beat her when he returned from a business trip."<sup>297</sup> Sylvia "told Ferraro that she planned to barricade herself in a spare bedroom and had even prepared a makeshift bathroom there."<sup>298</sup>

John Flynn's brother-in-law, Steven Hart — the man with multiple sclerosis and a cane who was thrown against the wall of a nursing home by John<sup>299</sup> — testified about that incident. The prosecution "suggested [that] Hart 'set John Flynn up' by

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289. Day Four of Flynn Trial, *supra* note 161.

290. *Id.*

291. See *supra* text accompanying notes 165-70.

292. Day Four of Flynn Trial, *supra* note 161.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. See *supra* text accompanying notes 154-61.

surreptitiously tape recording the assault,<sup>300</sup> though Steven Hart explained that he was fearful about what might happen that day with John, given his temper, and wore a tape recorder for self-protection.<sup>301</sup> In addition, Dorothy Hart described the relationship between John and Sylvia as one in which John was always abusive with Sylvia totally subservient and cringing when he spoke.<sup>302</sup> Dorothy and Steven Hart's son testified about being beaten by John Flynn (along with his siblings) during the 1970s.<sup>303</sup>

Also on day four, Sylvia's friend Phyllis Roberts testified about the bruises and abuse she had seen, as described above.<sup>304</sup> Afterwards, as she stood outside the courthouse, she said: "I was petrified in there, but I just told the truth, and believe me, I could have said a lot more if they asked."<sup>305</sup> When she saw Sylvia's picture in the newspaper the day after the shooting, she was sure that she would read about the death of Sylvia at John's hands.<sup>306</sup> And John Belcaro, John's ex-fishing buddy, testified about John's harassment of himself and of Sylvia at a dinner party at Belcaro's house.<sup>307</sup>

On the fifth day of the trial, criminalist Peter Deforest testified the "blood stains and ballistics evidence do not contradict the hairdresser's account of the 1998 shooting of her husband," though he "stopped far short of endorsing Flynn's version of events, telling jurors he could not determine exactly what happened."<sup>308</sup> Although the state's expert testified the blood splatter on the chair indicated John Flynn had been seated when the shots were fired, Deforest testified "that the stains do not address whether the victim was in the chair at the time of the shooting. The victim could have been slightly out of the chair and then fallen back into the chair before the blood flow started."<sup>309</sup> Deforest acknowledged, however, that Flynn could not have been lunging for his wife's throat with his hands out before him at the time of the shooting.<sup>310</sup> And he also

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300. Day Four of Flynn Trial, *supra* note 161.

301. *Id.*

302. See *supra* notes 171-76 and accompanying text.

303. See *supra* text accompanying notes 162-64.

304. See *supra* text accompanying notes 177-84.

305. Day Four of Flynn Trial, *supra* note 161.

306. *Id.*

307. *Id.*

308. Day Five of Flynn Trial, *supra* note 142.

309. *Id.*

310. According to the police, this was Sylvia's story when she was first interviewed. See Case Background of Flynn Trial, *supra* note 148.



"admitted that it was 'very obvious' Flynn was not looking at his wife when she shot him."<sup>311</sup>

David Searce, Sylvia's 38-year old son — a Navy operations specialist — also testified on day five. David was expected to be a key witness, but he testified for only a brief time and indicated afterwards "both he and his mother were disappointed in the testimony lawyers elicited."<sup>312</sup> According to David: "I basically said nothing."<sup>313</sup> Outside the courtroom, he explained that he wished the jury had heard "that he had seen his mother covered in bruises throughout her relationship with John Flynn and that he had interceded in a fight between the couple when he was 16."<sup>314</sup> He also would have liked to tell jurors that John Flynn "prevented him from addressing his mother as 'Mom,' insisting that outside the family he call her 'Sylvia.'"<sup>315</sup> David did tell jurors about the two times, described earlier, when he and his father tried to help Sylvia escape from John Flynn in the 1970s.<sup>316</sup>

Other witnesses on day five testified to seeing John physically and/or emotionally abuse Sylvia. For example, a next-door neighbor testified: "I never seen anything good between them . . . he was either yelling at her or talking to her like I would never talk to anybody."<sup>317</sup>

On day six, Sylvia Flynn decided not to take the stand. Mary Ann Dutton, a well-known psychologist who has specialized in problems of battered women and who teaches at George Washington University, testified as an expert for the defense.<sup>318</sup> Dutton had interviewed Sylvia twice and "given her a battery of 10 psychological tests."<sup>319</sup> Dutton stated that in her opinion, Sylvia "was a battered woman, and she had been exposed to chronic abuse that was quite severe."<sup>320</sup> According to Dutton: "[Sylvia] knew how to read John Flynn, and she knew by looking and listening to him that day that he meant to hurt her.... Sylvia Flynn had tried to leave and failed, she'd tried to summon police and failed, and she felt as though she

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311. Day Five of Flynn Trial, *supra* note 142.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. See *supra* text accompanying notes 191-96.

317. Day Five of Flynn Trial, *supra* note 142.

318. Court TV Online, *Flynn Turns Down Chance to Tell Her Side of the Story* (Oct. 3, 2000), at [http://courttv.com/trials/flynn/100300\\_ctv.html](http://courttv.com/trials/flynn/100300_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Six of Trial] (on file with author).

319. Day Five of Flynn Trial, *supra* note 142.

320. *Id.*

had no options.”<sup>321</sup> Dutton used the word “‘imminent’ to describe the type of threat Flynn felt.”<sup>322</sup> Paulhus, the prosecutor, attempted to undermine Dutton’s credibility as an expert:

He seemed to suggest Dutton was an extremist when he called jurors’ attention to several papers on feminist topics written by the psychologist. When he asked Dutton if she was “an advocate for domestic violence victims,” she looked puzzled and responded, “I think domestic violence is wrong, if that’s what you mean.”<sup>323</sup>

On day five, the prosecution began calling “a series of rebuttal witnesses who alleged that the 57-year-old Brick Township hairdresser lied about key elements in her account of her life with the man she says abused her for 28 years.”<sup>324</sup> Paulhus began with a married couple from Ohio who vacationed with the Flynns for three weeks said they never observed any signs of abuse. A former hair client testified that the defendant once told her bruises on her rib cage came from falling off a motorcycle, not her husband’s fists. Flynn’s former sister-in-law, who adopted the defendant’s infant son John Wesley Barker, III in 1965, said Flynn never made any effort to see the child.<sup>325</sup>

Additional rebuttal witnesses appeared on day seven. Michael C. Flynn, a son of John (but not of Sylvia) testified that his father was “a good man and a devoted parent.”<sup>326</sup> He regarded “the fishing trips he took with his father as ‘some of the best memories of my life.’”<sup>327</sup> He maintained that he never saw his father hit Sylvia, that he and Sylvia had a good relationship, and that although the couple often engaged in “profanity-laced arguments,” they were “two sided.”<sup>328</sup> On cross, he admitted that Sylvia had told him “she feared his father,” but added that “she seemed to be more concerned with his girlfriend than being afraid of him.”<sup>329</sup>

Prosecutor Paulhus also called a former waitress at Duncan Donuts “who testified Sylvia Flynn was a regular at her breakfast

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321. *Id.*

322. *Id.*

323. *Id.*

324. Williams, *supra* note 141.

325. Day Six of Trial, *supra* note 318.

326. Court TV Online, *Final Testimony Paints John Flynn as a Victim, not an Abuser* (Oct. 4, 2000), at [http://courttv.com/trials/flynn/100400\\_ctv.html](http://courttv.com/trials/flynn/100400_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Seven of Trial] (on file with author).

327. *Id.*

328. *Id.*

329. *Id.*

counter and had a close and possibly romantic relationship with another man," George Warner.<sup>330</sup> According to this witness, who was also Warner's housekeeper, Warner kept in his home "an 11-by-14 inch 'glamour shot'" of Sylvia in a feather boa.<sup>331</sup> She also reported that "Warner bought Flynn an expensive necklace which she wore every morning only during breakfast."<sup>332</sup>

In order "[t]o suggest that Flynn often exaggerated events to paint herself as a victim, the prosecutor called a police officer who investigated a car accident Flynn was involved in four months after the shooting."<sup>333</sup> Although Sylvia "told a newspaper that her car was engulfed in flames," the officer testified his "vehicle was only 'grazed' in the chain-reaction accident, and was 150 feet from the cars actually burning."<sup>334</sup>

Karen Keating, another rebuttal witness, testified that Sylvia had told her that her son, John Wesley Barker III, had died as a result of the car accident that killed his father.<sup>335</sup> In reality, as noted earlier, Sylvia gave her son to her husband's sister, who adopted him.<sup>336</sup>

At some point in the trial, Paulhus, the prosecutor, said that Sylvia had tried to kill John before August 15.<sup>337</sup> On January 3, 1997, Sylvia shot a gun at John, but it misfired.<sup>338</sup> According to Paulhus, she tried to kill him because he spent New Year's Eve without her at a party in Manhattan.<sup>339</sup> Sylvia had "given conflicting accounts of that shooting, saying either she fired to scare him or she fired to get him off her because he was suffocating her."<sup>340</sup>

Finally, the prosecution called its last rebuttal witness, Dr. Azariah Eshkenazi, a psychiatrist who had interviewed Sylvia twice, to rebut the testimony of Mary Ann Dutton, Sylvia's expert on battered women. Eshkenazi "said any mental problems she has now are the result of shooting her husband and were not present when she fired the gun."<sup>341</sup> Eshkenazi testified that

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330. *Id.* It was George Warner who urged Sylvia to call the police for an escort rather than going home alone on August 15. See *supra* text accompanying notes 229-30.

331. Day Seven of Trial, *supra* note 326.

332. *Id.*

333. *Id.*

334. *Id.*

335. Williams, *supra* note 141.

336. *Id.*; see also *supra* text accompanying notes 142-45.

337. Williams, *supra* note 141.

338. *Id.*

339. *Id.*

340. *Id.*

341. Day Seven of Trial, *supra* note 326.

[a] battered woman ... all her life has depended on her father, mother or husband; she has little education, is unable to support herself and is totally dependent, emotionally and financially, on her husband. . . . She cannot walk away from him because she is totally dependent on her husband for total survival.<sup>342</sup>

Since Sylvia had her own beauty shop and friends, she was not a battered woman.<sup>343</sup>

Pointing to her "five previous marriages," Eshkenazi also "said she knew how to extricate herself from a relationship if necessary."<sup>344</sup> Eshkenazi noted "[h]er fifth marriage was to a man 18 years her junior whom she married 'not for love but for money. . . .' It shows she knew how to survive."<sup>345</sup> Eshkenazi's concluded: "We don't see any of the symptoms [of a battered woman] here."<sup>346</sup> Sylvia's lawyer, William J. Farley, suggested on cross-examination that Eshkenazi "did not understand the syndrome," noting that Eshkenazi had testified that "a woman who fights back against her abuser or calls the police does not suffer from the syndrome" and that "[s]uch views are at odds with Dutton's testimony."<sup>347</sup> The judge asked "Eshkenazi if a woman could be the victim of domestic violence, but not a battered woman."<sup>348</sup> Eshkenazi responded: "If the woman has the inner strength to walk out, . . . there is no Battered Woman's Syndrome."<sup>349</sup>

Although many witnesses "testified that Flynn told them she was abused, and that her husband was arrogant and unfaithful," Paulhus argued that these "friends don't know the real Sylvia Flynn, one capable of planning and carrying out murder".<sup>350</sup>

[These friends] didn't know, for example, that for 27 years, the Flynn's were not legally married or that Sylvia Flynn had abandoned two children. She told her friends that one child had died in a 1965 car accident. The other child was reared by his father and lives in Virginia.<sup>351</sup>

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

343. Day Seven of Trial, *supra* note 326.

344. *Id.*

345. Williams, *supra* note 342.

346. Day Seven of Trial, *supra* note 326.

347. *Id.*

348. *Id.*

349. *Id.*

350. Williams, *supra* note 189.

351. *Id.*

On day seven, the jury also heard closing arguments and began deliberations.<sup>352</sup> Closing argument for the plaintiff was given by her attorney Farley:

Farley . . . told jurors that they would have to choose between two conflicting portraits of Flynn. He urged the panel not to see his client as a jealous murderer, as the state claims, but as a sad woman whose life is marked by episodes of abuse.

In his 20 minute closing argument, Farley never mentioned forensic evidence, but instead focused on what he called "a pattern of fear and hope" in Flynn's life. He reminded jurors that her brother and father had beaten her when she was a child. She escaped, he said, only to encounter more violence at the hands of other men.

He said John Flynn, who his client met in 1970, abused her throughout their marriage. He cited four witnesses who testified that they had seen bruises on [Sylvia's] body, and reminded jurors that John Flynn's bullying was not confined to his home. Flynn's brother-in-law, who suffers from multiple sclerosis and walks with a cane, testified that Flynn once attacked him as they argued over his elderly mother's care.

"John Flynn didn't know how to stand up to men. He knew how to stand up to Sylvia and to men with multiple sclerosis," said Farley.

He recounted occasions stretching back to the 1970s when Flynn left her husband only to return later.

Drawing on the words of the defense spousal abuse expert, he said, "Fear drove her away, hope brought her back."

Farley ridiculed the state's jealousy motive, saying John Flynn's affairs with other women filled his client with self-hatred and thoughts of suicide, but never vengeance.<sup>353</sup>

Paulhus gave the closing argument for the prosecution, arguing "the violence was sporadic and not severe enough to cause Battered Woman's Syndrome".<sup>354</sup>

Prosecutor Michel Paulhus called Flynn's account of the shooting "impossible, impossible, impossible."

He urged jurors to concentrate on the physical evidence, which he said told the absolute truth of what happened that night. John Flynn was turned away from the defendant when she shot him, he argued. She was in no danger at all.

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352. Day Seven of Trial, *supra* note 326.

353. *Id.*

354. Verdict of Flynn Trial, *supra* note 220.

He acknowledged that the victim was “no saint” and beat his wife on occasion.

“John Flynn was a loudmouth, and he was a jerk,” Paulhus said.

But, he said, Flynn was never a battered woman. He said she had options that truly battered women do not, and she was exploiting their experience to free herself from a murder rap.

“It’s an insult to the ones who truly are battered and live like that and suffer,” the prosecutor said.

Paulhus reminded jurors that when Flynn shot her husband she was carrying a cell phone, her car keys and a gun. If she genuinely feared for her life, he said, she could have used her keys to get away or the phone to call police.

“Sylvia Flynn is not a battered woman. She’s a woman scorned, and that’s why John Flynn is dead,” Paulhus concluded.<sup>355</sup>

On the first full day of jury deliberations, the jury of five men and seven women “sent two questions to Judge James N. Citta”:

In the morning, they asked Citta to reread the part of his charge outlining the elements of murder. Citta did, explaining that Flynn acted “purposefully and knowingly” when she took [John’s] life.

In the afternoon, the jurors sent out a second note asking the judge to repeat for a third time the elements of murder as well as the elements for two lesser charges, aggravated manslaughter and reckless manslaughter.

They also asked whether the phrase “purposefully and knowingly” applied to the period before the incident or during the incident.

The judge told them that since the state murder statute does not require premeditation, “prior to the incident has nothing to do with it.”<sup>356</sup>

Jury deliberations began all over again the next day when an ill elderly woman on the jury was replaced by a younger woman.<sup>357</sup> Jurors spent most of that “afternoon listening to the testimony of

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355. Day Seven of Trial, *supra* note 326.

356. Court TV Online, *Jury Still Pondering Sylvia Flynn’s Fate* (Oct. 5, 2000), at [http://courttv.com/trials/flynn/100500\\_ctv.html](http://courttv.com/trials/flynn/100500_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Eight of Trial] (on file with author).

357. Court TV Online, *Juror Replaced by Alternate, Deliberations Start Over* (Oct. 6, 2000), at [http://courttv.com/trials/flynn/100600\\_ctv.html](http://courttv.com/trials/flynn/100600_ctv.html) (last visited Oct. 23, 2000) [hereinafter Day Nine of Trial] (on file with author).

three key witnesses that they requested be read back to them."<sup>358</sup> One of the three key witnesses was psychotherapist Valerie Brown "who met with Sylvia Flynn once in 1997 and said that Flynn did not suffer from Battered Woman's Syndrome."<sup>359</sup> Jurors also asked "for read-backs of the testimony of the medical examiner and the state's crime scene reconstruction analyst."<sup>360</sup>

The jury was given the choice of three possible guilty verdicts: murder, requiring a finding that Sylvia "purposely or knowingly" caused John's death, carrying a minimum sentence of thirty years to life; aggravated manslaughter, requiring a finding that Sylvia caused John's death "under circumstances manifesting extreme indifference to human life," carrying a sentence of ten to thirty years; and manslaughter, requiring a finding that Sylvia caused John's death by actions "committed recklessly," and carrying a five to fifteen year sentence.<sup>361</sup> Alternatively, the jury could return a verdict of not guilty by reason of self-defense.<sup>362</sup>

The jury convicted Sylvia Flynn of aggravated manslaughter after deliberating "a little less than 10 hours."<sup>363</sup> According to the prosecutor David Millard, the verdict "ma[de] clear that the battered women's syndrome was not applicable as a legal defense to Mrs. Flynn's homicidal conduct."<sup>364</sup> In sentencing, the judge could give anywhere from ten to thirty years, as indicated above, with a presumption of twenty years.<sup>365</sup> Judge Citta sentenced her to the maximum thirty years (the same as the minimum sentence for a murder conviction), and did so under the state's "no early release act," Sylvia must therefore serve eighty-five percent of her term (twenty-five years and six months) before becoming eligible for parole.<sup>366</sup> At sentencing, the judge stated: "This is a person, who even after being made aware of the potential consequences, chooses to do what she chooses to do. . . . In this circumstance, she chose to commit homicide."<sup>367</sup> Thus, Sylvia ended up with a sentence that,

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358. *Id.*

359. *Id.*; see also *supra* text accompanying notes 211-15.

360. Day Nine of Trial, *supra* note 357.

361. Day Eight of Trial, *supra* note 356.

362. Day Nine of Trial, *supra* note 357.

363. Verdict of Trial, *supra* note 220.

364. Carol Gorga Williams, *Flynn Verdict: Wife guilty of Manslaughter*, ASBURY PARK PRESS, Oct. 11, 2000, at A1.

365. *Id.*

366. *Id.*; Carol Gorga Williams, *Woman Gets 30 Years in Slaying of Husband; She Tells Judge There was no Choice; He Calls Killing Planned*, ASBURY PARK PRESS, Oct. 5, 2000, at A1.

367. *Id.*

at a minimum, was almost three times as long as the plea bargain she had turned down prior to trial.<sup>368</sup>

## VI. UNDERSTANDING SYLVIA'S STORY

We cannot know the truth of what happened that evening in August when Sylvia entered the house and shot John. Sylvia, like many (but not all) battered women, was physically abused as a child and watched her father abuse her mother as well. Her first marriage took place at fourteen, at her mother's urging (to get Sylvia out of the house and away from her father). This first marriage (as well as some or all of her subsequent marriages) was likely also abusive.

There are several pieces of evidence that suggest Sylvia used alcohol regularly to cope with her situation: her threats and harassment of the mistress, Linda Chieko, often seem to have occurred when she had been drinking,<sup>369</sup> and she may have been drinking before returning home on Saturday, August 15.<sup>370</sup> Many battered women use alcohol or drugs to self-medicate as a coping strategy.

The prosecutor argued that Sylvia's friends did not know the "real" Sylvia, as evidenced by their not knowing that she had "abandoned" two children (giving one child up for adoption while telling friends that he was dead) or that she and John had not been married for twenty-seven of the years they were together.<sup>371</sup> And, in questioning Eshkenazi, the prosecutor used the fact that she had been married five times (once to a younger man with money) to elicit testimony that she therefore knew how to take care of herself and how to extricate herself from relationships.<sup>372</sup> All these "bad facts" are, however, normal in the life of a woman who has suffered abuse from childhood. It is not surprising that Sylvia had difficulty maintaining stable and healthy relationships with men given her background, including being married at fourteen to get away from an abusive father. Given her parents failure to parent her, it is not surprising that she was not able to parent her own children. Her friends' ignorance of the truth about her children indicates only that she was ashamed of her inability to parent, as almost any person would be given these circumstances. That she and John were not

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368. See Day Nine of Trial, *supra* note 357.

369. See *supra* text accompanying note 274.

370. See *supra* text accompanying note 233.

371. See *supra* text accompanying note 351.

372. See *supra* text accompanying notes 344-49.



married for almost all of their time together is likely additional evidence of John's abuse. If he was an abusive, controlling person, then he is the one who did not want to marry. John doubtless used the fact that they were not married for most of their time together to hurt Sylvia, increasing her insecurity and vulnerability.

John's psychological abuse would have been very damaging to a woman like Sylvia, fragile from her past experiences with abuse. Recall his demeaning remarks about her grammar<sup>373</sup> and the combination of his public (and doubtless private) rejections of her ("I don't dance with cows")<sup>374</sup> with his continuous infidelities (his former secretary's estimation that in the two years she made travel arrangements for John, he had about two dozen affairs.)<sup>375</sup> John's affairs were psychological abuse (and naturally, as discussed in Section IV, evoked anger as well as jealousy).

Sylvia's tendency to exaggerate — for example, her inaccurate description of the car accident<sup>376</sup> — is entirely consistent with a psyche that has been damaged by years of abuse, beginning in early childhood. Sylvia may well have had an abnormal need for sympathy and may not have been entirely in touch with reality in her assessments of the world around her. These "bad facts" are, again, part of the ordinary life of someone permanently scarred by abuse. They do not tell us anything about whether John abused her for years nor about Sylvia's state of mind at the time she shot him.

Sylvia's boyfriend — the man she met regularly at Dunkin Donuts for breakfast<sup>377</sup> — is another all-too-normal "bad fact" and irrelevant to what should have been the key issues in her trial. Many battered women have a "boyfriend," i.e., a man they depend on and with whom they have a relationship which is romantic on some level. These are extremely vulnerable women in great need of emotional support. The presence of such a friend does not, however, indicate that John was not violent nor that she did not shoot him out of reasonable fear for her own safety.

Sylvia said that she was barricaded in a bedroom when John returned home from California during the early hours of Saturday, August 15,<sup>378</sup> and that she left in the morning to go shopping (and, apparently, to get out of the house and away from him).<sup>379</sup> But a

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373. See *supra* text accompanying note 182.

374. See *supra* text accompanying notes 181-84.

375. See *supra* text accompanying notes 188-89.

376. See *supra* text accompanying notes 335, 351.

377. See *supra* text accompanying notes 330-32.

378. See *supra* text accompanying notes 297-300.

379. See *supra* text accompanying notes 225-28.

neighbor testified that she was drinking coffee on the porch in front of the house before she left and did not appear to be terrified.<sup>380</sup> Sylvia herself did not testify, so we do not know her explanation for her presence there that morning. But she did know John, and she may reasonably have thought, based on past experiences, that after a late return home from a cross-country flight she need not worry about his getting up at 9:15 a.m.

Sylvia's fear about going home on August 15 seems quite reasonable. She had tried to escape from John a number of times over the years and had gotten a restraining order at least once. Nothing had worked. When she tried to leave, John followed her and either cajoled her into returning or threatened relatives or friends supporting or harboring her.<sup>381</sup> As she explained to the dispatcher when she made the 911 call, she had nowhere to go. Perhaps she could have gone to the motel for the night, but that would only delay the inevitable. And she had great reason to be afraid. She had criticized John for his infidelity and he would have been furious at her for trying to control him.<sup>382</sup> That she started the confrontation by complaining about his infidelity is in no way inconsistent with her being a battered woman. Battered women routinely, as discussed in Section IV, fight verbally and sometimes even physically.<sup>383</sup> Indeed, it is difficult to understand why Sylvia would have called the police before going home that Saturday unless she was afraid for her safety. It does not seem likely that she intended to kill John out of pure jealousy and then made the call to the police, thinking they would refuse to escort her home (as they did) and she would therefore be able to kill John with impunity.

It is more difficult to understand why Sylvia felt reassured when the dispatcher told her that he had called John and that John had said she should come home.<sup>384</sup> It seems likely that the call would only infuriate John (which it did).<sup>385</sup> But perhaps, with no real options she could see (and a couple of drinks?),<sup>386</sup> she may have been anxious to believe the dispatchers' assurances — and did until she heard John say "You bitch, you called the police on me again."<sup>387</sup>

Sylvia's wavering recollection of precisely what John had been doing when she shot him — as the prosecutor stressed, her story

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380. See *supra* text accompanying notes 223-24.

381. See *supra* text accompanying notes 170-200.

382. See JACOBSON & GOTTMAN, *supra* note 79, at 66, 76, 82.

383. See *supra* text accompanying notes 87-88.

384. See *supra* text accompanying note 234.

385. See *supra* text accompanying note 235.

386. See *supra* note 232 and accompanying text.

387. See *supra* text accompanying note 235.

changing from a claim that John had been lunging at her throat to a claim that he had been rising from his chair<sup>388</sup> — is consistent with my own experiences with battered women, who often do not have a clear recollection of what happened. Sometimes they disassociate or snap at the time of killing and cannot remember it happening at all. Battered women often see their abusers as all-powerful, and to Sylvia, John's action of rising from the chair while yelling "You bitch, you called the police on me again,"<sup>389</sup> may have felt like he was lunging at her to choke her. She honestly may have remembered him as lunging at her (though he never did) and may have been convinced by her lawyer to change her story in light of the physical evidence that he was not lunging.

Sylvia's description of what John said before she shot him sounds like John — various witnesses report his use of "bitch" in similar situations.<sup>390</sup> She heard the tone of his voice, and she was terrified: she had not only called him on his infidelity but had also called the police.

The prosecution argued throughout the proceedings that Sylvia's denial of John's repeated violence (to Valerie Brown, for example),<sup>391</sup> her conflicting stories about incidents, and evidence that she had tried to kill John before (out of jealousy)<sup>392</sup> was used to undermine her credibility. But battered women routinely and normally deny or minimize the harm done to them. Indeed, a major problem for prosecutors in criminal proceedings against batterers is that in the vast majority of cases, the woman changes her story and denies the abuse by the time there is a hearing on a permanent order.<sup>393</sup> Most battered women do not leave an abusive partner the first time abuse occurs. When they return to an abuser — hopeful that the abuse is over — they inevitably deny or minimize the past abuse, as Sylvia did in her conversations with Valerie Brown and others.

Indeed, in our clemency cases, we found that women in prison charged with killing their husbands (or hiring someone to do so) still minimized the abuse. Often, the most horrific details would come out in interviews with others and would then be confirmed by the client. But the client would not herself bring up these details even

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388. Day Two of Flynn Trial, *supra* note 184.

389. See *supra* note 235 and accompanying text.

390. See *supra* text accompanying notes 179, 269.

391. See *supra* text accompanying note 213.

392. See *supra* text accompanying note 244.

393. See, e.g., Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999) (discussing why victims deny the abuse rather than cooperate with the prosecution).

when doing so could only help in the preparation of her clemency petition. Sylvia's inconsistencies, while not unusual, were more "bad facts" used against her at trial.

The testimony at trial that is actually inconsistent with Sylvia's story is actually very limited: John's cousin Judith, who described herself as Sylvia's friend, testified that Sylvia repeatedly said that she would kill John before allowing him to leave her for Linda Chiecko<sup>394</sup> and that Sylvia said she could not leave because she could not give up her home and possessions;<sup>395</sup> John's son by an earlier marriage testified that his father and Sylvia often had "profanity-laced arguments," but the arguments were "two sided" and John was not abusive;<sup>396</sup> several other witnesses testified that Sylvia was "an equal partner in an admittedly horrible marriage";<sup>397</sup> and a couple who had once vacationed with the Flynns for three weeks testified that they saw no evidence of abuse.<sup>398</sup>

Relatives, including children, of an abusive man often deny the abuse; this was true for several of our clemency clients even though the evidence of abuse was incontrovertible. Judith and her son are the only members of John's family to testify in support of the prosecution rather than the defense. Judith may have hated Sylvia for any number of reasons.<sup>399</sup> We know nothing about the married couple from Ohio that vacationed with John and Sylvia. Perhaps that husband was abusive, and they testified as they did to bolster denial of abuse in their own relationship. Although most of the evidence supported Sylvia's story, the jury found her guilty of aggravated manslaughter and the judge sentenced her to the maximum sentence of thirty years, which was also the lowest possible sentence for a murder conviction (though the jury acquitted her on the murder charge).<sup>400</sup> In the next section, I explore the factors that explain Sylvia's thirty-year sentence.

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394. See *supra* text accompanying note 261.

395. See *supra* text accompanying note 264.

396. See *supra* text accompanying note 328.

397. See *supra* text accompanying note 259.

398. See *supra* text accompanying notes 324-25.

399. We know that she did not like the fact that Sylvia openly discussed her (and John's) sex life. See *supra* text accompanying note 261. What was it Sylvia said that Judith disliked? That John repeatedly raped her? See *supra* text accompanying note 187. Perhaps she was ashamed to have a poorly-educated sister-in-law openly discussing John's sexual perversions.

400. See *supra* text accompanying notes 366-67.

## VII. SYLVIA'S PROBLEMS AT TRIAL

Sylvia, like most of the women we represented in the Illinois Clemency Project, faced a number of problems, including "bad facts," outrageous arguments made by the prosecution to appeal to stereotypes and cultural biases, and poor representation by defense counsel. She faced an additional problem not faced by any of our clemency clients but one likely to be a problem for other women who kill their abusers in the future: the prosecution's use of "experts" on battered women who believed stereotypes and knew nothing about the reality of battered women's lives. I begin by discussing how the prosecutor's arguments and experts appealed to cultural scripts and cognitive biases. I then turn to the problems with the defense.

### A. *Cultural Scripts and Cognitive Biases*

Battered women are not perfect. It is not good for the soul to live in terror, to be called a bitch and worse on a routine basis, to be demeaned and mistreated and tortured. As discussed earlier, most battered women are angry and many are jealous.<sup>401</sup> They may have been violent themselves, fighting back physically as well as verbally.<sup>402</sup> A person who lives in a culture (her home) where violence and vulgar degrading language are routinely hurled at her is likely to use violence and vulgar language as well. She is likely to drink too much, or use drugs to numb herself. She may well have past experiences with abuse and many personal difficulties, such as multiple failed relationships and children raised by others.

#### 1. *"Bad facts" and prosecutorial arguments.*

The combination of "bad facts" and the prosecutor's ability to make just about any argument, no matter how prejudicial, stereotypical, and nonsensical, is a major problem for many battered women who do receive trials. Consider, for example, the following arguments made by the prosecution in Sylvia's case:

The prosecutor took care to introduce evidence that prior to the shooting, Sylvia denied that John abused her, or minimized it, and gave inconsistent accounts, thus suggesting that her post-

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401. See *supra* text accompanying notes 77-102.

402. See *supra* text accompanying notes 82-88.

shooting accounts of abuse were false, simply an excuse for getting away with murder.<sup>403</sup>

Throughout the proceedings, the prosecutor argued that Sylvia was a woman scorned rather than a battered woman,<sup>404</sup> and that Sylvia shot John out of jealousy and anger rather than fear.<sup>405</sup>

On the second day of the trial, the prosecutor presented a number of witnesses to show that Sylvia was "an equal partner in an admittedly horrible marriage."<sup>406</sup> This evidence included her use of vulgar language, her threats and harassment of Linda Chieko, as well as Sylvia's 1997 attempt to shoot John.<sup>407</sup>

The prosecutor argued that the witnesses who testified to Sylvia's abuse at John's hands "[didn't] know the real Sylvia Flynn, one capable of carrying out murder."<sup>408</sup> To support this argument, the prosecution pointed to the fact that her friends did not know that she had "abandoned two children," one of whom was given up for adoption (rather than, as Sylvia had told her friends, dying in a car crash).<sup>409</sup>

The prosecutor argued that Sylvia's story of the details of the shooting changed over time (from him lunging at her ready to choke her to his getting up — or starting to get up — from his chair) and that she exaggerated her danger in the car accident, both indicating that she was not credible.<sup>410</sup>

Perhaps most dangerous was the prosecutor's argument that Sylvia was not a battered woman. Prior to trial, the press reported that the prosecutor argued that there was "no history of abuse."<sup>411</sup> Although the prosecutor admitted at trial that John was occasionally violent, he continued to maintain that Sylvia was not a battered woman,<sup>412</sup> but one trying to "rewrite history because she is trying to get away with murder."<sup>413</sup> According to the prosecutor, "the violence was sporadic and not severe enough

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403. See *supra* text accompanying notes 394-98.

404. See *supra* text accompanying notes 244-46.

405. See *id.*

406. See *supra* text accompanying note 259.

407. See *supra* text accompanying notes 260-63.

408. See *supra* text accompanying note 350.

409. See *supra* text accompanying note 351.

410. See *supra* text accompanying notes 333-34.

411. See *supra* text accompanying note 245.

412. See *supra* text accompanying note 252.

413. See *supra* text accompanying note 253.

to cause Battered Woman's Syndrome."<sup>414</sup> In his closing argument, the prosecutor argued that Sylvia was not "a truly battered woman," and that it would be "an insult to the ones who truly are battered" to think of her as such.<sup>415</sup> The argument that Sylvia was not a battered woman was supported by the evidence of Valerie Brown, the psychotherapist who met once with Sylvia in December of 1997, and psychiatrist Azariah Eshkenazi, the expert witness for the prosecution on battered women.<sup>416</sup>

The prosecutor used a question to argue subtly to the jury that Mary Ann Dutton's testimony was suspect. According to the Court TV report, he "seemed to suggest [that] Dutton was an extremist when he [the prosecutor] called jurors' attention to several papers on feminist topics written by the psychologist [Dutton]."<sup>417</sup>

With the exception of the last point in the above list (that Dutton's testimony was suspect because she was a feminist), all of the prosecutor's arguments are framed in such a way as to reinforce the fundamental attribution error, discussed earlier in Section III; that is the human tendency to overestimate the extent to which human behavior is the result of fundamental character traits rather than a response to a particular situation.<sup>418</sup> With many, if not most battered women, this will be easy to do because most have "bad facts" in their backgrounds: they are not saints. Such arguments, appealing to cultural biases against bad women as well as the cognitive bias of fundamental attribution error, are extremely troubling in the context of battered women who have killed. Rules for excluding evidence more harmful to the defendant than probative, such as evidence of past crimes, seem entirely consistent with the need to guard against this cognitive error.<sup>419</sup> What kinds of rules would help protect battered women from this bias? Consider the following suggestions for cases involving battered

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414. See *supra* text accompanying note 354.

415. See *supra* text accompanying note 355.

416. See *supra* text accompanying notes 211-16, 341-49.

417. See *supra* text accompanying note 323.

418. See *supra* text accompanying notes 43-46.

419. FED. R. EVID. 403; *id.* 404 (providing that character evidence is generally inadmissible, though there are exceptions); *id.* 405 (providing that specific instances of prior conduct are admissible in the limited circumstances in which "character or a trait of character of a person is an essential element of a charge, claim, or defense"); see *id.* 405, advisory committee note (discussing these rules).

women who have killed or injured (or hired someone to kill or injure) their abusers.

In both Sylvia's case and in the case of Janice, the Clemency client whose trial was described earlier,<sup>420</sup> the prosecution argued that the allegations were made up after the shooting to try to get away with murder. In addition, in Sylvia's case, the prosecutor argued that she was "an equal partner in an admittedly horrible marriage," despite overwhelming evidence that John had been physically abusive (and Sylvia had not).<sup>421</sup> Yet in both these cases, the evidence had clearly established that the deceased had physically and psychologically abused the defendant.

There is no such thing as "a typical battered woman" in any technical sense of the word.<sup>422</sup> Women react differently to abuse, and react differently to different levels of abuse, depending on their backgrounds, fragility, and other character traits.<sup>423</sup> In fact, although some courts and even state statutes speak explicitly in terms of the admissibility of evidence on Battered Woman Syndrome,<sup>424</sup> there is no such clinically diagnosable condition.<sup>425</sup> There is only abuse followed by a variety of responses.<sup>426</sup> That a woman fought back physically or verbally does not undermine the claim of abuse.<sup>427</sup>

We therefore should allow defense counsel to request a pretrial hearing on whether there is significant evidence of physical abuse of the defendant by the deceased. If the judge finds there is such evidence, the prosecution should not be able to argue that the defendant is not a battered woman or that she was an equal partner in a bad marriage.

Sylvia's prosecutor also argued that her claims of past abuse were incredible because they were inconsistent with her own earlier denials or attempts to minimize the abuse she suffered. Yet, as discussed above, women routinely, normally, deny and minimize abuse.<sup>428</sup> The prosecution also argued Sylvia was not credible because she had given different stories at different times about

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420. See *supra* text accompanying notes 121-30.

421. See *supra* text accompanying notes 259, 284-94.

422. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1197-1202 (1993).

423. *Id.* at 1216.

424. Mary Ann Dutton, *THE IMPACT OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS INVOLVING BATTERED WOMEN* 3-4 (1994), available at <http://www.ojp.usdoj.gov/ocpa/94/Guides/Trials/Impact/> (last visited Oct. 20, 2001).

425. Dutton, *supra* note 422, at 1197-1202.

426. *Id.*

427. See *supra* text accompanying notes 90-102.

428. See *supra* text accompanying notes 392-93.



whether John was lunging for her or merely starting to rise from his chair when she shot him. Battered women, however, often do not have one clear, accurate, unchanging memory of what happened, as discussed earlier.<sup>429</sup> These arguments makes sense only as appeals to the cultural bias (based on cultural scripts) that women who complain of male abuse are lying.<sup>430</sup> We need a rule holding that the fact that a woman has denied or minimized abuse in the past is inadmissible to show that there was in fact no abuse. Moreover, if the jury hears evidence that an abused woman's story about key events has changed over time, they should also hear an instruction explaining that although in general inconsistencies may suggest someone is lying, inconsistencies in memory about the shooting are normal for women who have killed abusers.<sup>431</sup>

Sylvia's prosecutor argued that she was an angry, jealous woman, not a battered woman. But, as we saw in Section IV, most battered women are angry and those whose abusers integrated their infidelity into their psychological abuse (as John did) are also jealous. This is a false dichotomy. That Sylvia was angry and jealous does not prove anything about whether she was afraid John was going to kill or seriously injure her when she shot him. This argument only makes sense as an appeal to stereotypes about battered women as always and only passive, dependent, and afraid, never feisty, angry, or jealous. We need a rule that would hold inadmissible evidence that a woman was angry at or jealous of her abuser for purposes of showing that she did not act out of fear at the time she killed or injured her abuser (or hired someone to do so).

In both Sylvia's case and in the case of our Clemency client, Janice, allegations about their inadequacies as mothers were used to make them look bad. In Sylvia's case, the prosecutor claimed that the fact that her friends did not know she had "abandoned" two children indicated that they did not know her.<sup>432</sup> In Janice's case, the prosecutor argued that her four abortions showed her disdain for human life.<sup>433</sup> The fact that Sylvia lied about something she was ashamed of — failing to parent her sons adequately — simply does not indicate that her friends did not know her. And the fact that Janice had four abortions at her abuser's insistence (after he had

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429. See *supra* text accompanying notes 376, 388-89.

430. See *supra* text accompanying notes 73-76. See generally Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L. J. 1459 (2001) (discussing cultural scripts in the context of battered women).

431. For specific language, see *infra* Section VIII.

432. See *supra* text accompanying notes 350-51.

433. See *supra* text accompanying notes 126-30.

convinced her that now was not the time to get pregnant, with the quite credible threat that otherwise he would perform the abortion himself)<sup>434</sup> shows nothing about how she felt about these experiences.

Although not framed as such, arguments such as those of the prosecutors in Janice's and Sylvia's cases are arguments based on character, i.e., that bad mothers are bad women. Because Janice and Sylvia were bad mothers, they did not act in self defense when they killed their husbands. This argument appeals to a powerful cultural script — good women are good mothers, and bad mothers are bad women. But like other arguments based on character, which are generally excluded by the rules of evidence, evidence that women who have killed their abusers were also bad mothers is far more prejudicial than probative.<sup>435</sup> We should adopt a rule excluding evidence that a woman has been an inadequate mother in any case in which she is on trial for murder (or hiring someone to murder) an adult partner.

Thus far in this section, I have advocated restraints on the ability of prosecutors to use "bad facts" when battered women are prosecuted for killing or injuring (or hiring someone to kill or injure) an abusive partner. In Section VIII, I summarize these changes and suggest specific rules to address the problems.

There remain two troubling aspects of the prosecution in Sylvia's case<sup>436</sup>: (1) the testimony of Valerie Brown and Azariah Eshkenazi, which was presented by the prosecutor to establish that Sylvia Flynn was not a battered women<sup>437</sup>; and the prosecutor's attempt (perhaps successful, given the outcome) to undermine Mary Ann Dutton's credentials as an expert by suggesting that she held extremist (feminist) views.<sup>438</sup>

## 2. "Experts"

The prosecution presented two witnesses who testified that Sylvia Flynn was not a battered woman: Valerie Brown and Azariah Eshkenazi. Both of these witnesses made statements in their testimony that were false *and* extremely damaging to Sylvia.

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434. *Id.*

435. *See supra* note 419 and accompanying text.

436. *See supra* text accompanying notes 212-16, 340-49.

437. *Id.*

438. *See supra* text accompanying note 323.

Valerie Brown was a psychiatric social worker.<sup>439</sup> She did *not* interview Sylvia after the shooting. She is the person who was supposed to give counseling to John Flynn in December of 1997 following Sylvia's charge of domestic violence and obtainment of a restraining order.<sup>440</sup> Although Sylvia had the restraining order rescinded a month later, the charges were dropped in exchange for his agreeing to "get counseling."<sup>441</sup> But it was Sylvia who showed up for the counseling session in December of 1997, not John.<sup>442</sup> As indicated earlier, Brown testified that Sylvia "said John Flynn had hit her only once in the last two years," a version inconsistent with that Sylvia "had given authorities in May" of that year.<sup>443</sup> Valerie also testified that she gave Sylvia information about a shelter, but reported that Sylvia was not "terribly interested."<sup>444</sup> According to Brown, Sylvia was "so imbedded in the conflict of the marriage that she really didn't want to get out"<sup>445</sup> and did not "present the typical 'markers' of battered woman's syndrome, which she [Brown] described as helplessness, hopelessness, isolation from family and friends and financial dependence."<sup>446</sup>

Sylvia's showing up for John's counseling session is, however, entirely consistent with his being a batterer. Batterers see their partners as the problem, not themselves. And after an abused woman has reconciled with her abuser — which happens routinely after she has filed charges — abused women typically do deny or minimize the abuse.<sup>447</sup> The fact that Sylvia showed up rather than John suggests that he was "likely to have committed more severe domestic violence and more likely to reoffend."<sup>448</sup> Men who either drop out of treatment programs or fail to make an appointment are often such men.<sup>449</sup>

Even more troubling is Valerie Brown's assertion that Sylvia was "so imbedded in the conflict of the marriage that she really didn't want to get out"<sup>450</sup> coupled with her insistence that Sylvia did not "present the typical 'markers' of battered woman's syndrome,"

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439. Williams, *supra* note 212.

440. See *supra* text accompanying notes 210-12.

441. *Id.*

442. *Id.*

443. Williams, *supra* note 212.

444. *Id.*

445. *Id.*

446. *Id.*

447. See *supra* text accompanying note 393.

448. Edward W. Gondolf, *Batterer Programs: What We Know and Need to Know*, 12 J. INTERPERSONAL VIOLENCE 83, 89 (1997).

449. *Id.*

450. See *supra* text accompanying note 215.

which she described as "helplessness, hopelessness, isolation from family and friends and financial dependence."<sup>451</sup> That is the problem for many battered women. Many remain — despite the violence — deeply attached to their abusers and hope repeatedly that the abuse has ended. *That* is why they stay.

Brown's testimony here is difficult to understand. What precisely is her point? Is she saying that a woman who is emotionally trapped in an abusive relationship is responsible for the violence and should not be able to defend herself when in danger? This seems like a deadly catch-22: if a battered woman is emotionally capable of leaving, then, of course, she should have left rather than using force to defend herself. Even assuming that a woman could have left, should that deprive her of the ability to defend herself?<sup>452</sup> But if she is not emotionally capable of leaving, then she is a woman who does not want to leave rather than a woman who may have acted in self defense when she killed her abuser.

Brown's testimony indicated to the jury that only women who are economically dependent on their abusers and isolated from family and friends are *really* battered women. But battered women are not a homogenous group. Not all battered women are economically dependent on their abusers.<sup>453</sup> Nor are all battered women totally isolated from family and friends. Indeed, some abusers *depend on their victims* for economic support, and some *want* their partners to have other interests.<sup>454</sup> Most battered women are far from helpless. As Gottman and Jacobsen report, many act courageously to protect themselves and their children in the face of danger.<sup>455</sup> And many — perhaps most — of those who have not yet decided to leave are hopeful that the relationship will improve, and their dreams will be fulfilled.<sup>456</sup> They remain imbedded in the abusive relationship.

Finally, I wonder about the appropriateness of Valerie Brown's testimony regarding whether Sylvia was a battered woman on the basis of a single conversation when Sylvia was not there to talk about herself or the problems in her relationship with John, but to convince Brown that John, with whom Sylvia had reconciled, did not need counseling. Sylvia was *not* Valerie's client, nor was she

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451. See *supra* text accompanying note 216.

452. For an argument that we would look at battered women differently were we to take relationships seriously, see Baker, *supra* note 430, at 1478-80.

453. See *supra* text accompanying notes 96-101.

454. *Id.*

455. See *supra* text accompanying notes 81-83.

456. See *supra* text accompanying notes 89-90.

interviewed by Valerie as a client. It is true they had a discussion. Could a discussion between an "expert" and a battered woman at a laundromat (as they waited for their clothes to dry) be the basis for testimony in court that the woman was not actually a battered woman?

But the larger problem is that Valerie Brown was asked questions to which she gave answers that were beyond her knowledge. And she seems to have been regarded by the jury as a reliable expert on battered women — the jury asked to have her testimony read to them after they began deliberations (though not the testimony of the either Dutton or Eshkenazi, the experts for the defense and prosecution). Given her testimony, Brown had little if any expertise in the area. Indeed, one wonders what qualifications she had for her job as a counselor of abusive men.

Dr. Azariah Eshkenazi, the prosecutor's other expert on battered women, was a psychiatrist from New York. He was hired to rebut the testimony of Mary Ann Dutton, Sylvia's expert on battered women. Eshkenazi, like Dutton, interviewed Sylvia twice. Unlike Dutton, who administered a battery of ten psychological tests to assess whether Sylvia "had been exposed to chronic abuse that was quite severe,"<sup>457</sup> Eshkenazi conducted no tests,<sup>458</sup> and concluded that "any mental problems she has now are the result of shooting her husband and were not present when she fired the gun."<sup>459</sup> Eshkenazi, like Brown, saw battered woman as all of a type:

A battered woman . . . all her life has depended on her father, mother or husband; she has little education, is unable to support herself and is totally dependent, emotionally and financially, on her husband. She cannot walk away from him because she is totally dependent on her husband for total survival.<sup>460</sup>

Because Sylvia had her own beauty shop and friends, she was not a battered woman.<sup>461</sup> Eshkenazi also pointed to her "five previous marriages" as evidence that "she knew how to extricate herself from a relationship if necessary."<sup>462</sup> Eshkenazi noted her fifth marriage was to a man 18 years her junior whom she married "not for love

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457. See *supra* text accompanying note 320.

458. See *supra* text accompanying notes 341-49.

459. See *supra* text accompanying note 341.

460. Williams, *supra* note 342.

461. Day Seven of Trial, *supra* note 326.

462. *Id.*

but for money. . . . It shows she knew how to survive."<sup>463</sup> Eshkenazi, like Brown, testified: "We don't see any of the symptoms [of a battered woman] here."<sup>464</sup> Sylvia's lawyer, Farley, did suggest on cross that Eshkenazi "did not understand the syndrome," noting that Eshkenazi had testified that "a woman who fights back against her abuser or calls the police does not suffer from the syndrome" and that "[s]uch views are at odds with Dutton's testimony."<sup>465</sup> The judge asked "Eshkenazi if a woman could be the victim of domestic violence, but not a battered woman."<sup>466</sup> Eshkenazi responded: "If the woman has the inner strength to walk out, there is no Battered Woman's Syndrome."<sup>467</sup>

Eshkenazi's testimony is as troubling as Valerie Brown's. Given Sylvia's abuse by her father and her marriage at fourteen to get away from him,<sup>468</sup> it seems most unlikely that "any mental problems she has now are the result of shooting her husband and were not present when she fired the gun."<sup>469</sup> Indeed, it is difficult to imagine how a psychiatrist could *know* from interviewing someone twice that any existing problems were related to one specific event.

The inaccuracy of Eshkenazi's narrow definition of battered women has already been discussed above in critiquing Brown's testimony. Like Brown's, Eshkenazi's narrow definition is not only inconsistent with what we know empirically about battered women, it is also, again like Brown's, consistent with stereotypes of battered women, suggesting that neither of them have any expertise at all. His testimony, as well as that of Brown, is consistent with the cognitive biases which tend to accompany the categorization of people into groups, as discussed in Section III.<sup>470</sup>

Eshkenazi makes two other outrageous statements in the testimony quoted above. He regarded Sylvia's "five previous marriages" as evidence that "she knew how to extricate herself from a relationship if necessary."<sup>471</sup> And, he pointed out that "her fifth marriage was to a man 18 years her junior whom she married 'not for love but for money.' It shows she knew how to survive."<sup>472</sup> But, the fact that Sylvia had gone through five divorces can hardly

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463. Williams, *supra* note 342.

464. Day Seven of Trial, *supra* note 326.

465. *Id.*

466. *Id.*

467. *Id.*

468. See *supra* text accompanying note 139.

469. See *supra* text accompanying note 341.

470. See *supra* text accompanying notes 29-48.

471. Day Seven of Trial, *supra* note 326.

472. Williams, *supra* note 342.

indicate she knew how to extricate herself from any and all relationships, no matter how dangerous or violent, and regardless of how strong the emotional bond. Relationships are not fungible goods, with each in a person's life — whether at fourteen or fifty-seven — equivalent to every other. Nor can the fact that she obviously knew how to survive until fifty-seven prove anything about whether, after twenty-eight years of involvement with John Flynn and psychological as well as physical abuse throughout that period, she could escape from *him*.

Dr. Azariah Eshkenazi appears to be a well-known expert witness — indeed, a professional expert witness — in all kinds of litigation in the New York area.<sup>473</sup> In light of his testimony, it

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473. See, e.g., Nat'l Ass'n State Jury Verdict Publishers, *Expert Witness Directory*, available at <http://www.juryverdicts.com/experts/es1.html> (last visited July 19, 2001) (listing Dr. Azariah Eshkenazi as expert psychiatrist). For cases he has testified in, see, for example, Louis F. Albanese, Rel. No. 34-39280 (S.E.C. Oct. 27, 1997) (opinion), available at <http://www.sec.gov/litigation/opinions/3439280.txt> (last visited July 19, 2001) (in employee challenge to disciplinary action by employer New York Stock Exchange, Eshkenazi testified for the employer regarding employee's ability to participate in an on-the-record interview; if employee had panic attack, there could be a short break in testimony); Human Res. Admin. v. Farber, OATH Index No. 1664/00 (Dec. 7, 2000), available at <http://www.nyc.gov/html/oath/html/dec/00-1664.html> (last visited July 19, 2001) (in disability action in which employee seeks to return to work, Eshkenazi testified for the employer that the employee was not sufficiently recovered from migraine headaches to return to work); Dep't of Fin. v. Serra, OATH Index No. 583/01 (Nov. 14, 2000), available at <http://www.nyc.gov/html/oath/html/dec/01-583.html> (last visited July 19, 2001) (in disability action brought by employer, Eshkenazi was hired to evaluate employee); Dep't of Parks & Rec. v. O'Connell, OATH Index No. 1769/97 (Oct. 14, 1997), available at <http://www.nyc.gov/html/oath/html/dec/97-1769.html> (last visited July 19, 2001) (in disability case brought by employer, Eshkenazi testified that employee lacked ability to return to work because of antipsychotic drugs usage); John Cichowski, *Vreeland Depicted as Rational Killer; Doctor Says Drugs Sharpened His Mind*, RECORD, Dec. 16, 1999, at L1 (Eshkenazi testifies for the prosecution in a murder case in which the defense presented an expert who testified that an overdose of barbiturates had impaired the defendant's ability to understand what he was doing when he shot two pizza delivery men; according to Eshkenazi, the drugs would only have alleviated the defendant's pain and helped him "focus on what he was doing"); Timothy Clifford, *Psychiatrist Sees Joel Steinberg for Prosecution*, NEWSDAY, Jan. 12, 1989, at 6 (reporting that Eshkenazi evaluated Joel Steinberg for the prosecution after the death of Lisa, aged six, from massive brain injury); *Failure to Help Prevent Wife's Deportation Is Factor Against Father Getting Custody*, N.Y. L.J., Aug. 8, 2000, at 21 (Eshkenazi testifies as Court-appointed mental health expert in custody case); *Finding of No Disability for Chronic Fatigue Is Not Supported by Medical Record*, N.Y. L.J., Oct. 27, 1999, at 25 (in a disability case, Eshkenazi testifies as to the plaintiff's mental status; not clear whether Eshkenazi was plaintiff or defendant's expert); William K. Heine, *Monmouth Caption*, ASBURY PARK PRESS, Sept. 22, 1995, § B, at 1 (lawyer argues that defendant, supposedly a battered woman who had killed her abuser, did not have effective assistance of counsel; in support, lawyer notes that Eshkenazi had examined the defendant prior to trial "and had 'insight into her personality disorder that would have assisted in her defense'"); Colleen Mancino, *Doctor Disputes Mental Illness; Contends Jeffrey Not Schizophrenic*, RECORD, Dec. 8, 1995, at N01 (in trial of murder, defendant Eshkenazi testified for prosecution that the defendant was not a schizophrenic and did not operate "under a haze of mental confusion"); *Penal Law Reduction of Murder Conviction*, N.Y. L.J., Apr. 23, 1992,

seems unlikely that he has any significant training or experience in domestic violence issues. He is clearly unfamiliar with the literature in the area.

The problem of experts who may have some psychiatric or psychological expertise but who know nothing beyond stereotypes about battered women is likely to be an increasingly serious one in the future. Every court that has considered whether the prosecution can examine such an expert in a case in which the defendant is introducing an expert on battered women has concluded that it may.<sup>474</sup> In future prosecutions of battered women, prosecutors are increasingly likely to call their own experts, and have every incentive to call someone with some training in psychiatry or psychology but without any real knowledge about domestic violence and its effects.

When juries hear two hired guns who testify as experts, one hired by each side, they may disregard both or believe the one they find more likeable.<sup>475</sup> Or jurors may tend to believe the expert

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at 21 (in trial of a man for killing his wife, Eshkenazi testified for the prosecution that the defendant was not a schizophrenic); *Post-Traumatic Stress Disorder Testimony Is Not Precluded by Court in Jones Act Suit*, N.Y. L.J., Dec. 4, 2000, at 21 (Eshkenazi was an expert witness for the plaintiff in a maritime case involving a the plaintiff's injury at work); *Retarded Woman Won't Stand Trial in Child's Death*, LEGAL INTELLIGENCER, Aug. 5, 1994, at 6 (Eshkenazi evaluated the defendant, about to be tried for the death a child for whom she was baby sitting, and testified that she was incompetent to stand trial since she had the mental ability of a seven year old and an IQ between 40 and 50); *Upward Departure Application Is Granted; Court Cites Dangerous Weapons, Risk of Death*, N.Y. L.J., Feb. 28, 2001, at 17 (Eshkenazi gave defendant, convicted of illegal possession of firearms, a psychiatric examination prior to sentencing); Carol Gorga Williams, *Murder Trial has Experts Battling*, ASBURY PARK PRESS, Sept. 18, 1997, § B, at 1 (in trial of man for murdering his girl friend, Eshkenazi testified for the defense that defendant suffered from obsessive-compulsive disorder and that the defendant had been upset).

474. See, e.g., *Florida v. Hickson*, 630 So.2d 172 (1993) (holding that defendant on trial for killing her abuser must submit to evaluation by adverse expert when she intends to present expert testimony on battered-spouse syndrome); *Kansas v. Stewart*, 763 P.2d 572 (1988) (in appeal on another issue, court refers to state's expert on battered women); *Montana v. Hess*, 828 P.2d 382 (1992) (holding that state has the right to have its expert(s) evaluate battered woman on trial for murdering abuser when she is presenting expert on battered woman syndrome); *New Hampshire v. Briand*, 547 A.2d 235 (1988) (holding that state has the right to an adverse expert on battered woman syndrome); *Bechtel v. Oklahoma*, 840 P.2d 1 (1992) (remanding for a new trial where defendant will be able to present an expert on battered woman syndrome, but noting the State also can present an expert on this issue); *Ortiz v. Texas*, 834 S.W.2d 343 (1992) (at punishment phase, state's expert testified that the defendant was not a battered woman); *New York v. Rossakis*, 605 N.Y.S.2d 825 (N.Y. Crim. Ct. 1993) (holding that battered woman on trial for killing her abuser must submit to examination by the State's expert).

475. See James M. Doyle, *Applying Lawyers' Expertise to Scientific Experts: Some Thoughts about Trial Court Analysis of the Prejudicial Effects of Admitting and Excluding Expert Scientific Testimony*, 25 WM. & MARY L. REV. 619, 641 (1984); Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 253 (1986); see also SAUL M.



whose testimony is most consistent with their own beliefs. Thus, allowing a Brown or an Eshkenazi to testify will often be tantamount to conducting Sylvia's defense without the testimony of Dutton. Indeed, in Sylvia's case, after deliberations began, the jury asked to hear, not the evidence of either Dutton or Eshkenazi, both of whom had conducted clinical interviews of Sylvia, but only the evidence of Valerie Brown, who never conducted a clinical interview of Sylvia.

Of the three witnesses who testified about whether Sylvia was or was not a battered woman, only one — Dutton, who testified for Sylvia — seems to have any actual expertise in the area. Dutton is a Professional Lecturer of Law at the National Law Center of George Washington University and has written extensively about battered women and their experiences.<sup>476</sup> Yet, for that very reason, the prosecutor suggested that she was an extremist who had written "feminist" articles on the subject.<sup>477</sup>

In both Sylvia's trial and our Clemency client Janice, the prosecution used the word "feminist" to undermine the defense, though it is mostly feminists, men as well as women, who are knowledgeable about domestic violence. I suggest, therefore, a rule forbidding the use of the word "feminist" by prosecutors to

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KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 85-86 (1988) (discussing possible effects of expert testimony on the reliability of eyewitness accounts, noting that conflicting evidence from hired experts may reflect "little more than experts' willingness to say almost anything for the right price," and that duels between experts can "deteriorate[] into a popularity contest," leaving the jury confused and misinformed).

476. See Lauren Bennett et al., *Risk Assessment Among Batterers Arrested for Domestic Assault: The Salience of Psychological Abuse*, 6 VIOLENCE AGAINST WOMEN 1190 (2000); Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999); Mary Ann Dutton, *Multidimensional Assessment of Woman Battering: Commentary on Smith, Smith, and Earp*, 23 PSYCHOL. WOMEN Q. 195 (1999); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Lisa A. Goodman et al., *Episodically Homeless Women with Serious Mental Illness: Prevalence of Physical and Sexual Assault*, 65 AM. J. ORTHOPSYCHIATRY 468 (1995); Lisa A. Goodman et al., *Predicting Repeat Abuse Among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System*, 15 J. INTERPERSONAL VIOLENCE 63 (2000); Philanda Smith Hutchings & Mary Ann Dutton, *Sexual Assault History in a Community Mental Health Center Clinical Population*, 29 COMMUNITY MENTAL HEALTH J. 59 (1993); Mary Ann Dutton, *Sexuality in Close Relationships by Kathleen McKinnney and Susan Sprecher*, 26 SEX ROLES 533 (1992) (book review); Mary Ann Dutton, *Impact of Evidence Concerning Battering and Its Effects in Criminal Trials Involving Battered Women* (1994), available at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Impact/> (last visited Oct. 20, 2001); Malcom Gordon, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women* (1994), available at <http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Valid> (last visited Oct. 20, 2001).

477. See *supra* text accompanying note 323.

undermine the credibility of the defendant's expert, counsel, or any other person, in cases involving battered women who have killed.

In addition, as we enter an era in which it is increasingly likely that in battered women's defense cases, the prosecution as well as the defense will call an expert to testify on battered women, it is of critical importance that standards be developed that require real expertise in the area. Indeed, such standards are necessary to handle the testimony of those who, like Valerie Brown, work in the domestic violence response system yet know little about the effects of domestic violence. It cannot be assumed that everyone with some psychiatric or psychological training is qualified to testify about the experiences of battered women.

Jurisdictions vary with respect to the precise standard for when a witness can testify as an expert on an issue such as the effects of domestic violence, but most are similar to the federal standard.<sup>478</sup> Under Federal Rule of Evidence 702, a witness can qualify "as an expert by knowledge, skill, experience, training, or education."<sup>479</sup> A great deal of discretion is vested in the trial court in determining whether a specific person is qualified as an expert on a particular issue, but appellate review is available for abuse of discretion.<sup>480</sup> At both the federal and the state level, however, the decisions applying this standard — tend to be *ad hoc* and difficult to reconcile.<sup>481</sup>

Two changes are possible responses to the problem of experts who know nothing. One would be to allow only the defense, not the prosecution, to introduce expert testimony on Battered Woman Syndrome or the experiences of battered women.<sup>482</sup> The defense needs to introduce such testimony to counter the biases, stereotypes, and cultural scripts of the judge and jury, who are likely to believe that all battered women are passive and wholly dependent on their

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478. JANE CAMPBELL MORIARTY, *PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS* §2:6 (2001).

479. FED. R. EVID. 702 (giving language of 702 as amended in December of 2001). The December 2001 amendment to 702 did not change the language quoted in text. See MORIARTY, *supra* note 478, at § 2:3.

480. MORIARTY, *supra* note 478, at § 2:4.

481. *Id.* at §§ 2:5, 2:6; see also *People v. Gallegos*, 644 P.2d 920 (Colo. 1982) (allowing police officer to testify on psychological state of victim during her testimony). Compare *United States v. Zink*, 612 F.2d 511, 514 (10th Cir. 1980) (affirming trial court's decision to allow physician to testify on psychological issues), with *United States v. Crosby*, 713 F.2d 1066 (5th Cir. 1983), *cert. denied*, 464 U.S. 1001 (1983) (allowing osteopath without board certification in psychiatry to testify on psychiatric issue while disallowing defendant's proffered expert, a counselor at a Veteran's Center who would have testified about posttraumatic stress disorder, even though many Vietnam veterans suffer from that condition).

482. For an article describing the differences between an expert on battered women's syndrome and one on battered women's experiences, see Dutton, *supra* note 422.

abusers, that women who complain about male abuse are likely lying, and that if the abuse had been as bad as she now claims, she would have left long ago. The prosecution has no similar need. Instead, stereotypes, biases, and cultural scripts automatically and unfairly skew deliberations in favor of the prosecution when a battered woman is on trial.<sup>483</sup> One solution — the solution I propose — is to allow *only* the battered woman (when she is the defendant in a prosecution for murder or attempted murder of her abuser) to present an expert on battered women's syndrome or experiences. That expert should, of course, be someone with real expertise.

This approach is likely to be rejected because courts have generally given the prosecution in criminal cases rights parallel to those of the defendant regardless of whether there is a parallel need for such rights.<sup>484</sup> As a far less satisfactory alternative, I therefore propose that the prosecution be allowed to present an expert on battered women when the defendant presents such a witness, but the state's expert must be (like the defendant's) someone truly qualified, with real knowledge and experience in the field.

Thus far in this section I have discussed Sylvia's problems at trial as a result of the prosecution's arguments and experts. I now turn to the problems caused by her own lawyer.

### *B. Defense Counsel*

Sylvia's lawyer was certainly part of her problem. Although he recognized the need for an expert on battered women and obtained the assistance of Mary Ann Dutton,<sup>485</sup> someone with real expertise in the area, he seems to have blundered a number of times.

Sylvia's lawyer may have erred in presenting John as *only* a monster without showing any positive aspects to their relationship.<sup>486</sup> Such a presentation can undermine a battered woman's defense, since the jury is unable to understand why she stayed.

During a pre trial hearing in December of 1999, the judge gave Farley "a tongue-lashing . . . for turning over evidence to the prime-

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483. This is, of course, not necessarily true for all prosecutions. See, e.g., *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997) (allowing prosecution to call expert on battered women as part of its case-in-chief in a rape prosecution).

484. Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1987) (arguing that courts unthinkingly give the state rights that are parallel to those of the accused even when inappropriate).

485. See *supra* text accompanying notes 318-21.

486. Indeed, one of John's relatives testified that John was a "monster." See *supra* text accompanying notes 163-64.

time television show '20/20.'<sup>487</sup> Farley had given "20/20" "a cassette copy of the 911 call Sylvia Flynn made to Brick police before shooting her husband" and "a recording of an interview with Steven Hart, John Flynn's brother-in-law."<sup>488</sup>

On the third day of the trial, the judge "dressed down Flynn's attorney, William J. Farley, Jr., several times for being unprepared for witnesses and ignorant about court procedure."<sup>489</sup> Before "storming off the bench for an unscheduled recess," the judge snapped: "I have an evidence book if you'd like to borrow it, Mr. Farley."<sup>490</sup>

On the fifth day of the trial, the judge

[L]earned that over the weekend Farley had shown a videotape of the testimony of the prosecution's ballistic expert to Deforest in direct violation of the judge's sequestration order on witnesses. 'What am I supposed to do now?' [the judge] shouted. In the end, the judge prohibited Farley from engaging [Sylvia's] expert [Deforest] in a 'critique' of the state expert Rod Englert.<sup>491</sup>

Deforest was "a well-known forensic expert who worked for Los Angeles prosecutors during the O.J. Simpson trial" and had been "called primarily to undermine Englert's contention that John Flynn was seated and facing away from his wife when shot."<sup>492</sup>

Perhaps this tongue-lashing from the judge contributed to Farley's failure to elicit much evidence from the next witness, David Searce, Sylvia's son, who felt that he "basically said nothing,"<sup>493</sup> though he could have said more about John Flynn's abuse of his mother. Even Court TV commented on the inadequacy of the direct examination of David, noting that questions about Farley's handling of the case continued to arise.<sup>494</sup>

As indicated earlier, for most of the Clemency Project's clients, the major problem was their defense counsel. Sylvia Flynn's lawyer's shortcomings, including his failure to elicit valuable evidence from David Searce<sup>495</sup> and showing Sylvia's expert on crime

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487. Andrew Gannon, *Lawyer Rebuked for Giving "20/20" Show Audiotape*, ASBURY PARK PRESS, Dec. 17, 1999, at B2.

488. *Id.*

489. Day Three of Flynn Trial, *supra* note 138.

490. *Id.*

491. Day Five of Flynn Trial, *supra* note 142.

492. *Id.*

493. See *supra* notes 313-16 and accompanying text.

494. Day Five of Flynn Trial, *supra* note 142.

495. See *supra* notes 313-16 and accompanying text.

scenes a tape of the prosecution's expert,<sup>496</sup> may well have contributed to her thirty-year sentence.

This exemplifies another set of problems in an adversarial system in which decisions, such as the verdict of the jury and the sentence of the judge, can be influenced by countless emotional factors having nothing to do with the defendant's guilt or innocence. Judge Citta explained his harsh sentence (the harshest permitted given the jury verdict) in the following words: "This is a person, who even after being made aware of the potential consequences, chooses to do what she chooses to do.... In this circumstance, she chose to commit homicide."<sup>497</sup>

The judge appears to have believed (1) that Sylvia was not a truly battered woman; and (2) that Sylvia had boasted to Judith (John's cousin) that she could kill John because of his affair and "beat a conviction."<sup>498</sup> On the first point, recall that the judge asked "Eshkenazi if a woman could be the victim of domestic violence, but not a battered woman."<sup>499</sup> And Eshkenazi responded: "If the woman has the inner strength to walk out,...there is no Battered Woman's Syndrome."<sup>500</sup> The implication is that Sylvia had the inner strength to walk out and therefore did not have Battered Woman's Syndrome.

Perhaps this exchange helps us understand the judge's explanation of Sylvia's sentence. Had the only experts been people who, like Mary Ann Dutton, really knew something about abusive men and their victims, perhaps Sylvia would have had a better chance of a fair trial, i.e., one in which emotional biases on the part of decision makers were kept to a minimum. In the next section, I summarize the changes I have suggested at various points in this section, including the suggestion that experts on battered women be people with some knowledge in the area.

### VIII. SUMMARY OF REFORMS

In order to minimize the effect of emotional biases unfairly prejudicing the trials of battered women who have killed or injured their abusers, I suggest changes in a number of areas.

A pre-trial hearing should be held before a judge to determine whether there is significant evidence of physical abuse of the

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496. See *supra* text accompanying note 491.

497. See *supra* text accompanying notes 366-67.

498. See *supra* text accompanying note 247.

499. See *supra* text accompanying note 348.

500. See *supra* text accompanying note 349.

defendant at the hands of the deceased. If there is such evidence, the prosecutor should not be allowed to argue that the defendant is not a battered woman or that she was an equal partner in a bad situation.

The fact that a woman denied or minimized the abuse in the past should be inadmissible to show that there was in fact no abuse in the past.

The fact that a woman was angry at or jealous of her abuser should be inadmissible to show that she was not acting out of fear at the time she killed or injured (or hired someone to kill or injure) her abuser.

A woman's inadequacies as a mother or unwillingness or inability to mother should be inadmissible in her prosecution for murder or attempted murder of (or hiring someone to kill) an adult partner.

In the prosecution of a battered woman who has killed her abuser, if the prosecution argues that the defendant is not credible because her story of what happened at the time of the killing has changed over time, the jury should hear the following instruction:

*The fact that the defendant's story about the key events had varied over time may indicate, as the prosecution suggests, that she is lying. But in assessing this evidence, keep in mind that battered women often change their stories about such events over time because of psychological problems preventing clear recall or the need to deny or minimize abuse.*

Prosecutors should not be able to use the word "feminist" to undermine the credibility of a woman's claim to be a battered woman in a criminal trial or to undermine the credibility of any expert or witness.

In order to qualify as an expert on battered women's syndrome or experiences, it should be necessary that the witness be familiar with the literature on domestic violence and its effects on victims as well as with the literature on abusers and their characteristics.<sup>501</sup>

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501. For a similar suggestion in the context of psychological experts testifying on the reliability of eyewitness' accounts, see KASSIN & WRIGHTSMAN, *supra* note 475, at 86.

[C]ourts should set more stringent standards when it comes to qualifying as an expert. According to the rules, an individual is qualified "by knowledge, skill, experience, training, or education." In current practice, that standard is rather

When there has been a showing of significant evidence of physical abuse of the defendant at the hands of the deceased (at the pre-trial hearing described above), the defendant — but not the prosecution — should be allowed to introduce an expert to testify on battered women's syndrome or experiences.

As noted earlier, courts have tended to give prosecutors the same rights as those accorded defendants (no matter how inappropriate).<sup>502</sup> It is therefore most unlikely that this last suggestion will be adopted. As an inferior alternative, I therefore propose the following rule:

In a prosecution of an allegedly abused woman for murder of her alleged abuser, the prosecution has the right to have a qualified expert examine the defendant and testify about battered women if the defendant presents such an expert.

The changes suggested here have a much broader focus than the issues which have dominated the legal literature on fair trials for battered women who kill. Since expert evidence on battered women has been admissible, the legal literature has tended to address two issues: (1) the appropriate content of the expert witness testimony for the defense (e.g., should the expert testify on "battered women's syndrome" or "battered women's experiences")<sup>503</sup> and (2)

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loosely applied. Just as not all physicians are qualified to perform surgery, not all psychologists are experts on the topic of eyewitness testimony. At the very least, courts should demand that their experts be "actively engaged" through teaching, writing, or research.

*Id.* (footnotes omitted).

502. See *supra* note 484 and accompanying text.

503. See, e.g., Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L. J. 121 (1985) (noting that some experts have given courts the impression that all battered women are alike); Dutton, *supra* note 422, at 1197-1202 (1993); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) (considering whether the syndrome approach may be biased in favor of middle- and upper-income white women); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973 (1995) (arguing that experts should testify on the batterer's pattern of coercive control rather than battered woman syndrome or post traumatic stress disorder). Empirical studies suggest that it may make little difference whether the expert speaks of battered women's syndrome or experiences. See Regina A. Schuller & Patricia Hastings, *Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence*, 20 LAW & HUM. BEHAV. 167 (1996) (finding that mock jurors "rendered more lenient verdicts and provided more favorable evaluations of the defendant's claim of self defense in the presence [of either form] of expert testimony" for the defendant than when there was no such expert).

whether the immanence requirement of self defense should be expanded.<sup>504</sup>

I have argued that the problems battered women face are far broader. Many have to do with cognitive biases and cultural scripts which make battered women's stories seem unlikely or incredible, as discussed earlier.<sup>505</sup> My suggestions grow out of very limited experience: familiarity with the cases of a number of battered women who have killed as a result of my work for clients of the Illinois Clemency Project for Battered Women and reading in the area. I am not an expert on any aspect of criminal law and have no trial experience. I hope to provoke a broader discussion, particularly with those who have more expertise, on what sorts of changes might give battered women who kill a better chance of a fair trial.

### IX. CONCLUSION

As illustrated by Judge Posner's contribution to Bandes' collection of essays, *The Passions of Law*, there are a number of reasons why decision-makers in the legal system are likely to have difficulty judging battered women without bias. I have explored this problem in the context of battered women on trial for killing or injuring (or hiring someone to kill or injure) an abusive spouse, but many of these problems would exist regardless of the type of action, whether custody dispute or tort action. In particular, I have identified problems posed by cognitive biases (categorization accompanied by inaccurate stereotyping, the fundamental attribution error, our tendency to empathize more readily with those with power, and those whose stories seem credible because consistent with cultural scripts).

To illustrate the specific difficulties these biases can cause battered women, I have described some of the problems we saw while preparing clemency petitions for women in Illinois in the 1990s as well as the problems faced by Sylvia Flynn in a murder trial publicized by Court TV. Battered women are routinely perceived as wholly passive and dependent, consistent with the testimony of two "experts" in Flynn's case and with our tendency to stereotype and to see members of other categories as more different

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504. See, e.g., Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (arguing that most cases involve a face-to-face encounter and therefore there is no broad need to change the meaning of immanence as earlier authors had argued).

505. See *supra* notes 27-76 and accompanying text.



from our selves than they actually are. In actuality, battered women are a diverse group: some are economically independent others economically dependent, most are angry, most fight back verbally, many fight back physically, and many are jealous of batterers who use their infidelity to inflict (psychological) injury on their partners. Indeed, battered women tend to experience the emotions most of us would experience were we demeaned, degraded, and physically violated.

I have suggested three kinds of changes designed to improve the fairness of trials of battered women who have killed or injured abusive partners. First, I have suggested that more resources be devoted to public defenders, including adequate resources for investigations as well as reasonable case-loads. Second, I have suggested that a number of restrictions be placed on evidence admissible in such trials and on prosecutors' arguments, including a pre-trial hearing on whether substantial abuse occurred.

Finally, I have argued for two kinds of changes related to "experts" who study the effects of domestic violence or the experiences of battered women. First, that a person has some training in psychiatry or psychology is not enough to qualify as an expert on domestic violence. Second, prosecutors should not be able to use the word "feminist" to undermine the credibility of an expert (or anyone else in the prosecution of a battered woman). Prosecutors now can introduce their own expert when a defendant introduces an expert on battered women. The need for criteria is therefore of critical importance at this time.