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The Revictimization of Domestic Violence Victims

Angela de la Garza

I. Introduction

It is likely that there is not one whose life has not been affected by domestic violence in some form. If you are a female in the United States, it is statistically likely that you have been a direct victim of domestic violence.¹ If you are like me, you have not only been a victim of domestic violence, but you have been revictimized by the criminal justice system.² The term *revictimized* means a person is first the victim of a violent crime, then becomes a victim again of the criminal justice system when he or she is accused of being the initial aggressor in the event. To become revictimized is quite confounding. I believe women are totally blindsided by becoming revictimized because of the culture we are raised in. In suburban society we are raised to believe that males should always treat females with respect and honor, that it is wrong for a male to physically or mentally hurt a female, that our criminal justice system empathizes with the truth, and that when a man knowingly and willingly hurts a woman, the criminal justice system will provide her protection and justice. Sadly, these ideals are not reflected in reality.

Domestic violence is an epidemic that infects every culture in the world. This infectious disease does not concern itself with race, religion, or socioeconomic status. Just as fascinating is the manner in which each country and culture handles this disease. In my research both national and international, I have stumbled upon some very creative laws and very interesting policies. Sadly, no country has yet found the cure for the disease.

1. *Statistics*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (last visited Nov. 23, 2020).

2. From 2014 to 2015, I was in an abusive relationship and a victim of domestic violence. Because I acted in self-defense during an attack, I became revictimized by the criminal justice system. By revictimized I mean first I was the victim of a violent crime, then second became the victim of the criminal justice system when I was accused of being the initial aggressor in the event. At that time, I could not understand how the criminal justice system could find me an aggressor. Determined to get to the bottom of this, I chose to study law at The University of Denver Sturm College of Law. It turns out this situation is common for victims who act in self-defense. This article is a product of my research and my experience.

An example of a problematic policy is one found in our very own United States. This was announced within an immigration reform decision on June 11, 2018, by Attorney General Jefferson Sessions.³ On that date he announced a major reorganization in the United States' immigration asylum policy. The new policy change was to exclude victims of domestic violence and gang violence from the social groups that meet the asylum standard. The explanation for this change was that domestic violence and gang violence are both forms of *private* crime. Private crime differs from public crime in that the only witnesses are the private parties involved, making it difficult to prove. One point that seemed paradoxical was when Sessions proclaimed, "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required."⁴ The Attorney General is most definitely correct in stating that no country provides its citizens with complete security from private criminal activity, but is he correct in stating that perfect protection is not required?

A. *Equal Protection*

The Fourteenth Amendment of the United States Constitution states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*⁵

The latter portion of Section 1 of the Fourteenth Amendment is referred to as the Equal Protection Clause. If you are a United States citizen, you are under the hypothetical umbrella of equal protection of the laws and are not to be denied that right.

Let us keep equal protection of the law in mind when remembering Jeff Sessions' comment about perfect protection. Yes, the words, equal and perfect are very different in meaning, and are not interchangeable. My argument here is not that they are one in the same. Rather, my argument is, considering the language of the Constitution which grants each

3. Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

4. *Id.*

5. U.S. CONST. amend. XIV, § 1 (emphasis added).

American citizen equal protection of the law, perfect protection should not only be required, but also be our standard.

The Equal Protection Clause, “*nor deny* to any person within its jurisdiction the *equal protection* of the laws,”⁶ provides that each citizen of the United States shall not be denied equal protection. If this is the case, how are we not perfect in our protection from private crime? I cannot help but speculate at the possibility that some of us are being denied equal protection of the law. My suspicion is founded in current statistics. The statistics I am referring to are as follows:

One in three women have been a victim of physical brutality by an intimate partner in the United States.⁷ One in four women and one in seven men have been victims of severe physical violence (e.g. beating, burning, strangling) by an intimate partner in their lifetime.⁸ Intimate partner crimes account for fifteen percent of *violent crime* in the United States.⁹ “On average, nearly twenty people per minute are physically abused by an intimate partner in the United States. During one year, this equates to more than ten million women and men.”¹⁰ Domestic violence is the greatest cause of *injury* to women.¹¹ The number of women *killed* in the United States by an intimate partner is double the number of soldiers killed in the Afghanistan war in the same eleven-year period.¹² This article is named, “The Revictimization of Domestic Violence Victims.” I define revictimization as when a female victim of domestic violence calls upon the equal protection of the law and, as a result, is herself accused of domestic violence by the criminal justice system, making her a victim once again.

B. Revictimization

The first part of this article will be a review of definitions the criminal justice system has adopted to assist in its prosecution of domestic violence, and how these definitions have led to the revictimization of domestic violence victims. The second part of this article will explain the three

6. U.S. CONST. amend. XIV, § 1 (emphasis added).

7. Jennifer O’Neill, *Domestic Violence Statistics: The Horrific Reality*, GOOD HOUSEKEEPING (Feb. 24, 2016), <https://www.goodhousekeeping.com/life/relationships/a37005/statistics-about-domestic-violence/>.

8. *Statistics*, *supra* note 1.

9. *Id.*

10. *Id.*

11. O’Neill, *supra* note 7.

12. *Id.*

major actors of the criminal justice system, and how each specifically enhances revictimization of domestic violence victims.

II. Definitions and Their Revictimizing Abilities

In the next part of this article, I will demonstrate how decontextualization and gender discrimination toward women who defend themselves warps the criminal justice system's prosecution of violent acts. Additionally, it has made it so that non-conforming women who are not "victim enough"¹³ are not permitted to exercise their legal right to self-defend, therefore they are denied the constitutional right to equal protection of the law.

A. History of Domestic Violence

Is domestic violence considered criminal or civil? Logically any phrase with the word "violence" in its title would fall under the umbrella of criminal law because a violent act toward another is both an intentional and a criminal act. Surprisingly, it is not so for many cases of domestic violence. Domestic violence, in its beginning, was processed in the civil family law courtroom.¹⁴ It is important to note, civil court places the focus on the relationship (or the contract) in question, and its reconcilability. It was originally due to the belief that domestic violence only took place between married couples (intimates), in the privacy of their homes. The "privacy of their homes" made it difficult to provide evidence because the only witness to the crime were the parties involved. In 1985 this stance was changed within many jurisdictions with the removal of the marital exemption law.¹⁵ Previously, the marital exemption law provided an exemption to husbands as perpetrators of rape upon their own wives.¹⁶ As a result of this change, domestic violence found its way into the criminal courtroom, but only in certain circumstances. Those certain circumstances are ambiguous, undefined, and problematic.

Adding criminal consequences to domestic violence also added the responsibility of law enforcement to assess and issue charges correctly.

13. See generally Bennett Capers, *On Violence Against Women*, 13 OHIO ST. J. CRIM. L. 347, 359–61 (2016).

14. Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 1–26 (2013) (discussing how and why views of domestic violence changed from sympathy to apathy).

15. *Warren v. State*, 336 S.E.2d 221 (Ga. 1985).

16. See *id.*

The psychological components and established patterns found in domestic violence cases are what created uncertainty in correctly assessing criminal charges. More than helping, this change created a blurred line. Civil court uses the pattern of domestic violence within the relationship. In addition, civil court prioritizes the reconcilability of the relationship/contract, rather than making restitution for criminal acts. In civil court the pattern of violence of the perpetrator is used to support the degree of irreconcilability of the contract.

Adjudication of domestic violence can take place in either courtroom—criminal, civil, or both. Determination of which court (or courts) the case will be processed in also depends upon if it is a case between intimates or strangers. Colorado Law establishes the intimate relationship as follows:

Colo. Rev. Stat. § 14-10-124(1.3)(a)–(b) (2018) (a) ‘Domestic violence’ means an act of violence or a threatened act of violence upon a person with whom the *actor is or has been involved in an intimate relationship*, and may include any act or threatened act against a person or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship. (b) ‘*Intimate relationship*’ means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both parents of the same child regardless of whether the persons have been married or have lived together at any time.”¹⁷

Where there is no intimate relationship between the alleged perpetrator and the victim, they can be considered strangers. Tuerkheimer states,

Here it is sufficient to observe that criminal law’s failure to recognize patterns of power and control is compounded by the evidentiary prohibition on proof of “character” or disposition. Structured to remedy paradigmatic violence between strangers, law negates context.¹⁸

17. COLO. REV. STAT. § 14-10-124(1.3)(a)–(b) (2018) (“(a) ‘Domestic violence’ means an act of violence or a threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship, and may include any act or threatened act against a person or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship. (b) ‘Intimate relationship’ means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both parents of the same child regardless of whether the persons have been married or have lived together at any time.”).

18. Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1031, 973 (2004).

It is necessary to determine the strangers versus intimates question as the dynamics of domestic violence cases are more complex than other types of violence cases. The word *domestic* in the phrase *domestic violence* indicates it is a case between two intimate parties, rather than strangers. The same actions might constitute a case of sexual assault, assault, or battery when the parties are strangers. The intimacy between the two actors is what adds a dynamic that changes how and where the case will be processed. The intimate relationship indicates there could be none or all of the following involved: a pattern of violence, a history of battery, protection orders, a marriage contract, a common law marriage, children in common, etc. These possibilities have to be taken into consideration when strategizing how and where to process a domestic violence case.

Contract or no contract, each state uses its own regulations in deciding how domestic violence will be prosecuted, but the regulations can also be very ambiguous. For example, Colorado law states:

The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in *some* situations in prosecuting crimes involving domestic violence.¹⁹

The italicized word *some* in that statute obviously presents a question and lends ambiguity to domestic violence prosecution.

Because a domestic violence case can go to criminal, civil, or both courts, the word *some* should be minimally relied upon. Prosecuted as a crime, the pattern of abuse upon the same victim ought to be permitted but, unfortunately, this is not the standard procedure. There are several factors which influence the admission of evidence in a criminal domestic violence case. One possibility is the use of Rule 404 as a defense by opposing counsel. Colorado Rule of Evidence 404(a) states: "Evidence of a person's character or trait of his character is not admissible for the purpose of

19. COLO. REV. STAT. § 18-6-801.5 (2018) (emphasis added) ("Domestic violence—evidence of similar transactions. (1) The general assembly hereby finds that domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness. The general assembly therefore declares that evidence of similar transactions can be helpful and is necessary in some situations in prosecuting crimes involving domestic violence. (2) In criminal prosecutions involving domestic violence in which the defendant and the victim named in the information have engaged in an intimate relationship as of the time alleged in the information, evidence of any other acts of domestic violence between the defendant and the victim named in the information, and between the defendant and other persons, constitute other acts or transactions for the purposes of this section, and the court may authorize the admission of evidence as provided in subsection (3) of this section.")

proving that he acted in conformity therewith on a particular occasion.”²⁰ Though there are situations where character evidence may be permitted, the guidelines to do so make it quite challenging. As it stands, the use of the pattern of abuse in a criminal court is limited.²¹

Now that I have reviewed that domestic violence is adjudicated in both civil and criminal court, from this point forward I will reference domestic violence as it exists in criminal court.

B. Decontextualization

Rather than prosecuting criminal domestic violence cases as an event that is part of a cycle, the criminal justice system removes the history of battery and prosecutes individual, isolated events.²² This is demonstrated in the Delagarza case.²³ As a result, what we see in the criminal prosecution of domestic violence is law enforcement, judges, and legal counsel processing the evidence of one isolated event in time.

Legal scholar Deborah Tuerkheimer refers to the removal of the history of battery in criminal domestic violence cases as decontextualization.²⁴ Because the criminal justice system does not permit the cycle of violence to be used in establishing character evidence, the victim and the perpetrator cannot always be recognized.

As you can imagine, when context is removed from any story, one is left to rely upon the available evidence to guess the beginning, middle, and

20. COLO. R. EVID. 404(a).

21. COLO. R. EVID. 404(b) (“Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.” An example of this would be if the accused voluntarily answered a question with character evidence in the response, such as, “I did not choke her, I am not a violent person.” Offering, “I am not a violent person” opens the door to questioning.)

22. *See, e.g.*, COLO. R. EVID. 404(a) (“(a) Character evidence generally. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. In a criminal case, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim’s character for aggressiveness or violence is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; (2) Character of alleged victim. In a criminal case, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor”)

23. Transcript of Record at 18, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015).

24. Tuerkheimer, *supra* note 18, at 960.

end. Tuerkheimer notes, “[t]he incident-focused criminal law contemplates an act or omission . . . taking place in an instant of time so precise that it can be associated with a particular mental state or intention.”²⁵ Tuerkheimer’s article is a call to criminalize domestic violence in general. She and I agree: “Domestic violence should be criminalized to capture its nature and its harm. Bringing law into alignment with social reality requires a statutory definition of battering that encompasses a course of conduct characterized by power and control.”²⁶ She considers the criminal court approach of not permitting character evidence into the courtroom as “systemic blindness.”²⁷ It is human nature to use *judgement* to make guesses. Mathematician and Author Jordan Ellenberg explains it this way,

If you swing a rock in a loop around your head and suddenly release it, it’ll shoot off along a linear trajectory at constant speed, exactly in the direction that calculus says the rock is moving at the precise moment you let go. That’s yet another Newtonian insight; objects in motion tend to proceed in a straight-line path, unless some other force intercedes to nudge the object one way or the other. That’s one reason linear thinking comes so naturally to us: our intuition about time and motion is formed by the phenomena we observe in the world.²⁸

We naturally rely on what we’ve experienced and what we know. Therefore, removing character evidence risks blinding jurors. Juror blindness leads to inaccurate conclusions about both aggressor and victim, especially when the female victim is not a “typical” victim.²⁹ For this reason, permitting jurors knowledge of character evidence should not be as restricted as in other types of criminal cases.

25. *Id.* at 972 (quoting Gerald E. Lynch, *Rico: The Crime of Being a Criminal*, 87 COLUM. L. REV. 927, 932 (1987)).

26. *Id.* at 1019.

27. *See id.* at 972–73, 1019–22.

28. JORDAN ELLENBERG, HOW NOT TO BE WRONG: THE POWER OF MATHEMATICAL THINKING 40-41.

29. The “typical” and “non-typical” victims are described in depth in the pages to follow, but for clarification here I mean typically a victim is thought of as a person who has not used force in self-defense. Once a person has responded to an attack with his or her own violence, he or she is no longer typical. An example of a typical victim is a person who accepts the abuse of an abuser without fighting back. An example of a non-typical victim is a person who responds to the abuse with their own violence, even if it is only to escape and preserve their life.

C. The Perfect Victim

The chaos decontextualization creates is a second opportunity to wrong the victim. I say this because statistics have proven, and my research has revealed, that the criminal justice system is absolutely confounded when it comes to how to correctly understand women who did not “correctly” gender perform—meaning, they fought back.³⁰ Legal scholars Lisa Young Larance and Susan C. Miller state, “But, in cases involving women who have used force, decontextualized intervention can be an experience of revictimization.”³¹ The term *gender perform* means how one enacts his or her gender based on society’s assigned norms per gender.³² Gender communication scholar Julia T. Wood notes, “We are born male or female (sex), but we learn to act in masculine and/or feminine ways (gender). Gender, which is sometimes called gender role, involves outward expressions of what society considers masculine or feminine. We demonstrate gender role by how we speak, dress, style our hair, and so forth.”³³ She goes on to state, “Roles are assigned to individuals by their society as a whole. Thus, for each of us there are certain roles that society expects us to fulfill because of society’s definition of us.”³⁴ “Not only does society assign roles, but it also assigns value to the roles. Competing and succeeding in work life and public affairs are primary roles assigned to men, and to those roles prestige is attached.”³⁵ An example of a correct female gender performance is a female ballerina. In contrast, when a female is a hockey player it creates a cognitive dissonance in the minds of our society. Women behave “correctly” when they behave femininely.

Wood uses cognitive development theory to establish how humans and societies develop gender identity.³⁶ Wood’s theory notes that “children pick models to teach themselves competency in masculine or feminine behavior.”³⁷ Additionally, she uses gender schema theory, which states that “cognitive processes are central to our learning what gender means in

30. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

31. Lisa Young Larance & Susan L. Miller, *Finding the Middle Ground: Reimagining Responses to Women’s Use of Force*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 437, 441 (2015).

32. JULIA T. WOOD, *GENDERED LIVES: COMMUNICATION, GENDER AND CULTURE* 63 (10th ed. 2013).

33. *Id.* at 21.

34. *Id.* at 57.

35. *Id.* at 57–58.

36. *Id.* at 51.

37. *Id.*

our culture and to learning how to perform our gender competently.”³⁸ Both of these theories suggest strength is associated with being male.³⁹ Strength, both physical and mental, is assigned to men. Along with the assignment of the role is the assignment of its value.⁴⁰ Strong men are highly valued in our society, and opposite of this, strong women are devalued.⁴¹ Men as the strong gender are encouraged in our society to be leaders, and in contrast women as the “weak” gender are encouraged to support, care for, and respond to others.⁴² Women gain value in our society when they embody the following characteristics: nice, nurturing, and self-sacrificing.⁴³ This obviously is the less esteemed role.⁴⁴ Wood also notes that this can be “frustrating for those who are encouraged to conform to roles that are less esteemed.”⁴⁵ Unfortunately, women who naturally embody traditionally masculine characteristics often receive less esteem from society.

I am not stating that this is their choice; I am stating that, according to cognitive development theory, this is their nature. A woman who is a leader, is strong, and takes care of herself is not correctly gender performing in our society. Gender norms are unspoken and undocumented scripts, with general guidelines that have been established through tradition, much like international common and or customary law. Gender roles are so clearly communicated in our society, in fact, that studies show seventy-three percent of female athletes engage in what Jamie R. Abrams calls “apologetic behavior.”⁴⁶ Apologetic behavior is behavior that a person engages in to communicate an apology for not correctly conforming to their gender role.⁴⁷ Female athletes are naturally strong, independent, powerful, self-sufficient, and iconic. As they embody these incredible traits, they simultaneously feel the need to apologize for not being feminine enough for society. An example of apologetic behavior is when female athletes cultivate a “girlie appearance.”⁴⁸ In short, not all women gender perform “correctly.” Unfortunately, these are the women

38. *Id.* at 51–52.

39. *Id.* at 56.

40. *Id.* at 57.

41. *See generally id.* at 50, 56–58, 65.

42. *Id.* at 57–58.

43. *Id.* at 58.

44. *Id.*

45. *Id.*

46. Jamie R. Abrams, *The Feminist Case for Acknowledging Women’s Acts of Violence*, 27 *YALE J.L. & FEMINISM* 287, 327 (2016).

47. *Id.*

48. *Id.*

who risk becoming subject to inaccurate judgements when context is removed from their situations, especially in domestic violence situations. Here is where becoming revictimized by the criminal justice system becomes a slippery slope for female victims of domestic violence.

D. The White Norm Standard and the Perfect Victim

Elizabeth L. MacDowell's research has led to her definition of the *perfect victim* as a "white, middle-class, heterosexual woman who is passive and dependent."⁴⁹ In no way do I mean to diminish the extreme presence of race within this topic, but it is not the focus of this article, and will not therefore be heavily mentioned. Although, because race plays a large role in domestic violence, I will be forced to occasionally acknowledge its inescapable presence.

The criminal justice system typically provides access to services and remedies for abuse to those women who embody the battered woman identity.⁵⁰ Therefore, women who are credible victims of domestic violence have socially been given the following characteristics: "scared, helpless, meek, blameless, passive, submissive, weak and powerless."⁵¹ Due to decontextualization, correct gender performance is relied upon by the criminal justice system. These are the characteristics highly prized in the alleged victim. With the perfect victim picture in mind consider this thought, "Imagine a world in which the law protected all of us based on shared vulnerability, without regard to gender or age or class or beauty."⁵²

Legal scholar Leigh Goodmark adds a layer to these characteristics. She notes there are three acceptable characteristics of a victim of domestic violence: passive, middle-class white, and straight.⁵³ She adds, "They do not fight back."⁵⁴ The criminal justice system considers the middle-class white victim, outlined above in MacDowell's definition, as the definition of the *perfect victim*. Unfortunately, not all domestic violence victims fit that definition.⁵⁵ The combination of credible victim characteristics, plus belonging to the white middle class equals what is called the *white norm*. Goodmark refers to the research of Professor Shelby Moore when she

49. Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 543 (2013).

50. *Id.*

51. Goodmark, *supra* note 30, at 83 (internal quotation marks omitted).

52. Capers, *supra* note 13, at 359.

53. See Goodmark, *supra* note 30, at 82–92.

54. *Id.* at 83.

55. *Id.* at 91–92.

explains that the term *white norm* describes victimhood as tied closely to womanhood because a true woman is characterized as submissive, domestic, pious, pure, and white.⁵⁶ Alternatively it is referred to as gender essentialism, the theory of gender essentialism states a battered woman must be a particular type of victim to be credible.⁵⁷

Scholar Lenore Walker defined battered woman syndrome to further describe the perfect victim.⁵⁸ Women with this syndrome are continuously battered by the same batterer having a learned helplessness, and becoming unable to escape their batterer.⁵⁹

Learned helplessness is a phenomenon which was hypothesized and tested by American Psychologist Martin Seligman. Seligman used a dog in a cage to prove learned helplessness.⁶⁰ In his experiment, Seligman placed a dog in a cage and applied an electric shock to the dog.⁶¹ At first the dog attempted to get out of the cage, but after so many shocks and failed attempts to get out of the cage, the dog finally succumbed to his life of misery and did not attempt to escape.⁶² After some time, Seligman opened the cage door wide open and applied the electric shock once again.⁶³ Even with the door wide open, the dog did not attempt to escape; the dog had accepted his helplessness and chose to remain.⁶⁴ Battered woman syndrome uses Seligman's theory of learned helplessness and dependency, stating that women who are in abusive relationships succumb to their situation and choose to remain.⁶⁵ She is the perfect victim in the sight of the criminal justice system, therefore she is a woman who genuinely needs the protection of the law. A woman who fails to conform to this very specific gender performance will have an uphill battle with the criminal justice system.⁶⁶

56. *Id.* at 85–86.

57. *Id.* at 87.

58. Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws so Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154, 163 (2015).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 163–64.

63. *Id.*

64. *Id.*

65. *Id.* at 164.

66. *See generally* Goodmark, *supra* note 30.

E. Incorrect Gender Performance—the Victim who Fights Back

As mentioned before, not all women perform gender roles the same. The problem arises when a woman's gender role is not clear and/or differs depending on which part of the country she is in, her culture, her race, etc.⁶⁷ Women's susceptibility to domestic violence has historically been categorized based on race, ethnicities, religions, and socioeconomic brackets.⁶⁸ Though these beliefs have essentially changed, the uphill battle which I previously mentioned, consistently applies to those women who incorrectly gender perform in a domestic violence event. Specifically, a woman who fights back against her perpetrator is a woman who has failed in her gender performance. Fighting, or self-defending, does not conform to the white norm standard. The criminal justice system, having white norm expectations of battered women, cannot understand, and therefore improperly handles, women who fight back. As one scholar explained, "[S]tories not part of the common culture[] will . . . have difficulty being heard."⁶⁹ For women, fighting back in domestic violence cases reaps unexpected and unimaginable consequences.

The victim who fights back has exposed her refusal to be dominated and therefore is deemed not "'victim' enough."⁷⁰ As previously noted, strength is misunderstood and not commonly accepted by our society when it is found in women.⁷¹ Unfortunately, rather than receiving the protection that is rightfully hers, when a woman who does not meet the white norm standards calls for help, she receives something different from law enforcement and the criminal justice system as a whole.

We see an example of this is the 2007 domestic violence story of nine-year Denver police officer Steven Sandoval. Sandoval was fired for a charge of domestic violence.⁷² After consideration, John Criswell heard the case and reversed Sandoval's termination.⁷³ In the reversal hearing, Officer John Criswell stated of the alleged victim (Sandoval's wife), "Corina appears to have a reasonably strong, independent personality; she does not present a 'mousy' appearance in any senses of that word."⁷⁴ Here

67. See generally MacDowell, *supra* note 49.

68. See Goodmark, *supra* note 30, at 76–77, 85–89.

69. *Id.* at 115.

70. Capers, *supra* note 13, at 361.

71. See WOOD, *supra* note 32, at 50, 56–58, 65.

72. Christopher N. Osher, *Cop's Firing over Abuse Claim Reversed*, THE DENVER POST (Jun. 3, 2007), <https://www.denverpost.com/2007/06/03/cops-firing-over-abuse-claim-reversed/>.

73. *Id.*

74. *Id.*

it is made evident that the victim's appearance/performance caused her the loss of credibility as a victim. In response to this statement about the victim came this rebuke (paraphrased) from an advocate for battered women: "a woman's appearance has no bearing on whether or not she was abused."⁷⁵ In that same case, Executive Director of the Colorado Coalition of Domestic Violence Denise Washington stated, "What somebody looks like is not a predictor or indicator of whether they could be a potential victim of domestic violence."⁷⁶

In a similar case, Goodmark noted a judge told a female victim, "I bet you could really hurt a man."⁷⁷ This portrays the obvious communication in American society that if you are a non-conforming female victim of violence, i.e. you do not fit the white norm, you are discriminated against because of it. When judges apply this use of discrimination to non-conforming female victims, the question completely changes from providing legal protection of the law to a victim of crime, to credibility. In these judges' statements above, it is obvious the judges' focus was on deciding whether or not the woman was a credible victim, rather than if he/she should extend to her the constitutional right to equal protection from crime.⁷⁸ Can you see how it would be easy to become revictimized if you were a woman who fought back?

F. Self-Defense

Is it not human nature to respond to a physical attack with either fight or flight? Author Simon Sinek describes this human response as follows, "In the event of an actual threat, like police responding to an alarm, adrenaline is released into our bloodstream, giving us energy to get away or boosting our strength to face our foe."⁷⁹ Whether the danger is real or imagined, the stress we feel is real. Unlike our rational minds, our bodies do not try to assess what the danger is. We simply react to the chemicals flowing through our bloodstreams to prepare us for what might be lurking. Our Paleolithic brain does not care about understanding the threat. It just wants us to increase our chance of survival.⁸⁰ The Colorado Criminal Code states:

75. *Id.*

76. *Id.*

77. Goodmark, *supra* note 30, at 86.

78. U.S. CONST. amend. XIV, § 1.

79. SIMON SINEK, LEADERS EAT LAST: WHY SOME TEAMS PULL TOGETHER AND OTHERS DON'T 66-67 (2017).

80. *Id.* at 68.

[A] person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.⁸¹

This statute goes on to point out what self-defense is not when it states:

(3) Notwithstanding the provisions of subsection (1) of this section, a person is **not** justified in using physical force if:

....

(b) He or she is the **initial aggressor**; except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force.

....

(4) In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction. The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted recklessly, with extreme indifference, or in a criminally negligent manner. However, the self-defense law instruction shall not be an affirmative defense instruction and the prosecuting attorney shall not have the burden of disproving self-defense.⁸²

The Colorado self-defense statute is clear that the right to defend oneself is justified under the condition that one believes imminent harm is present. As noted previously, to defend oneself in the presence of imminent harm is a survival instinct, an instinct that can be perniciously destroyed as was demonstrated in Seligman's experiment, where the dog had learned helplessness. Reading the statute is easy; it is when human influence becomes involved that we find dissonance. Unfortunately, using self-defense as a woman often leads to revictimization.

81. COLO. REV. STAT. § 18-1-704(1) (2020).

82. *Id.* at § 18-1-704(3)–(4) (emphasis added).

1. Use of force by women

Abrams notes the findings of Abbe Smith's studies of incarcerated women when she notes, "It might also include victims who were wrongly arrested as perpetrators when they were not the primary aggressor. Or it might include women who were arrested under problematic 'failure to protect' laws, which disproportionately hold women accountable for 'harms they have neither created nor perpetrated.'"⁸³ Eighty-five to ninety percent of women in prison experienced violence prior to incarceration, as victims, not perpetrators.⁸⁴ Research shows women and men use force for different reasons. Goodmark describes women's use of force as follows:

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

Notice, when found in women, force is a reaction to a threat. As scholar Brandi L. Jackson noted, "Regardless of whether a woman in an abusive partnership decides to end the relationship, there may come a point when the abuser attacks her with enough force to threaten her life, forcing her to use deadly force to protect herself."⁸⁶ Considering such, it is easy to connect how, psychologically, women who fight back are in a state of survival. Another way to state that these women are reacting with self-defense is Goodmark's perspective of women who fight back when she states that "actively struggling against [] violence" is a woman's way of "hold[ing] on to her sense of self."⁸⁷ As noted before, our limbic brain encourages our will to live. Because a woman naturally possesses the will to live, she is doing what is instinctual to preserve her life. She is the dog being shocked but instead she is using force to get out of her situation. As such, women typically use force in self-defense.⁸⁸ A woman's use of force is distinctive in that it is often a survival response, which is many times legally justified.

83. Abrams, *supra* note 46, at 294.

84. *Id.*

85. Goodmark, *supra* note 30, at 92.

86. Jackson, *supra* note 58, at 154-55.

87. Goodmark, *supra* note 30, at 79.

88. Abrams, *supra* note 46, at 294 n.29.

2. Use of force by men

In contrast, Mary Anne Frank's research of the Marissa Alexander and Rico Gray case notes the testimony of the accused aggressor, Marissa Alexander.⁸⁹ Ms. Alexander was violently attacked by her child's father in their shared home while he was under the restriction of a protection order. "There, she says, Gray threatened her life. Alexander said she fired a shot into the ceiling as a way to scare Gray off."⁹⁰ During Gray's sworn deposition he admitted to being a habitual abuser of women, and also stated that he had told Ms. Alexander that if she ever cheated on him he would kill her.⁹¹ Men typically use force to dominate and control.⁹² Tuerkheimer notes that "[t]he batterer's desire to dominate his victim functions as the animating force behind his abusive behaviors."⁹³ Abrams notes the work of Shamita Das Dasgupta who states:

The research indicates that women who assault their heterosexual partners are distinct from men who engage in battering behaviors, as most of the women are victims of ongoing abuse. The consequences of women's violence differ as well—as perceptions of women's abusive behavior are fundamentally different than that of men's. For example, women tend to recognize such behavior as "a violation of their socially prescribed gender role and readily confess to their transgressions," whereas men tend to minimize violence against female partners and/or blame the victims.⁹⁴

Obviously, these are characteristics of a perpetrator. Scholar Sarah M. Buel noted, "[i]t is the perpetrator who employs terroristic conduct—physical, psychological, sexual, financial, and individualized abuse—to solidify control of his partner that is the batterer."⁹⁵ Motivation for use of force by men is dominance and control, in a domestic relationship context.

Regarding this type of use of force in his testimony before the Senate Judiciary Committee, actor Terry Crews explained the motivation of his abuser this way, ". . . but what he was effectively telling me while he held my genitals in his hand was that he held the power. That he was in

89. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1118 (2014).

90. *Id.* at 1112.

91. *Id.* at 1119.

92. Tuerkheimer, *supra* note 18, at 965.

93. *Id.*

94. Abrams, *supra* note 46, at 309 n.136.

95. Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 231 (2003).

control.”⁹⁶ In this specific attack, the abuser (male) was using violence and verbal threats as a coercion to exert power, induce fear, and essentially control another person. These are characteristics of male use of violence. This type of use of force is explained in the Colorado self-defense statute as not justified by the law and is therefore criminal.⁹⁷ Remember the Use of Force statute which defines for us what unjustified use of force is when it states, “Notwithstanding the provisions of subsection (1) of this section, a person is *not* justified in using physical force if: . . . (b) He [or she] is the *initial aggressor*.”⁹⁸ This type of violence is therefore not justified by law.

G. Recognizing Perpetrator or Victim?

Criminal Law uses what is called the mens rea element, or the guilty mind element. The mens rea requirement is that:

[T]he prosecution must prove not only that the defendant carried out certain acts but also that they had a certain mental state. This is often known as the “mens rea” (“guilty mind”) element, and it prevents people from being punished when their intentions were innocent. When a prosecutor is trying to prove intent or another mental state, they may present evidence showing that a defendant had a motive to commit the crime. Conversely, a defendant may try to defeat a charge by showing that they did not have a motive to commit the crime. However, having a motive is not a required element of a crime.⁹⁹

Intent in use of force distinguishes perpetrator from victim. Notice, the previously defined female use of force fits exactly into the Colorado statute of self-defense, which is justifiable by the law. Whereas the previously defined male use of force, on the other hand, fits exactly into the Colorado statute description of non-justifiable defense. The defined male use of defense most accurately fits into the description of assault.¹⁰⁰ To be clear, making use of force to self-defend in the presence of imminent bodily harm is legal and a constitutional right.¹⁰¹

As previously mentioned, the identity of the perpetrator and the victim must be determined upon law enforcement’s arrival at the individual

96. *U.S. S. Comm. on the Judiciary: Hearing on the Survivors’ Bill of Rights: Implementation and Next Steps Prepared Testimony of Terry Crews Actor and Advocate*, 114th Cong. (Jun. 26, 2018).

97. COLO. REV. STAT. § 18-1-704(3) (2020).

98. *Id.* (emphasis added).

99. *Mental State Requirement*, JUSTIA (May 2019), <https://www.justia.com/criminal/mental-state-requirement/>.

100. COLO. REV. STAT., *supra* note 98 (use of physical force in defense of a person).

101. *Id.*

domestic-violence event. Research indicates the use of gender discrimination is heavily relied upon when distinguishing between perpetrator and victim. To put gender discrimination into perspective, note how sexual assault (which is typically violence between strangers) is drastically different when gender discrimination is not a factor. Hollywood actor Terry Crews was sexually assaulted in 2016 by a successful Hollywood agent.¹⁰² Terry Crews is known for his successful NFL football career and his body-building physique. Crews wrote and published an autobiography in 2014 called, *Manhood: How to Be a Better Man—or Just Live with One*.¹⁰³ Crews obviously embodies masculinity and strength. In Terry Crews' 2018 testimony before the senate committee, he gave his account of being the victim of a sexual assault.¹⁰⁴ In this hearing, his physical appearance/gender was never questioned. Never did a senator state, "I bet you could really hurt a man,"¹⁰⁵ or "[H]e does not present a 'mousy' appearance in any senses of that word."¹⁰⁶ The reason that his strength was never questioned is because, as stated earlier, strength is assigned to males, and is also valued when embodied by males. This makes it evident that Terry Crews, though he does not conform to the stereotypical victim, does not share the uphill battle in establishing credibility as a victim in the way that self-defending women must establish credibility. His petition for equal protection of the law was honored.

I would like to continue with examples of when gender discrimination is removed from the picture. Let us take a look at how drastically different victims of domestic violence react to the criminal justice system and domestic violence when the responders are all female.¹⁰⁷ In India, domestic violence rates were so high, the United Nations established all-women police stations in 1971.¹⁰⁸ This was for the purpose of building trust with female victims of domestic violence.¹⁰⁹ Female police officers take the phone calls of the women reporting the crime.¹¹⁰ Female officers receive victims who come into the police station, making it drastically

102. U.S. S. Comm. on the Judiciary, *supra* note 97.

103. TERRY CREWS, *MANHOOD: HOW TO BE A BETTER MAN—OR JUST LIVE WITH ONE* (2014).

104. *Id.*

105. Goodmark, *supra* note 30, at 86.

106. Osher, *supra* note 72.

107. Preeti Jha, *Are India's All-Women Police Stations Helping To Combat Gender Violence?*, SCROLL.IN, (Feb. 5, 2018), <https://scroll.in/article/print/819369>.

108. M. Bastick et al., *Women's police stations/units*, UN WOMEN: VIRTUAL KNOWLEDGE CENTRE TO END VIOLENCE AGAINST WOMEN AND GIRLS, <http://www.endvawnow.org/en/articles/1093-womens-police-stations-units.html> (last updated Dec. 29, 2011),

109. Jha, *supra* note 107.

110. *Id.*

more comfortable for women to come forward.¹¹¹ Additionally, female police officers pursue the criminal, and provide the victim with a safe location in which to shelter, making the victim of the violence comfortable again.¹¹² Prior to this arrangement, women did not feel confident in reporting domestic violence. “Women are terrified of testifying,” said Kavita Krishnan, secretary of the All India Progressive Women’s Association. “They don’t feel comfortable coming forward because they are living among their attackers and police are standing with them.”¹¹³ Returning to the abuser or to society without protection could have dangerous consequences, resulting in the victim needing to call upon law enforcement again. For example, a student who had been sexually assaulted 5 years prior in Haryanathe was raped for reporting the crime.¹¹⁴ At the all-women police stations, women, as victims of violence can trust that they are going to receive actual protection of the law, and in turn, justice.

India does not offer perfect protection, but it is at least making attempts to reduce domestic violence, and violence toward women.¹¹⁵ The statistics paint a hopeful picture of the future. Once the women of India trusted that law enforcement would respond positively to their need for protection, the domestic violence reporting rate went up by twenty-three percent.¹¹⁶ India clearly recognizes victims and their needs, proving that women who are in need of protection of the law should have access to it, whether they have acted in self-defense or not.¹¹⁷ Regardless of her use of force, the woman who fought back is still a victim, and she must be identified as such. Correct identification of the perpetrator and the victim is crucial in a domestic violence case.

III. Three Major Actors of the Criminal Justice System, Enhancing Revictimization

Navigating the criminal justice system is likely cumbersome for most people, but for a woman who has self-defended it can be daunting at every turn. The three actors of the criminal justice system where reform must occur are: Law Enforcement, Judges, and Public Defenders.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Bastick, *supra* note 108, at 219.

117. Goodmark, *supra* note 30, at 75–118.

The failure of criminal law to remedy domestic violence is best understood in historical context. So viewed, this failure is neither atypical nor coincidental, but rather one of many tangible proofs of the oft-quoted proposition that “criminal law is, from top to bottom, preoccupied with male concerns and male perspectives.”¹¹⁸

The main argument of this article concerns this well-stated blight upon society which Jeff Sessions proclaimed for all to hear: “[P]erfect protection is not required.”¹¹⁹ The criminal justice system is failing victims of domestic violence by revictimizing them.¹²⁰ Reform must take place within our criminal justice system.

A. Law Enforcement

Revictimization of domestic violence victims is so feared by women of our society that many women refuse to rely on law enforcement in their time of need.¹²¹ Of note, this fear is aggravated when the victim is a woman of color, because women of color face additional barriers. Considering the aggravating factors presented for women of color, one scholar noted, “even desperate victims find it difficult to view the criminal justice system as a viable option for safety.”¹²² Inviting law enforcement into their lives only invites scrutiny. An example of the general fear women have comes from the earlier mentioned Osher article noting the *Sandoval* case, when the victim refused to cooperate with investigators.¹²³ A domestic violence expert who analyzed the officer’s history concluded the victim’s behavior was “consistent with a battered woman trying to protect herself from further negative consequences.”¹²⁴ This shows female victims may be aware of the possibility of revictimization and, therefore, choose either not to report or not to cooperate. The damaging consequences of revictimization only hurt the progress of changing our society’s domestic violence epidemic.

Despite law enforcement’s duty to correctly open domestic violence cases and ensure equal protection of the law, officers persistently fail to

118. Tuerkheimer, *supra* note 18, at 969 (quoting Stephen J. Schuhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995)).

119. Elliot Spagat, *Sessions excludes domestic, gang violence from asylum claims*, THE ASSOCIATED PRESS (Jun. 12, 2018), <https://apnews.com/article/c5b237a0b47649de9f047506f0f07fdf>.

120. See Jackson, *supra* note 58, at 176–77.

121. Goodmark, *supra* note 30, at 99.

122. Buel, *supra* note 95, at 240.

123. Osher, *supra* note 72.

124. *Id.*

adequately respond, fail to correctly identify perpetrators and victims, and fail to provide equal protection to women.

1. Unresponsive law enforcement

A common example of law enforcement's failure to respond can be seen in the *Navarro v. Block* case.¹²⁵ In this case, Maria Navarro was at home with her family celebrating her birthday when she received a phone call from her estranged husband's brother, warning her that her estranged husband was on his way to kill her.¹²⁶ Maria had an active protective order against her husband and called the police for protection because she knew her death was imminent.¹²⁷ The police department did not feel that it was an emergency, and therefore did not go to Maria's house until it was too late.¹²⁸ Fifteen minutes after Maria Navarro called 911 for help, her estranged husband did just what he said he was going to do—he entered Maria's home and killed her.¹²⁹ Pursuant to 42 U.S.C. § 1983, Maria Navarro's family later sued the county for its allegedly discriminatory policy and custom of affording lower priority to 911 calls related to domestic violence than to non-domestic violence calls.¹³⁰ With knowledge of Maria's husbands' history of battery, law enforcement should have recognized that he was a dangerous criminal and that Maria was indeed in an emergency situation. This demonstrates the need for law enforcement to change its current perception and take domestic violence, even threatened domestic violence, more seriously.

Law enforcement also failed to protect Chanda Johnson, who repeatedly called to report that her ex-husband, Garrett, violated his restraining order and that she feared for her life.¹³¹ Garrett was a violent and dangerous person who had battered Chanda consistently for years, nearly killing her at times.¹³² The victim noted that the police were responsive at first, but stopped responding after a while.¹³³ Additionally, there were several times throughout those years when Garrett was sent to

125. *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995).

126. *Id.* at 713.

127. *Id.*

128. *Id.* at 714.

129. *Id.*

130. *Id.*

131. Alan Prendergast, *System Failure*, WESTWORD (Aug. 29, 2002, 4:00 AM), <https://www.westword.com/news/system-failure-5071404>.

132. *Id.*

133. *Id.*

jail or restrained by a protection order.¹³⁴ Yet, after some time, law enforcement no longer prioritized the victim's calls for help.¹³⁵ A report of such a dangerous and violent criminal at large should command an immediate response from law enforcement. Unfortunately, the police often neglected to enforce Chanda's protection order against Garrett, and on several occasions, did not even respond to her calls requesting their help.¹³⁶ Chanda called the police when Garrett showed up to her house with a gun threatening to murder her and their son, in active violation of the protection order placed upon him.¹³⁷ The police failed to respond to her call for protection, and Chandra Johnson, just like Maria Navarro, ended up a homicide victim.

In both cases, unresponsiveness by law enforcement to the calls from domestic violence victims ended fatally. Where is the equal protection of the law here? What is law enforcement communicating, not only to domestic violence victims, but to criminals at large? Law enforcement's implied message that it refuses to protect victims in lethal situations leaves many women feeling helpless and unprotected. It is understandable that a victim would have no trust in law enforcement and ultimately resort to fighting back.¹³⁸ If law enforcement is so bothered by repeat calls from victims, it should petition to change the criminal procedure.

2. *Incorrectly identifying the perpetrator and the victim*

Colorado law prohibits a person from using force in self-defense if he or she is the initial aggressor.¹³⁹ Upon law enforcement's arrival to a domestic violence event, a true victim is usually scared, angry, aggressive, defensive, and upset.¹⁴⁰ The perpetrator seems more reasonable and is therefore more believable. Law enforcement officers often mistakenly arrest a female domestic-violence victim when they incorrectly identify her as the initial aggressor.¹⁴¹

134. *Id.*

135. *Id.*

136. *Id.*

137. *Colorado v. Garrett*, No. 04CA726, 2006 WL 4098658, at *1 (Colo. App., 2006) (App. Brief); Prendergast, *System Failure*, *supra* note 131.

138. Jackson, *supra* note 58, at 176.

139. COLO. REV. STAT. ANN. § 18-1-704(3) (West 2020).

140. Buel, *supra* note 95, at 217–91.

141. See Alan Prendergast, *No Way to Treat a Lady: Victims Get Busted, Too*, WESTWORD (Jun. 18, 1998, 4:00 AM), <https://www.westword.com/news/no-way-to-treat-a-lady-victims-get-busted-too-5058766>; Osher, *supra* note 72.

Research shows law enforcement has a generally low view of women who call for legal protection in a domestic-violence event, which leads to apathy, skepticism, and a tendency for criminal justice personnel to empathize with the batterers.¹⁴² As one scholar put it:

The quality of police education is also central to the effectiveness of fighting domestic violence. Officers may need more guidance on how to handle the particularly complicated aspects of domestic violence calls, such as “uncooperative parties, mutual combatants, alcohol or drug involved violence, and violations of protection orders.” The improvement and expansion of police training is rife with challenges, including institutionalized racism and sexism, inadequate federal and state funding, and problems within police culture.¹⁴³

Law enforcement’s general view of women who call for protection is that battered women are incapable of making rational decisions. Given this low view, women who call law enforcement are arrested by the state.¹⁴⁴ Where does this come from? Law enforcement’s view has a history.

One scholar points to the *exit myth*: the belief that, due to “[c]hanges in employment opportunities, family and property law, and psychosocial understandings of intimate relationships,” women can easily exit abusive marriages.¹⁴⁵ The exit myth therefore has created a rise in unsympathetic law enforcement as police officers came to believe that victims were to blame for their problems because they stayed in abusive relationships.¹⁴⁶ Law enforcement began to ask, “why didn’t she just leave?”¹⁴⁷ Due to this change in the perception of domestic violence victims, women can no longer use an established pattern of violence as justification for self-defense.¹⁴⁸ The resulting view has led to law enforcement not always taking calls for help seriously, denying victims protection of the law from their abuser.¹⁴⁹ Of note, victims who call frequently are not responded to in a timely fashion, if at all.¹⁵⁰ When law enforcement does respond,

142. Ramsey, *supra* note 14, at 20.

143. Amy M. Zelcer, *Battling Domestic Violence: Replacing Mandatory Arrest Laws with a Trifecta of Preferential Arrest, Officer Education, and Batterer Treatment Programs*, 51 AM. CRIM. L. REV. 541, 556 (2014) (footnote omitted).

144. *Id.* at 549.

145. Ramsey, *supra* note 14, at 1-2.

146. *Id.* at 28-31.

147. *Id.* at 5.

148. *Id.*

149. *Id.*

150. See *Fajardo v. County of Los Angeles*, 179 F.3d 698 (9th Cir. 1999).

women often report that police tend to favor the man in the event, and therefore, treat an incredibly dangerous situation very lightly.¹⁵¹

We can see this low view of women in the story of Krystal and her husband Mark. Upon arrival, law enforcement was focused on the words Krystal used in response to her husband's abuse. Rather than finding out what led Krystal to be hostile, angry, and aggressive, law enforcement decontextualized the event and failed to identify Mark as the perpetrator and Krystal as the victim.¹⁵² Law enforcement heard Krystal say, "I'll kill you!" and they wrongfully identified her as the perpetrator.¹⁵³ What they did not consider was that Mark had committed previous acts of violence upon Krystal.¹⁵⁴ Moments before police arrived, Mark threw water in Krystal's face; when he told officers Krystal was making up stories, Krystal threatened to kill him.¹⁵⁵ How does law enforcement continue to fail in correctly making these distinctions?

In the aforementioned Osher article noting the *Sandoval* story, Steven had beaten his wife, Corina, for years, despite her frequent calls to the police for protection.¹⁵⁶ Officer Steven Sandoval testified in a hearing of one of the isolated events that Corina was the initial "aggressor and that he had merely pushed her back."¹⁵⁷ Steven also "testified that Corina could experience great mood swings and . . . he was the one who had to defend himself."¹⁵⁸ Here, we see that the police who responded to that call accepted a statement by a man who presented himself as the reasonable person. His report to the police at the scene that the victim was mentally unstable established that he was the reasonable person. Therefore, police officers identified her as the initial aggressor, and in turn revictimized her.

Another example of the male perpetrator establishing credibility by appearing reasonable is noted by Elizabeth MacDowell in the story of Steve and Madeline.¹⁵⁹ Here, the victim did not cooperate with the police upon their arrival when she did not answer their questions.¹⁶⁰ Steve (the perpetrator) told the police that his wife, Madeline (the victim), attempted

151. Prendergast, *No Way to Treat a Lady*, *supra* note 144.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Osher, *supra* note 72.

157. *Id.*

158. *Id.*

159. MacDowell, *supra* note 49, at 538.

160. *Id.*

suicide.¹⁶¹ Stating this gave the perpetrator the leverage of gaining the police officer's trust that he was the reasonable person and therefore more credible. In *People v. Delagarza*, the police report shows that, upon arrival at the scene, the victim used many phrases that should have made it obvious that she (Delagarza) was the victim.¹⁶² The police officers in this isolated event were the same respondents to a domestic violence call by the same victim and perpetrator just four months prior to this event. Yet, law enforcement could not figure out which one of them was the victim and which one was the perpetrator. Both parties were arrested in this event.¹⁶³ Law enforcement's failure to correctly identify the victim and the perpetrator obstructs justice.

3. *Discrimination against women*

Laws have been established in an attempt to tackle the domestic violence epidemic. Unfortunately, these laws have also provided a loophole for discrimination, which has encouraged revictimization.

a. Mandatory arrest laws. It is questionable whether mandatory arrest laws help or hurt domestic violence victims.

Mandatory arrest laws have resulted in a dramatic increase in the number of women arrested. In states that have adopted mandatory arrest laws, the rate of female arrests has risen from a range of four to twelve percent to between fifteen and thirty percent. Further, mandatory arrest policies often lead to dual arrests where police arrest both the batterer and the victim. This occurs when police cannot identify who the initial or primary aggressor was—a situation that is particularly likely when the woman acted out of self-defense. It is estimated that women were the primary aggressors in thirteen percent of domestic violence cases nationally; however, women account for up to thirty percent of domestic violence arrests.¹⁶⁴

This is because women who have acted in self-defense in a domestic violence situation are often suspected of being the initial aggressor.¹⁶⁵ It is up to law enforcement officers to determine the initial aggressor. Law enforcement's predispositions of non-conforming women combined with an inability to identify can influence determination of the initial aggressor.

161. *Id.*

162. Transcript of Record, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246).

163. *Id.*

164. Zelcer, *supra* note 143, at 550.

165. *Id.*

Unfortunately, the majority of police officers receive, on average, only twelve hours of domestic violence training.¹⁶⁶

In 1984, Tracey Thurman sued the City of Torrington, Connecticut for \$2.3 million for failing to respond to her calls for protection against her abuser.¹⁶⁷ Resulting from that case, the shift of law enforcement's view to annoyance with victims was noted.¹⁶⁸ "Police officers began to view domestic violence calls as annoyances occasioned by unsympathetic women who wasted state resources on problems of their own creation."¹⁶⁹ One can only wonder how unresponsiveness by law enforcement has affected homicide numbers. The Thurman case encouraged the creation of a mandatory arrest law.¹⁷⁰

Though there are very good reasons for the creation of a mandatory arrest law, statistically, the law has done victims more harm than good.¹⁷¹ At its inception, it was created with the benefit of the victim in mind. In response to the claims of abuse, law enforcement's response policy changed, and mandatory arrest of one or more parties in a domestic-violence call became the law.¹⁷² But because law enforcement is frequently unable to correctly identify the victim and the perpetrator, mandatory arrest laws often result in the wrongful arrest of the victim.¹⁷³ The victim might be arrested alongside the perpetrator, or be viewed as the aggressor and arrested alone.¹⁷⁴

A 2001 study of domestic violence arrests in New York City found "that, of the individuals who were arrested alongside their putative abusers, sixty-six percent were African-American or Hispanic, forty-three percent were living below the poverty line, and nineteen percent were receiving public assistance."¹⁷⁵ Women of these categories were found not victim enough, and therefore were revictimized for being unfeminine and for not being weak. African-American women especially tend to become labeled as "unfeminine" because they face increased/unique social and political inequalities.¹⁷⁶ Sociologists Meghan Novisky and Robert Peralata

166. *Id.* at 556.

167. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

168. *Ramsey*, *supra* note 14, at 5.

169. *Id.*

170. *Zelcer*, *supra* note 143, at 545–46.

171. *Buel*, *supra* note 95, at 229–32.

172. *Zelcer*, *supra* note 143, at 545–46.

173. *See Ramsey*, *supra* note 14, at 9.

174. *Id.*

175. *Capers*, *supra* note 13, at 361.

176. *Id.*

of Kent State University surveyed one hundred and one women in domestic violence shelters and found that “a woman may believe the police will mistakenly arrest her as the aggressor, so she won’t report [abuse]. This reasoning supports the data that mandatory arrest policies result in higher arrest rates of battered women, which could deprive them of the support they need.”¹⁷⁷

Revictimization of the victim places her into the criminal justice system. Once the victim is placed into the criminal justice system, she is presented to the district attorney as a criminal suspect. Being suspected of domestic violence makes her now eligible for criminal convictions. Once she becomes the initial aggressor, her use of force is no longer justified and now the criminal justice system treats her as a criminal.¹⁷⁸ Because law enforcement must arrest at least one party, the victim may become guilty of domestic violence herself.¹⁷⁹ In this peculiar position, the victim questions herself. She questions whether it is actually legal to use force when death or severe bodily harm is imminent. The victim questions why she is now being pursued by the criminal justice system as a dangerous criminal. Research shows that being a victim of domestic violence is so traumatizing to a woman that it changes her personality.¹⁸⁰ Domestic violence undermines her confidence, abilities, skills, and sanity.¹⁸¹ As her sanity is already in a vulnerable position, one can only imagine the added trauma to a woman when she is first, incorrectly accused, and second, processed through criminal procedure as a criminal. The results are damaging beyond imagination. This not only changes how a woman perceives the criminal justice system, but also the rest of her world and her existence within it. When imminent harm is present, acting in self-defense is a legal right for individuals who are the victims of domestic violence.¹⁸² The practice of mandatory arrest laws often adds psychological trauma to the domestic violence victim.

b. Stand Your Ground laws. Another set of laws created for victims of violent crimes are Stand Your Ground laws. One Stand Your Ground law states that, in a place where a person is legally permitted to be, should he or she feel that their life is in danger, they are permitted to use force

177. *Mandatory Arrest Laws May Hurt Domestic Violence Victims*, UNIV. OF AKRON (Mar. 26, 2015), <https://uakron.edu/im/news/mandatory-arrest-laws-may-hurt-domestic-violence-victims/>.

178. *Id.*

179. Buel, *supra* note 95, at 229–30.

180. Goodmark, *supra* note 30, at 79.

181. *Id.*

182. COLO. REV. STAT. ANN. § 18-1-704 (West 2020).

against the person causing the imminent harm.¹⁸³ Should the person end up using deadly force, he/she is justified as his/her life was threatened.¹⁸⁴ Stand Your Ground laws create a way for victims to legally protect themselves in the presence of imminent death, but it backfires when used by female victims of domestic violence.¹⁸⁵ In its original draft, the Stand Your Ground law of Florida imposed a “duty to retreat” on any person exercising the Stand Your Ground right.¹⁸⁶ The “duty to retreat” required the victim of the violent crime to first make an attempt to retreat from the threat to ensure the use of force was the absolute last resort.¹⁸⁷ To require a woman in a domestic violence situation to first retreat may not be reasonable due to the fact that women typically experience a power imbalance due to the physical differences in their size and strength. It was for this reason the state of Florida removed the duty to retreat for domestic violence victims, allowing them to justly use force in a life-threatening attack without the “duty to retreat.”¹⁸⁸ As mentioned above, legal use of force is referred to as self-defense.¹⁸⁹ One scholar notes that the individual response to imminent death is dependent upon the victim, but in the case of domestic violence, it is most likely that the victim does not have the choice to flee.¹⁹⁰

Restraint is one of many behaviors of control used by abusers. To better understand strategies used by abusers, one should refer to the “wheel of control.”¹⁹¹ The wheel of control is a diagram which notes each major type of abuse and the behaviors which precede violence. It is instrumental in assisting the recognition of abuse before it becomes violent.

Let us look at the research supporting the strength of Stand Your Ground laws when gender is not considered, as opposed to its failure to support the victim when she is female. Scholar Brandi L. Jackson compared two separate cases where Stand Your Ground laws were applied, and found that in the case where the invaded person was male, Stand Your Ground law was a viable claim; however in the case where the

183. FLA. STAT. § 776.012 (2020).

184. *Id.*

185. Jackson, *supra* note 58, at 160.

186. *Id.*

187. *Id.*

188. *Id.* at 170.

189. COLO. REV. STAT. ANN. § 18-1-704 (West 2020).

190. Franks, *supra* note 89, at 1105.

191. *The Power and Control Wheel*, COERCIVE CONTROL COLLECTIVE (Mar. 12, 2018), <https://coercivecontrolcollective.org/news/2018/3/12/the-power-and-control-wheel-1>.

victim was female, it was not.¹⁹² Jackson notes the Trayvon Martin case of 2012, where the alleged victim applied the Stand Your Ground law and was successful.¹⁹³ Jackson then goes on to note a story of a victim named Natasha who had been cornered, beaten, raped, and terrorized for years by her abuser.¹⁹⁴ At one final event, she made use of Stand Your Ground law and exercised her right to justifiable self-defense.¹⁹⁵ Unfortunately for her, it resulted in a fifteen-year prison sentence.¹⁹⁶ The court decided that she could not make use of the Stand Your Ground law in her case, because she did not fulfill her duty to retreat.¹⁹⁷ The duty to retreat had been removed in domestic violence cases; why did that not apply here? Jackson notes this was a case where there were varying implementations of the law.¹⁹⁸ In Jackson's case study, the victim was charged with second-degree murder and criminal possession of a firearm.¹⁹⁹ Ultimately, she was convicted of manslaughter and sentenced to fifteen years in prison because she was unable to apply the Stand Your Ground law.²⁰⁰ Because the implementation of the law varied so greatly, one cannot help but wonder if gender discrimination toward women who fight back is practiced by the criminal justice system. The comparison demonstrates that the criminal justice system chooses to apply Stand Your Ground laws in cases where the perpetrator is male.

Simply stated, law enforcement must end this apparent discrimination by fairly applying mandatory arrest laws and Stand Your Ground laws when arriving to and processing a domestic violence event. Fair application of these laws will require a change in law enforcement's understanding and perspective of domestic violence victims. Though this will be a large undertaking, the benefits of mandatory arrest laws and Stand Your Ground laws outweigh the harm and are therefore worth the effort.

192. Jackson, *supra* note 58, at 157.

193. *Id.* at 156-57.

194. *Id.* at 156.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

B. The Courtroom

The second necessary reformation in the criminal procedure process is a trial hearing. Once a criminal domestic violence case gets to this point, the district attorney must decide which party is the perpetrator and which party is the victim. At trial, a victim may be revictimized if the identity of the initial aggressor is called into question and he or she must rebut the accusation. At this stage, judges and juries, or the courtroom, will scrutinize a “non-conforming” woman very carefully, as she does not fit the perfect victim stereotype. Her credibility as a victim will be called into question. It is for this reason the woman who fought back must tread carefully, as her gender performance could lead to her win or loss. The victim’s testimony removes the previous decontextualization as it presents the pattern of violence which is an accurate defense to the jury.

1. Identifying the perpetrator and the victim in the courtroom

Because decontextualization occurs in the law enforcement stage, it is carried over to the courtroom. A narrative is a perspective, or story, of the domestic violence event from the victim’s point of view. Adding self-defense by the victim adds a layer to how the case will be heard in court. Goodmark implies stories of women who fight back create cognitive dissonance for judges.²⁰¹ Legal researchers present several theories regarding the courtroom’s preconceived notions of domestic violence victims as well as perpetrators of domestic violence. This same research also shows that the way in which the courtroom views non-conforming women inevitably changes its conclusions. Legal scholar Elizabeth MacDowell applied intersectionality theory to courtrooms hearing criminal domestic violence cases to explain the outcomes of these hearing, saying:

Intersectionality is the primary framework used by feminist scholars to analyze the significance of co-occurring identities to the issue of domestic violence. Kimberlé Crenshaw, who originally applied intersectionality to analyze experiences of black women in employment discrimination cases, introduced the term into legal scholarship. Using the analogy of traffic at a four-way intersection, Crenshaw argued that the existence of more than one subordinate identity creates distinct vulnerabilities to further disempowerment that cannot be accurately captured or addressed by analyzing a single axis of subordination alone:

201. Goodmark, *supra* note 30, at 115.

“If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them.” Thus, she reasoned, while a black woman may be harmed by practices that are sexist or racist, she may also be uniquely harmed by practices that harm neither men of color nor white women. Crenshaw subsequently extended intersectional analysis to other women of color and to the intersection of gender and other categories of identity. She defined structural intersectionality as “the ways in which the location of women of color at the intersection of race and gender makes [their] actual experience . . . qualitatively different than that of white women.”²⁰²

The determining factor of *who* caused the accident is *who* was at the intersection. Biases regarding race, gender, and their intersection often influence who can be accused. MacDowell also notes that in a criminal domestic violence hearing, the courtroom focuses on the identity of the victim, rather than on the relationship between the victim and perpetrator.²⁰³ The question to be resolved is: who is the victim, and who is the perpetrator? Just as it should be with law enforcement, it is crucial for criminal judges to view domestic violence as a whole, rather than only as an isolated one-time event being prosecuted that day in court.²⁰⁴ This being said, decontextualization should be discouraged by way of incorporating the victim’s narrative.

As it stands, domestic violence hearings often decontextualize the event. The judge does not use the perpetrator’s pattern of violence to establish that the victim acted in self-defense against said pattern of violence. Please note that when a perpetrator commits an act of violence upon a person one time, that is an isolated and unique event. In contrast, when the same perpetrator commits an act of violence upon the same victim more than once, there is now an established pattern of violence between the couple. That victim is now a battered woman, and he is now a batterer.²⁰⁵

a. The victim in the courtroom. As noted previously, the way a victim uses force in an imminent death situation is very different than the way a perpetrator uses force.²⁰⁶ The courtroom can look and listen for a victim to say, “I was afraid” or “I was beaten.”²⁰⁷ Unfortunately, when the victim

202. *Id.* at 542–43 (alteration in original) (citations omitted).

203. *Id.* at 541.

204. See Tuerkheimer, *supra* note 18, at 972–74.

205. See Buel, *supra* note 95.

206. Goodmark, *supra* note 30, at 86.

207. *Id.* at 82.

also uses force, she becomes non-conforming.²⁰⁸ The white norm standard is an incorrect norm to impute when seeking to identify a victim in a domestic violence courtroom.

Jackson notes that the court uses the reasonable person standard in prosecutorial decisions. As defined previously, the reasonable person standard asks, “what would a reasonable person do?”²⁰⁹ Jackson explains this “is particularly harsh for women” because it “was clearly established with the reasonable *man* in mind.”²¹⁰ The reasonableness standard as applied to women focuses on her decision to remain in the relationship, rather than on her actions at the very moment.²¹¹ This often causes the court to conclude that the woman did not act reasonably, and therefore, she loses.²¹² Jackson also notes that there are biased views in court that disadvantage domestic violence victims.²¹³ One bias is that courts tend to blame the victim for her abuse.²¹⁴ Another bias is male normativity, which is the court’s use of male behavior to establish a standard for normality.²¹⁵ Based upon my personal experience, I was heavily discouraged from testifying at all.²¹⁶ My voice was never actually heard in court.²¹⁷ My character was made up of a compilation of testimony from witnesses and the testimony of the plaintiff.²¹⁸

(1) *Too weak.* As a passive victim, the woman has already been silenced by her abuser and is accustomed to feeling small, silenced, and insignificant.²¹⁹ The passive victim is often not heard by the courtroom. Journalist Alan Prendergast found this to be true in his investigation of the *Garrett* case.²²⁰ In attendance of the court hearing for violating restraining orders, he notes:

208. *Id.* at 119.

209. Jackson, *supra* note 58, at 173.

210. *Id.* at 176.

211. *Id.* at 175.

212. *Id.*

213. *Id.* at 155.

214. *Id.*

215. *Id.*

216. Transcript of Record, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246). The discussion between my public defender is not noted in the transcript, but only reported here from my experience. When discussing my turn to testify, my public defender strongly urged me NOT to do so. His reason was that he felt the prosecutor would rip me apart. It was for this reason my story was never heard by the jury.

217. *Id.*

218. *Id.*

219. Buel, *supra* note 95, at 228.

220. *Colorado v. Garrett*, No. 04CA726, 2006 WL 4098658, at *1 (Colo. App. May 4, 2006) (App. Brief).

No, Chanda Johnson didn't get much of an opportunity to explain. In July last year, she sat in the hectic, crowded confines of Denver County Courtroom 117-M—where justice is served up quick and sloppy, like bowls of gruel doled out to a hungry mob—and waited for the judge to call her name. When it was her turn, she stood up, a soft-spoken, 29-year-old woman, and tried to tell it all—despite the room full of strangers, the killer glare of her ex-husband, the impassive faces of the heard-it-all-before court professionals.

She wasn't permitted to step up to the podium and speak into the microphone, like a person who mattered. She had to stand at the gate that divides the participants in the trial process from the spectators and speak her piece from there.

She didn't get very far. Judge Robert B. Crew Jr. interrupted her. [Her abuser] taunted her.²²¹

When it was Chanda Johnson's turn to testify, she was subtly dismissed.²²² The outcome could have been different if she had fought for her right to be heard. However, if she had fought for her right to be heard, she would no longer have been too weak but too strong.

(2) *Too strong*. On the contrary, a woman who is strong or outspoken and who has already been revictimized by the criminal justice system can be made to feel like she is crazy, unstable, and guilty of a crime.²²³ In many circumstances a woman who fights back is a woman who was previously passive and ultimately became fed up with the criminal justice system failing her. Most of the time, it is not her norm to be aggressive—it was her last resort, which she believed was justified. Buel refers to Dr. Jeffery Edleson who explains women who use violence as follows:

There are three categories of violent women: the first group includes women who are forced to use violence in self-defense to avoid serious harm by their partners. The second category contains those women who have long been victimized, either as a child or by a violent partner. Such survivors may assault preemptively to avoid being harmed again. Third, there are women who instigate abuse without provocation or initial assault by their partners. Edleson cautions intervenors not to be manipulated by those purporting that men and women are battered equally, but instead to recognize that a small minority of women are the

221. Prendergast, *System Failure*, *supra* note 131.

222. *Id.*

223. See Hope Toffel, *Crazy Women, Unharmful Men, Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument For Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 370–71 (1996).

primary physical aggressors. . .²²⁴

Though she may not realize it at the time, every word that comes out of her mouth in the courtroom may cause her to appear as the perpetrator of domestic violence. In *People v. Delagarza*, the public defender instructed his client (the revictimized victim) to dress in a way that hides her body for the trial hearing.²²⁵ He told his client that her muscles were too big, and that she appeared too strong.²²⁶ What was being communicated was that her physical strength had to be hidden, because there was a chance that she would not be heard once the judge took note of it. This is also a form of silencing. Strength when embodied in a woman is devalued and can become self-incriminating.

Whether too weak or too strong, both types of victims, are less likely to want to speak about their domestic violence case because, in some way, they have been silenced. As mentioned previously, gender discrimination in domestic violence cases causes the victim's credibility to be questioned. The courtroom must determine whether the woman who fought back is actually the initial aggressor. The reality is that no matter how strong, independent, and influential a person is, he or she can also be a victim. Let us go back to the case of the Hollywood actor, Terry Crews.²²⁷ When Terry Crews was sexually assaulted in 2016 and testified before the Senate Judiciary Committee, his strength was not the focus.²²⁸ The Senate Judiciary Committee heard his narrative, even though he is a person well-known for his exceptional physical strength. Because he is male, no judge would think to ask him why he needed protection. They did not ask him because it is an absurd question to ask a person who was, at that moment, in the grasp of a controlling, dangerous, and terrifying criminal. Discrimination against strong women, however, proves to be alive and well in the courtroom whenever a judge insists on bringing the woman's strength into question.

224. Buel, *supra* note 95, at 230.

225. Transcript of Record, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246). These statements are not in the transcript but are noted from personal memory. This instruction was particularly memorable to me because I went shopping for clothes which concealed my muscular build in order to meet the request. The clothes I selected and wore to trial the next day resulted in an accusation that I falsely reported my income to the Public Defender's office. The prosecutor alleged I was dressed "too well" and therefore not believably indigent. This led to a subsequent income investigation hearing.

226. *Id.*

227. Jeremy Fuster, *Terry Crews to Senate Committee: I Won't Be in 'Expendables 4' After Producer Threatened 'Trouble'*, THE WRAP (June 26, 2018, 11:22 AM), <https://www.thewrap.com/terry-crews-senate-committee-wont-expendables-4-producer-threatened-trouble/>.

228. *Id.*

b. The psychology of the perpetrator and the perpetrator in the courtroom. Some legal scholars have relied on intersectionality theory to explain and describe the occasion when the perpetrator and the victim convene in the courtroom.

Intersectionality—which examines the multidimensional and interactive character of race and gender norms and stereotypes in domestic violence cases—provides a better framework for understanding the possible dynamics involved in these cases. For example, considering race and gender highlights the fact that, historically, white men have not been punished for engaging in intimate relationships with, or violence against, women of color.²²⁹

The example in McDowell has led to speculation that “[V]iolence remains chiefly a male privilege.”²³⁰ This is a theme which has been greatly studied by legal scholars across the globe. MacDowell explains it as follows, “Put another way, white heterosexual male identity is socially construed to be normative.” Masculinity scholars refer to such ideals as hegemonic masculinity or “masculinity [that] identifies the most empowered, those at the top of the male hierarchy.” He is a white male.²³¹ Intersectionality theory offers some explanation as to how the courtroom justifies the behavior of perpetrators.

(1) *Psychology of a perpetrator.* In the established domestic violent relationship, perpetrators deeply fear losing access to their victim. In Leslye Orloff’s *Manual on Intrafamily Cases for the D.C. Superior Court Judges (1993)* the author states, “Perpetrators do not just let victims leave relationships. They will use violence and all other tactics of control to maintain the relationship.”²³² This fear of loss, inter alia, leads perpetrators to pursue extensive measures to keep their victim.²³³ An example of this is found in *Hernandez v. Ashcroft*, where the perpetrator traveled from another country in hunt of his victim.²³⁴ The perpetrator is often relentless in pursuit of the victim. Author Leslye Orloff states:

Sometimes physical abuse, threats of harm, and isolation tactics are interwoven with seemingly loving gestures (e.g., expensive gifts, intense displays of devotion, sending flowers after an assault, making romantic promises, tearfully promising it will never happen again). Amnesty

229. MacDowell, *supra* note 49, at 541.

230. Franks, *supra* note 89, at 1103.

231. MacDowell, *supra* note 49, at 547.

232. *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003).

233. *Characteristics of Abusers*, INDEPENDENT LIVING RESOURCE CENTRE THUNDER BAY, www.ilrctbay.com/upload/custom/abuse/content/abusers.htm (last visited Oct. 26, 2020).

234. *Hernandez*, 345 F.3d 824.

International (1973) describes such “occasional indulgences” as a method of coercion used in torture. With such tactics, the perpetrator provides positive motivation for victim compliance. . . The message is always there that if the victim does not respond to this “loving” gesture or verbal abuse, then the perpetrator will escalate and use whichever tactic, including force, is necessary to get what he wants. In my three years as a civil protection order court mediator, I experienced stories of perpetrators in hot pursuit as described above.²³⁵

Within Leslye Orloff’s *Manual on Intrafamily Cases for the D.C. Superior Court Judges* (1993) she notes, “. . .the perpetrator provides positive motivation for victim compliance. . .” Providing positive motivation is where the perpetrator displays a paradoxical character in great contrast to the prior character. Becoming positive,²³⁶ is the stage where perpetrators are the most pernicious. In *Hernandez v. Ashcroft*, the Board of Immigration Appeals judge notes Leslye Orloff states:

Either immediately following the battering incident or shortly thereafter, the batterer will become contrite, apologetic and will beg the battered woman for forgiveness. He tells her that the violence will never happen again and promises to reform. During this phase, batterers will court their spouse and become again the man that she fell in love with. Many batterers honestly believe that they will reform their behavior. Battered women want to believe them . . . [Batterers] will be apologetic or very convincing that the violence will cease. However, without outside intervention in most cases the cycle will gradually repeat itself[,] moving from this hearts and flowers phase back into the tension building phase.²³⁷

Unfortunately, without education in the psychology of perpetrators, a court may fall for the perpetrator’s often quite convincing portrayal as the victim while minimizing, denying, and lying about the abuse they committed. In contrast, the non-conforming woman is hysterical, angry, aggressive, passive, docile, or ambivalent, and may possibly blame herself for the abuse after hearing the offender attribute the harm to her failing.²³⁸ The court mistakenly labels the perpetrator to be the “good guy” and the victim the “bad guy.” The court must clearly recognize that a perpetrator’s courtroom behavior is only a snapshot in time, which has been grossly decontextualized.

235. LESLYE ORLOFF, *MANUAL ON INTRA FAMILY COURT CASES FOR D.C. SUPERIOR COURT JUDGES* (2d ed. 1993).

236. *Id.*

237. *Id.*

238. Buel, *supra* note 95, at 264.

The inability to recognize the performance of a skilled manipulator demonstrates either a need for education or a bias favoring males. In her article regarding the use of Stand Your Ground laws, legal scholar Mary Ann Franks reports that the law is hostile to women's use of force and encourages male aggression.²³⁹ In the Alexander revictimization story mentioned above, the male perpetrator, Gray, gave his sworn deposition where he admitted that he had threatened her multiple times.²⁴⁰ Ms. Alexander tried to claim immunity under Stand Your Ground but was denied and found guilty of aggravated assault.²⁴¹ Franks notes:

In other words, the Stand Your Ground/Battered Women's Syndrome axis offers strong reinforcement of the status quo: a world in which white male interests are at the top of the hierarchy, and everyone else's is somewhere below. It offers more power to the already powerful, immunity to the already protected, and reproach for any woman who tries to act like a man.²⁴²

This is the court we must strive to change.

2. Character evidence in the criminal courtroom

"The most telling sign of future violence is past violence."²⁴³ Colorado Rule of Evidence 404(b)²⁴⁴ states that evidence of a character trait (such as history of battery) is not admissible. This is problematic as patterns, habits, and co-dependency, which are character traits, do not just disappear. Federal Rule of Evidence 404(3) does however provide exceptions for a witness.²⁴⁵ In the event that the revictimized woman is cross-examined by opposing counsel she has the opportunity to use extrinsic evidence to impeach the perpetrator.²⁴⁶ Federal Rule of Evidence 608(b) states:

Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for

239. See generally Franks, *supra* note 89.

240. *Id.* at 1118-1119.

241. *Id.*

242. *Id.* at 1126-1127.

243. Zelcer, *supra* note 143, at 555.

244. COLO. R. EVID. 404(b).

245. FED. R. EVID. 404(3).

246. FED. R. EVID. 608(b).

truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about. By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.²⁴⁷

Thus, the cross-examination could be providential to the revictimized woman if executed strategically by her legal counsel. Though it would not directly permit the use of the pattern of violence, it would at least provide an opportunity to impeach the perpetrator's character credibility in the presence of the jury. In *Delagarza*, the judge stated:

However, if the complaining witness denies that he was charged in this case, I do believe 608 (b) does not govern the admissibility of extrinsic evidence specific instances of conduct concerns that conduct of a witness for the purpose of attacking or supporting this character for truthfulness, other than a conviction of a crime. . . They may however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination.²⁴⁸

Unfortunately, without character evidence the domestic violence case is a random act, as though it were a crime between strangers. Scholar Deborah Tuerkheimer states it this way:

Even where multiple episodes of physical violence are charged in a single indictment or complaint, law disregards the space between these incidents, using physicality alone to ascribe meaning. By isolating and atomizing violence in intimate relationships, law renders context meaningless.²⁴⁹ Relationship connects and organizes what might otherwise appear to be random acts.²⁵⁰ Structured to remedy paradigmatic violence between strangers, law negates context.²⁵¹

Federal Rule of Evidence 404 (2) (A) provides the exception that the defendant may offer evidence of the character trait.²⁵² This means the perpetrator's character can be used should the perpetrator open the door in his testimony.²⁵³ An example of this would be: the defense asks, "Did you

247. *Id.*

248. Transcript of Record at 27, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246).

249. Tuerkheimer, *supra* note 18, at 973.

250. *Id.* at 974.

251. *Id.*

252. FED. R. EVID. 404(2)(A).

253. COLO. R. EVID. 404(b). ("Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided

choke Ms. de la Garza?”, and the perpetrator responds, “I am not a violent person, therefore I did not choke Ms. de la Garza.” In that example the perpetrator opened the door to his character when he made the claim of not being a violent person. It is only in this circumstance that the defense can incorporate into the trial his pattern of violence upon the victim to prove, by the preponderance of the evidence, that he is in fact a violent person. This is most likely why victims are discouraged from testifying—there would be a risk of revealing the past violence. In *People v. Delagarza*, the judge denied the use of the fact that the perpetrator was simultaneously charged with third degree assault.²⁵⁴ The judge explained:

So in this case the Defendant seeks to introduce evidence that the Defendant was actually charged with a crime at one point. My concern is that I think it does give greater weight to the fact of a charge as evidence as opposed to when the law states that’s clearly not permissible. So I’m going to err on the side of caution, not take judicial notice of the fact that the Defendant was charged because I think there is tension between taking judicial notice of that fact and the law which states that a charge itself is not a crime.”²⁵⁵ My concern is that it could confuse the jury if I were to take judicial notice of that fact.²⁵⁶

On the contrary, juries with knowledge of the simultaneous charge of assault would be more accurately informed because they would have the context of the whole story.²⁵⁷ Why is it confusing to reveal a dangerous criminal at large?

There is a criminal domestic violence decision in which the judge brilliantly recognized and applied the cycle of violence to identify the perpetrator as the criminal. The victim, Hernandez, was a Mexican citizen applying for a U-Visa in the United States.²⁵⁸ U-Visas are available to victims of a crime within the border of the United States. Here, the judge dove deeply into the psychological complexities of domestic violence when she recognized the perpetrator’s use of the cycle of violence to

that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”)

254. Transcript of Record at 27, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246).

255. *Id.* at 27.

256. *Id.* at 27.

257. Tuerkheimer, *supra* note 18, at 973–974.

258. *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003).

identify that the abuser had committed abuse preceding the violent acts.²⁵⁹ She stated:

Although Hernandez was not battered in the United States, the interaction that took place in the United States presents a well-recognized stage within the cycle of violence, one which is both psychologically and practically crucial to maintaining the batterer's control. We conclude that an abuser's behavior during the "contrite" phase of domestic violence may, and in circumstances such as those present here does, constitute "extreme cruelty."²⁶⁰

Hernandez is a perfect portrait for domestic violence courts to model themselves after. In this case, Hernandez became a domestic violence victor, rather than a victim without justice. The combination of the perpetrator's pattern of violence permitted as evidence, and the judge using the perpetrator's pattern of violence to establish that he was in fact the initial aggressor, transformed the iniquitous situation. The *Hernandez* decision should be used by criminal domestic violence judges as a model of knowledge, logic, and an excellent use of judicial resources.

3. *Effective assistance of counsel*

"The right to counsel is the right to the effective assistance of counsel."²⁶¹ This is the third place where victims of domestic violence are susceptible to revictimization. Here, a victim can either be rescued and receive justice, or be failed again by the criminal justice system. Battered women are "denied adequate assistance for reasons ranging from overwhelmed courts and uneducated staff to batterer tenacity and racist practices."²⁶² This is usually the case when domestic violence victims use public defenders. Many victims of domestic violence use public defenders, rather than private counsel. Buel notes "It has been documented that access to legal assistance is the single highest predictor of long-term reduction in domestic violence."²⁶³ It seems only logical that if the goal of the criminal justice system is to reduce domestic violence, there should be a greater standard for effective assistance by public defenders. Women who have been revictimized by the criminal justice system should have access to

259. *Id.*

260. *Id.* at 828.

261. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel. . .").

262. Buel, *supra* note 95, at 224.

263. *Id.* at 225.

effective assistance of counsel to ensure their constitutional right to justice.²⁶⁴ Unfortunately, public defenders have a history of providing ineffective assistance of counsel to victims of domestic violence.²⁶⁵ In her research, legal scholar Sarah M. Buel notes *Powell, Gideon*, and *Strickland* in addressing this lack of effectiveness:

In spite of the Sixth Amendment's mandate that criminal defendants be afforded assistance of counsel, battered women are too often denied an effective defense. . . . [T]he Supreme Court has provided two clear mandates: first, the right to counsel; and, second, that such counsel must be competent. . . . Given the prevalent lack of knowledge regarding domestic violence issues by the appellate bar and bench, battered defendants' attorneys have little to no accountability.²⁶⁶

Consider how difficult it is to successfully process a claim for ineffective assistance of counsel. When the state overwhelms the public defender's office, they have little choice but to provide subpar assistance, simply due to a lack of time to devote to each case. This has devastating effects upon victims as well as upon the general public who will receive the perpetrator right back into their community.

a. Duty to correctly represent the client. Correctly representing a victim who has become the defendant is difficult. A public defender's job is to instruct the jury and present his or her defense in a strategic manner conducive to justice for the client. With this in mind, when public defenders select what they need from the victim's narrative to create their defense, they in turn omit the victim's choices during a time of crisis. The result is a silenced victim. This practice is referred to as professionalizing a narrative.²⁶⁷ Public defenders usually grab what they can from the victim's story and present it to the jury in a fashion they hope will lead to justice. Mind you, this is done with very limited time and energy to establish the client-attorney relationship, hear the full story, and formulate sound defense. This rushed style of representing a client naturally leads to a sloppy outcome. Though professionalizing a victim's narrative is done with good intentions, the result is that the victim's voice is silenced, and she is never accurately heard.²⁶⁸ Where the victim has been revictimized by the criminal justice system and is the defendant on trial, the public

264. *See id.*

265. *Id.* at 226.

266. *Id.* at 250–51 (citations omitted).

267. Goodmark, *supra* note 30, at 120.

268. *See generally* Goodmark, *supra* note 30, at 121.

defender will need to defend her from prosecution. This is because the prosecution is attempting to prove her guilty of criminal assault.

(1) *Client-attorney relationship*. The first step in establishing a client-attorney relationship is for the attorney to listen to their client's story. "The most powerful evidence of the validity of these assertions is found in victims' accounts of the abusive relationship."²⁶⁹ Buel notes that it is paramount for public defenders to understand that abusers have, by this point, established a pattern of violence which must be recognized to accurately represent their client.²⁷⁰ This step establishes an understanding between the two, and more importantly, builds trust. Keep in mind that women who are victims of domestic violence are already untrusting, they are devastated that they have been revictimized and are having to prove that they are not guilty of assault, and they are angry at the criminal justice system in general. These women have been attacked, by both their abuser and the criminal justice system, and altogether devalued for their strength.²⁷¹ When a woman is at the stage of speaking with an attorney, she has already been victimized twice and therefore believes every actor in the criminal justice system is untrustworthy and against her.²⁷² Sarah M. Buel notes in her research, "They feel judged by legal professionals as a result of lawyers' negative body language and blaming questions that demonstrate disappointment, pity, frustration, contempt, and derision for the victim."²⁷³ Should public defenders wish to receive the respect of their client, a revictimized victim, they must make her feel safe, comfortable, and confident in their counsel. Public defenders can establish the client-attorney relationship by fully hearing their client's narrative and investigating all of her claims, especially the perpetrators' use of the cycle of violence.²⁷⁴

b. *Duty to thoroughly investigate*. Buel notes, "Another frequent failing is counsel's insufficient investigation into and scrutiny of the history and documentation of abuse The *Strickland* Court ruled that for ineffective assistance claims, particular consideration must be afforded to assertions that counsel did not investigate information provided by the defendant."²⁷⁵ Documenting history of abuse will help judges and juries

269. Tuerkheimer, *supra* note 18, at 965.

270. *Id.* at 262.

271. *See generally* Buel, *supra* note 95.

272. *Id.*

273. *Id.* at 241.

274. *See generally* Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483 (2012).

275. Buel, *supra* note 95, at 261.

understand the abuser's state of mind. This helps the judge and jury realize that the criminal justice system has mistakenly convicted the victim of being the perpetrator or mutual batterer.²⁷⁶ In claiming self-defense, counsel must establish that their client, the revictimized victim, meets a "reasonable person" standard. An example of this is outlined in California Jury Instructions for Criminal which state:

A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat. In the exercise of [his] [her] right of self-defense the person may stand [his] [her] ground and defend [himself] [herself] by the use of all force and means which would appear to be necessary to a *reasonable person* in a similar situation and with similar knowledge; and a person may pursue [his] [her] assailant until [he] [she] has secured [himself] [herself] from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more have easily gained safety by flight or by withdrawing from the scene.²⁷⁷

Unfortunately, reasonable person guidelines, generally, are very vague and tend to disfavor the victim²⁷⁸, who is usually distraught immediately following the abuse when law enforcement arrives. Nonetheless, public defenders must investigate their client's narrative adequately as it had previously been decontextualized, this to prove her innocence.

c. Duty to correctly instruct the jury. The jury should receive the history of battery so that its decision as to whether the victim acted in self-defense or whether he or she was the primary aggressor can be more clearly recognized. Tuerkheimer notes, "The incident-focused criminal law contemplates an act or omission . . . taking place in an instant of time so precise that it can be associated with a particular mental state or intention."²⁷⁹

Of the four main communication research methodologies, ethnography is what Princeton anthropologist Clifford Geertz defined as "[a] method of participant observation designed to help a researcher experience a culture's complex web of meaning."²⁸⁰ Ethnographic research is "not an experimental science in search of law, but an

276. See generally Buel, *supra* note 95.

277. Jackson, *supra* note 58, at 161.

278. *Id.*, at 176.

279. Tuerkheimer, *supra* note 18, at 972 (internal citation omitted).

280. EM GRIFFIN, A FIRST LOOK AT COMMUNICATION THEORY 34 (8th ed. 2012).

interpretive approach in search of meaning.”²⁸¹ Plainly stated, “Getting it right means seeing it from their point of view.”²⁸² Ethnographers place themselves into a situation they desire to understand completely. The ethnographer hopes to interpret what happened and explain what it means within the culture. Ethnography defined means mapping out social discourse; discovering who people within a culture think they are, what they think they are, what they think they are doing, and to what end they think they are doing it.²⁸³ There is no better teacher than experience. Though it is deeply personal, and a personal source of years of pain and suffering, I have exposed the fact that I myself have lived through revictimization by the criminal justice system in a domestic violence case. It is for this reason that I have devoted myself to legal research and writing on this subject. As a communication scholar, an ethnographer, and a Master of Legal Studies, I would like to bring you a slice of what I have lived through myself.

In the case of *People v. Delagarza*, the public defender’s attempts to use character evidence were referred to as a *limine instruction*.²⁸⁴ The use of limine instruction afforded the prosecutor the ability to remove testimony of the abuser’s previous violence upon the victim. The prosecutor stated:

With the court taking judicial notice of the—of the crimes, Defense is going to get up and argue self-defense. You heard that he was charged with third degree assault, you heard that he was charged with false imprisonment; it goes directly to that, it is a fact in contention, and I don’t think it is proper to take judicial notice of that.²⁸⁵

The prosecution went on to argue that,

[I]t goes to their theory of self-defense, and we’re saying that was not the case here.”²⁸⁶ In this case, the alleged victim (perpetrator) was mutually charged with third degree assault/domestic violence, but the charge was “subsequently dismissed pursuant to . . . an informal plea agreement by the People and that he would do a certain thing, and the case would be dismissed”²⁸⁷

281. *Id.*

282. *Id.*

283. *Id.* at 263.

284. Transcript of Record, *People v. Delagarza*, 2015 M 570 (Colo. Dec. 1, 2015) (No. 2016CV30246).

285. *Id.* at 23–24.

286. *Id.* at 24.

287. *Id.* at 22.

As was the case here, victims will be unable to receive justice should the court not permit the jury to know the perpetrator's history of battery upon the victim. Public defenders, as advocates for defendants, should establish that their clients are not the primary aggressors, but rather the victims of violent crimes. Public defenders must fulfill their duty to correctly and accurately instruct all involved of the character of the perpetrator.²⁸⁸ When public defenders fail to present the pattern of violence used by the perpetrator, the revictimized victim is robbed of her voice. What's more, the isolated event misleads the jury to believe she is the criminal who committed the act of violence rather than the person who had to fight back to save her life. One scholar explains that jurors hearing a criminal case seek to know "what" and "why"²⁸⁹ ". . . evidence of motive is always relevant."²⁹⁰ Recidivism and, in turn, revictimization are inevitable if the jury is not properly instructed with the evidence of motive.

IV. Conclusion

Every person either knows a victim of domestic violence, knows a perpetrator of domestic violence, or directly experiences domestic violence for themselves. For this reason, the domestic violence epidemic affects all of us in some form. This is exacerbated by members of our government who believe "perfect protection of the law is not required."²⁹¹ As stated by scholars Larance and Miller, "[f]or some women, in some circumstances, police action has been crucial for their safety. For other women, police action has had devastating long-term consequences. We refuse to collude with an unexamined expansion of state power to criminalize women as abusers and penalize their defensive action."²⁹² As citizens of the United States, we have the constitutional right to the equal protection of the law, regardless of our gender or our gender performance. Based on both legal research and ethnographic research, I can state with certainty that the constitutional rights of revictimized women have been grossly violated.

As outlined throughout the body of this article, as long as the criminal justice system refuses to correctly identify victims and perpetrators, refuses to allow character evidence into criminal trial hearings, and

288. See generally Tuerkheimer, *supra* note 18.

289. *Id.* at 985.

290. *Id.* at 984.

291. Spagat, *supra* note 119.

292. Larance & Miller, *supra* note 31, at 439.

continues to gender discriminate against non-conforming women, we will have a problem. My ideas are simple. Once the criminal justice system correctly identifies the victim and perpetrator, permits use of the pattern of violence, and allows public defenders the time and energy to devote to their client's domestic violence cases, the epidemic can begin to be resolved. In turn, justice will be served. American law enforcement, judges, and public defenders must collectively agree to stop failing non-conforming women by revictimizing them. This is a petition for the equal protection of the law for women who fight back.