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ARTICLE

THE PRACTICE OF DOMESTIC VIOLENCE

Shannon Selden*

ABSTRACT

This Article argues that in order to fully understand and address domestic violence, we should examine the cultural meaning of domestic violence and how that meaning constitutes and is constituted by legal responses to domestic violence. The Article draws on a close reading of the literature on domestic violence, case law, and women's writings on abuse to suggest that an analogy to torture offers an alternative framework for understanding the cultural meaning of domestic violence and its sources.

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* Associate, Debevoise & Plimpton, New York, New York. The opinions expressed in this Article are those of the author alone, and do not reflect the views of the firm or its clients. Many thanks to Austin Sarat and Courtney Cahill, whose thoughtful comments helped shape this Article.

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These are stories of domestic violence:

For Irene Miller, marriage consisted of patterns of attack and calm. Mark would often explode after a brief argument over the children or money. He would choke Irene, and throw her across the room or onto the bed. He would hit her with his fist, bang her head into the floor or the wall, kick her and bite her. He would take her hands and feet and bend them back and twist them.¹

After Rick and Janet had been married a week, Janet commented that they made a very nice-looking couple. Rick's jaw tightened, and without saying anything, he turned and began hitting her in the jaw with his fists, working down her body. Janet was trapped in a corner. She eventually fell to the floor. Rick kicked her until she lost consciousness.²

Terry Biggers hit his wife Margaret in the face with his fists and stomped on her body with his shoes while threatening to kill her. Margaret drifted in and out of consciousness as he beat her. Eventually, she was able to jump out a second story window and escape. The police found blood all over the house.³

In 1996, Curtis Wilds stabbed his wife Tonya to death in the kitchen while their three children watched.⁴ At trial, witnesses testified that Curtis had choked Tonya while she was in the hospital and thrown her against the wall.⁵ One night, she woke up in bed to find Curtis pouring gasoline over her body and her night-

1. Angela Browne tells the story of Mark and Irene Miller at length — from the beginning of their relationship to Irene's eventual killing of Mark — in *WHEN BATTERED WOMEN KILL* (1987). This excerpt is found at 59. Browne's research revealed that typical abuse reported by women who had killed their husbands ranged from being slapped, punched with a fist, kicked or hurled bodily to being choked, smothered or bitten. Women reported attacks in which they were beaten with an object, threatened or injured with a weapon, scalded with hot liquid, or held under water. Sexually assaultive acts were also frequently mentioned. The typical battering episode involved a combination of assaultive acts, verbal abuse, and threats.

Id. at 58.

2. BROWNE, *supra* note 1, at 48.

3. *Biggers v. State*, 741 So. 2d 1003, 1005 (Miss. Ct. App. 1999).

4. *State v. Wilds*, 515 S.E.2d 466, 471 (N.C. Ct. App. 1999).

5. *Id.* at 472.

gown.⁶ And, when Tonya was taking a bath, Curtis poured gasoline into the bathtub. He frequently threatened to kill her, once pointing a gun at her while she begged for her life on her knees.⁷

Rosa Bernal's husband Pedro hit her all over her body — her face, legs, and back. He then pushed her down and raped her anally, vaginally, and orally while threatening to kill her.⁸

David Christel assaulted his girlfriend when she was six months pregnant. He broke into her apartment and slapped her about the face. He then grabbed her by the neck, forced her face into a pillow, and raped her. During the rape, Christel's girlfriend suffered premature labor contractions and severe pain. She had to be admitted to the hospital.⁹

Ralph Weldy began beating his wife Cynthia two days after their marriage. Two months after they were married, he returned home drunk and began beating Cynthia on her face and her arms. While she was seated on a kitchen chair, Ralph repeatedly plunged a 12-inch long serrated knife into the wall right next to Cynthia's head. Ralph continued to assault Cynthia throughout the night — sometimes with his fists and sometimes with weapons. At one point he broke a glass and threatened Cynthia with the jagged bottom. Early in the morning, Ralph struck Cynthia's head, shoulder, torso, stomach, and ribs with a piece of firewood. When Cynthia went to work after the nightlong assault, Ralph came to the restaurant where she waited tables and hit her in the head while she was carrying a pot of coffee. He left, then returned, hauled Cynthia outside and renewed his attack.¹⁰

In the driveway of their San Antonio home, Rudy Tejada hit his wife Brenda with a closed fist in her face, arm, and leg, leaving cuts and bruises.¹¹

The project of defining domestic violence requires identifying and describing the social meaning generated by the proliferation of stories like these while simultaneously recognizing and describing the particularity of individual women's experiences. That project of "thick description"¹² is the purpose of this Arti-

6. *Id.* at 473.

7. *Id.* at 474.

8. *State v. Bernal*, No. 97-1-01301-8, 1999 WL 10094, at *1 (Wash. Ct. App. Jan. 11, 1999).

9. *People v. Christel*, 537 N.W.2d 194, 197-98 (Mich. 1995).

10. *State v. Weldy*, 902 P.2d 1, 8 (Mont. 1995).

11. *Tejada v. State*, 905 S.W.2d 313, 315 (Tex. Ct. App. 1995).

12. The term is Clifford Geertz's. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 29 (rev. ed. 2000). For a discussion of the ways in which cultural

cle. Part I discusses how definitions of domestic violence have played a crucial role in determining the nature and success of political and legal responses to such violence. Some of the approaches this Article examines focus on the individual subjective experiences of women who have been abused, others focus on the social or economic consequences of domestic violence. While each of these views illuminates an important aspect of the crime, Part II moves toward a framework that accounts for both the individual and the public components of domestic violence. Part II defines torture and identifies three critical parallels between the practice of torture and the practice of domestic violence. Like torture, domestic violence restricts movement and independence over time, often involving the infliction of physical and psychological pain, and revolving around a dynamic of interrogation and self-betrayal. Part III argues that the practice of domestic violence is shaped by the state's responses, or lack thereof, to instances of abuse. Women's belief in the possibilities for exit and redress, and men's belief in the acceptability of their actions, are crucially shaped by legal and cultural responses and regimes. Part IV contends that, like torture, domestic violence has devastating consequences for the public (or "political") lives of its victims. Because domestic violence is, above all, "domestic," taking place within the spaces of the home and relationships of intimacy, it erodes the integrity of the private spaces and lives of its victims. While domestic violence can be a spur to political action, it undermines women's opportunities to have meaningful and vigorous public lives. Part V concludes that approaching the practice of domestic violence as a form of torture arms us with a framework according to which we can and should shape our legal and social responses.

I. INTRODUCTION: WHAT IS AT STAKE IN DOMESTIC VIOLENCE?

Domestic violence or, more specifically, the violence that men inflict upon women with whom they have intimate relationships,¹³ has both individual and social meaning. For the women

studies of law can use thick description as an explanatory and interpretive tool, see Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 60-61 (2001).

13. Although men are also victims of domestic violence, and domestic violence could be described and written into statute in gender-neutral terms, I use domestic violence throughout this Article to describe the violence against women by men.

who are victims of domestic violence, abuse, injury, and coercion affect their daily lives, choices, and interactions with others. For women who are abused, violence is deeply personal and individual: each woman's life and choices are at stake.¹⁴ At the same time, domestic violence exists at a systemic level.¹⁵ Domestic violence is pervasive, it is commonplace, and while it may not be the rule, it is far from exceptional.¹⁶ To adequately understand and address domestic violence, one must acknowledge that it is

Women are overwhelmingly the victims of domestic violence and domestic violence assumes a social meaning and social role that dominantly affects women. This approach necessarily excludes some groups who are also victims of domestic violence: namely, men and women in homosexual relationships who are subject to intimate abuse. It is unfortunate that to study an area of criminal law and social norms that has left women on the margins of justice I find myself relegating others to the margins and footnotes of my Article. Part of the cultural and social meaning of domestic violence, then, is the perception among both men and women that domestic violence is violence perpetrated by men against women. For analyses of domestic violence that explore more fully violence in lesbian and gay relationships and criticize "essentializing" approaches, see Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); and Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 195 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

14. Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 13, at 60 [hereinafter Mahoney, *Victimization or Oppression?*] observes that even as women live under systemic power disparities, embedded in cultural expectations and norms, "the experience of structural inequality is, for each woman, the experience of her life. . . . Violence at the hands of intimate partners, a relatively common event for women, is experienced in this context of love and responsibility, work and obligation, commitment and uncertainty." Others describe how battered women amend their behavior to please their batterers and avoid further injury. See RICHARD J. GELLES & MURRAY A. STRAUSS, *INTIMATE VIOLENCE* 130-31 (1988); LENORE WALKER, *THE BATTERED WOMAN SYNDROME* (1984). Mahoney also suggests that women are reluctant to define themselves as "battered women" or as "victims" and may experience their battering relationship as simply a "bad marriage." Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) [hereinafter Mahoney, *Separation*]; see also KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988) (discussing reluctance among discrimination victims to perceive/describe themselves as victims).

15. See *infra* at II.A (citing National Crime Survey Statistics).

16. In 2002, we could make the same observation as a Massachusetts legislature committee did in 1841 when it observed that each member of the House had personal knowledge of wives "dejected [and] heartbroken . . . subjected, day after day, for long and heavy years, to the cold looks, the insolent and brutal abuse, and often to the blows of the man, whom the law calls her husband." Jerome Nadelhaft, *Wife Torture: A Known Phenomenon in Nineteenth Century America*, 10 J. AM. CULTURE 39, 42 (1987).

always both an individual struggle and a social fact.¹⁷ Each of the stories above is both an individual tragedy and a chapter in a larger tale. This Article is an attempt to think about and to describe stories like those as individual experiences and as the social practice of domestic violence. This Article further argues that those experiences and that practice are best conveyed and addressed by conceiving of domestic violence as torture.

Those who study domestic violence identify different aspects as the "core" of the matter. Each approach takes the pure facts of domestic violence and situates them within a particular meta-narrative, a larger social and legal framework. This Article rejects many of those approaches and suggests an alternative analysis: an analogy to torture. Like many of the approaches it seeks to replace, however, this analogy seeks to establish a larger framework in order to achieve a particular purpose.

The U.S. Congress, for example, eager to enact a bill that would pass constitutional muster, chose the economic impact of violence against women as the core of its analysis in order to justify its power to legislate under the Commerce Clause.¹⁸ The Supreme Court's Commerce Clause jurisprudence and post-*Lopez*¹⁹ demands for extensive legislative findings induced Congress to ground its civil rights legislation in extensive economic analysis and commerce-related reasoning.²⁰ The Senate Judiciary Committee offered its support for the bill by stating that "gen-

17. Martha Minow observes that we tend to dramatize and focus upon extraordinary cases while denying larger patterns of violence. She points to the public fascination with Lisa Steinberg's case and the public debates over the relative responsibility for the child of Joel Steinberg, the abusive husband and father, and his wife Hedda Nussbaum, herself a battered woman. According to Minow, debates about responsibility "contribute also to the dynamic of brief, public fascination with individual horror stories followed by extended public quiescence about the more widespread problem." Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1683 (1990).

18. See, e.g., S. REP. NO. 103-138, at 54 (1993) (finding billions of dollars in health care costs, criminal justice costs, and business losses due to gender-based violence).

19. *United States v. Lopez*, 514 U.S. 549 (1995).

20. See David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252 (1998) (discussing relationship between VAWA and the Supreme Court's Commerce Clause jurisprudence); Sara E. Kropf, *The Failure of United States v. Lopez: Analyzing the Violence Against Women Act*, 8 S. CAL. REV. L. & WOMEN'S STUD. 373 (1999) (same). See also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 443 (2000) (noting that although the Commerce Clause has been used since the New Deal to justify federal antidiscrimination legislation, recent cases indicate that the

der-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."²¹ Although Congress's efforts to design a civil rights remedy for gender-based violence were dismissed by the Supreme Court in *United States v. Morrison*,²² the Violence Against Women Act remains an exemplar of an effort to cast domestic violence (among other forms of gendered violence) in particular terms in order to achieve a given legal result. Here, because a Commerce Clause justification seemed more likely to satisfy the Supreme Court than a Fourteenth Amendment Equal Protection argument,²³ Congress emphasized the costs domestic violence imposes on the American economy over the costs it imposes on women's personal lives and social equality.²⁴ Based on this analysis, any victim of domestic violence is justified in bringing a civil rights claim against her husband in federal court because her experience is part of a larger epidemic that imposes substantial burdens on the national economy. While it is indeed true that domestic violence has serious national and economic effects and that Congress's approach adequately explains the stories that introduce this Article as part of a larger national problem, the Commerce Clause approach obscures the emotional and physical impact domestic violence has on individual women.

Lenore Walker's groundbreaking work is another example of an attempt to explain the actions of individual battered women by situating them within a larger explanatory framework, but it too is incomplete. Her exploration of the psychological patterns and practices of the battering relationship became a cru-

Supreme Court is increasingly eager to limit Congress's power to legislate under the clause).

21. S. REP. NO. 102-197, at 53 (1991).

22. 529 U.S. 598 (2000).

23. At least *ex ante*. The VAWA hearings began before the Supreme Court's decision in *Lopez*. While it is now evident that *Lopez* heralded a dramatic shift in the Court's Commerce Clause jurisprudence, the full force of this decision may not have been realized by those pushing the economic rationale for VAWA's civil rights remedy. See Post and Siegel, *supra* note 20.

24. To be fair, the civil rights remedy of 42 U.S.C. § 13981 was also explicitly treated as a civil rights remedy and modeled after those found in 42 U.S.C. §§ 1981, 1983, and 1985(3). Margaret A. Cain, Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 383 (1999). Absent the long tradition of civil rights remedies justified as Commerce Clause legislation, however, such economic arguments would have been unnecessary and may have seemed a strange justification. See Post and Siegel, *supra* note 20, at 443.

cial component of the self-defense claims of battered women standing trial for killing their abusers.²⁵ Walker's "battered woman syndrome" became a critical diagnostic and explanatory device, used to explain how the defendant's experience of abuse affected her perceptions and behavior, particularly her ability or inability to leave the battering relationship and her perception of imminent danger outside the context of acute battering incidents.²⁶ Walker argued that such testimony enabled women to make a more persuasive case for their juries:

There is a fundamental difference between the way women tell of their battering experiences and what is permitted under the male-identified rules of evidence. . . . Rules of evidence call for the recitation of discrete events separated from feelings or opinions. Facts out of context may be acceptable, but they do not convey the battered woman's experience. Expert witnesses can tie together what the current evidentiary rules do not allow the defendant to say.²⁷

Although battered woman syndrome may have been necessary to make sense of defendants' actions for lay jurors, it has deleterious consequences for battered women. As Martha Mahoney points out, "one result of the highly publicized focus on battered woman syndrome and learned helplessness has been to inappropriately increase cultural attention to the battered woman's psychological makeup."²⁸ Using expert testimony and psychology to explain women's actions has two results: it simultaneously makes them comprehensible to the jury and obscures the pervasiveness of domestic violence while displacing the focus of inquiry from the batterer's acts to his victim's responses.²⁹ As with Congress's use of economic evidence to justify civil rights legislation, the need to respond to legal conditions of testimony and trial induces

25. See WALKER, *supra* note 14. Recently, Linda Mills has emphasized the importance of lawyers and police taking a psychological approach to battering. See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) [hereinafter Mills, *Killing Softly*]; *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996) [hereinafter Mills, *Other Side*].

26. See WALKER, *supra* note 14; see also CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 41-60, 76-94 (1987).

27. Lenore Walker, *A Response to Elizabeth M. Schneider's Describing and Changing*, 9 WOMEN'S RTS. L. REP. 223, 223-24 (1986).

28. Mahoney, *Separation*, *supra* note 14, at 43.

29. See ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 24 (2000) ("Employing 'battered woman syndrome' as an explanatory framework shifts the focus of the violent act to the woman, and the use of 'syndrome' suggests that it is she who is emotionally or mentally impaired.").

an approach to domestic violence that, in attempting to satisfy legal criteria, elides and obfuscates many of the crucial issues at stake. Where the Commerce Clause approach fails to pay adequate attention to individual experience, Walker fails to examine the larger political and social problem created by pervasive domestic violence. Walker helps us understand why Tonya Wilds remained married to her husband Curtis despite years of severely violent abuse,³⁰ but she has little to say about the cultural environment such abuse — and its proliferation throughout numerous households — generates.

Others have offered analyses that attempt to situate individual experience within the framework of pervasive domestic violence. Since domestic violence arrived at the forefront of many feminists' concerns, scholars have increasingly recognized that one of the issues that law and scholarship must address is the coercive and controlling nature of intimate abuse. Martha Mahoney, for example, persuasively argues that those who concentrate only on the most grotesque and violent episodes of abuse ignore the normalcy and pervasiveness of violence against women in intimate relationships.³¹ By casting their sights beyond severe incidents of violence, scholars like Mahoney explore and illuminate the ways in which abusive men control their partners psychologically, emotionally, financially, and physically. This literature has exposed both the multivalent nature of wife abuse and its pervasiveness.³² Such an approach is crucial for women for several reasons. First, and perhaps most importantly, it is a form of consciousness-raising: it allows women who are not subject to the most egregious attacks to identify potentially dangerous relationships and encourages them to seek assistance and safety. Exposing the many layers and forms of abuse allows women to recognize and assert that they are entitled to a greater measure of safety and respect in their relationships. Second, a multilayered analysis of wife abuse encourages general societal recognition of the pervasiveness of abuse and its presence as a social problem, not a tragedy that besets a few unfortunate individuals. Such an approach redefines and contests the appropriate nature of intimate relations between men and women, and challenges those who accept "some" coercion, or some mild

30. *State v. Wilds*, 515 S.E.2d 466, 471 (N.C. Ct. App. 1999); *see also supra* text accompanying note 7.

31. Mahoney, *Separation*, *supra* note 14, at 2-4.

32. *See id.* at 3.

physical "correction" as acceptable and appropriate within marriage or other intimate relations. These approaches allow women like Brenda Tejada to understand that even though they may have only been physically attacked once, that attack is not an isolated fight, but part of an identifiable and widely practiced means of gaining control in a relationship.³³

This Article argues that domestic violence as a means of coercion and control and as a crime that lasts over a sustained period of time is best addressed by conceiving of domestic violence as torture. This approach is not uniquely mine: Rhonda Copelon argues that domestic violence should be understood as torture because the international law of torture offers a legal tool for addressing such violence and recognizing it as a human rights violation.³⁴ She suggests that international law's prohibitions against torture should be extended to gender-based crimes in order to increase their public profile and to motivate the human rights community, as well as to achieve access to a more efficient forum for redress.³⁵

Although I agree that a definition of domestic violence as torture serves an invaluable legal and political purpose, unlike Copelon's approach, I develop this analogy more as a form of exploration of the cultural life of domestic violence than as an instrumental legal approach. Following those who seek to do "law and cultural studies," I argue that we must focus on the cultural meaning of domestic violence and how that meaning constitutes and is constituted by legal responses to domestic violence in order to fully understand both the crime and the best means to address it.³⁶ The remainder of the Article suggests that we can best recognize the cultural meaning of domestic violence and its

33. *Tejada v. State*, 905 S.W.2d 313, 315 (Tex. Ct. App. 1995).

34. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 294-95 (1994). In a similar attempt at redefinition, Isabel Marcus, in *Reframing "Domestic Violence: Terrorism in the Home*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 13, at 11, argues that domestic violence should be understood as a form of terrorism and Joyce E. McConnell, in *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992) suggests that slavery is a more apt framework for understanding.

35. See generally Copelon, *supra* note 34.

36. As Austin Sarat and Thomas Kearns argue:

Meaning is perhaps the key term in the vocabulary of those who speak about the cultural lives of law, of those who seek to connect the word and the world. "Our gaze," Geertz observed, "focuses on meaning, on the ways . . . (people) make sense of what they do — practically, morally, expressively, . . . judically — by setting it within larger

sources — which together I call the practice of domestic violence — by identifying its similarities to torture.

II. DOMESTIC VIOLENCE AS TORTURE

In Amnesty International's first international review of the use of torture, it defines torture as "the systematic and deliberate infliction of acute pain in any form by one person on another, or on a third person, in order to accomplish the purpose of the former against the will of the latter."³⁷ Since then, the definition of torture has been modified somewhat. The United Nations Convention Against Torture now includes a state action requirement: to be considered torture, the act must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."³⁸ Torture is also defined and monitored by numerous other agreements and bodies, including the Human Rights Committee and the domes-

frames of signification, and how they keep those larger frames in place or try to, by organizing what they do in terms of them.

Austin Sarat & Thomas R. Kearns, *Introduction to LAW IN THE DOMAINS OF CULTURE* 1, 6 (Austin Sarat & Thomas R. Kearns eds., 2000). Law is both a "larger frame of signification" in which people determine what is and is not acceptable action, and one of many cultural fora that are informed and constituted by social practice. See Mezey, *supra* note 12. The law both reflects and constructs our responses to domestic violence, and our cultural understanding of domestic violence both reflects and constructs our legal regime. In utilizing this approach, I take as a guide the notion that "focusing on the production, interpretation, consumption, and circulation of legal meaning suggests that law is inseparable from the interests, goals, and understanding that deeply shape or comprise social life." Sarat & Kearns, *supra* at 6. By examining both the physical and emotional facts of domestic violence and the legal responses to it, I hope to elucidate the interaction between law and social life in the practice of domestic violence.

37. AMNESTY INTERNATIONAL, REPORT ON TORTURE 31 (1973) [hereinafter REPORT ON TORTURE].

38. The definition reads in full:

For the purposes of this Convention, the term "torture" means any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. A/RES/39/46 (1984).

tic laws of many countries.³⁹ The distinguishing elements of torture first identified by Amnesty International in 1973 remain central in those subsequent definitions, however. Torture involves, “the infliction of acute pain and suffering”; “the breaking of the victim’s will”; and “systematic activity with a rational purpose.”⁴⁰ Torture is also frequently associated with political repression or, more explicitly, with the Machiavellian approaches of political regimes seeking to retain power through fear and the elimination of opposition.⁴¹ In this Article, I examine the experience of domestic violence as a parallel to the experience of torture. Using the three elements of torture identified by Amnesty International in 1973 as the guiding definition, I explore the social meaning of domestic violence for those who perpetrate and suffer it.

Elaine Scarry’s sustained examination of the rubric of pain and torture in *The Body in Pain* gives content to Amnesty International’s definition and I follow her rubric throughout the Article.⁴² She describes and defines torture as follows: first, torture consists of both the physical act of inflicting pain, and the verbal act of interrogation.⁴³ As Scarry describes, the questions posed by the torturer are asked *as if* they were crucial — as if they were the sole reason for the infliction of violence.⁴⁴ For the torturer, the importance of ascertaining an answer overwhelms and renders invisible the fact of the pain he is inflicting.⁴⁵ For the prisoner, the pain so overwhelms that the question is meaningless and any answer is given.⁴⁶ When the prisoner is in great agony and answers the question, he is said to have “betrayed” himself by giving in under torture. In this process of interrogation, the prisoner experiences the negation and annihilation of his pain, yet no one else, and certainly not the torturer, can sense or share

39. For a full discussion of the laws and bodies regulating torture, see Andrew McEntee, *Law and Torture*, in *A GLIMPSE OF HELL: REPORTS ON TORTURE WORLDWIDE 1-20* (Duncan Forrest ed., 1996); Copelon, *supra* note 34.

40. REPORT ON TORTURE, *supra* note 37, at 30.

41. *See id.* Rhonda Copelon has persuasively argued that domestic violence could and should be understood as torture under these international legal instruments, including the state action requirement. COPELON, *supra* note 34. I will not revisit her legal arguments here.

42. ELAINE SCARRY, *THE BODY IN PAIN* (1985).

43. *Id.* at 28.

44. *Id.* at 28-29.

45. *Id.* at 29.

46. *Id.*

that experience.⁴⁷ The torturer, on the other hand, enjoys the continuous expansion of his world and the absence of pain. By reducing the prisoner to his body and his agony, the torturer has achieved for himself an ever-increasing world.⁴⁸ The question and answer of the interrogation reinforce this sundering: The torturer's voice grows larger, louder, more demanding, as the prisoner either "betrays himself" and confesses or is reduced to a scream.⁴⁹ In the infliction of torture,

It is the intense pain that destroys a person's self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language-destroying: as the content of one's world disintegrates, so the content of one's language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject.⁵⁰

Nothing exists for the victim of torture but her body and her pain. Through this process, the victim is reduced to her body, her sentience obliterated,⁵¹ and her pain is understood as the torturer's power.⁵²

The structure of domestic violence is alarmingly similar to that which Scarry describes as the structure of torture. Using Scarry's rubric of torture and pain to explore the structure of domestic violence, I draw three parallels. First, between captivity and intimacy; second, between the torture of the prisoner and spousal abuse; and third, between the destruction of language through interrogation and its destruction through retaliation for acts of autonomy or of speech. Taken together, these parallels suggest that domestic violence should be understood as a form of torture.

A. *Captivity and Intimacy*

Like the torturer to the prisoner, a man in an intimate relationship has continuous access to the woman he beats. They are, or began as, lovers, spouses, partners. The word "intimate" describes a proximity between individuals that is not identified in

47. *Id.* at 36.

48. *Id.* at 36-37.

49. *Id.* at 36.

50. *Id.* at 35.

51. *Id.* at 38.

52. *Id.* at 37.

other relationships.⁵³ The victim is not elusive or strange, but is an always already present part of his life. While she may attempt to leave, or seek temporary refuge, she can rarely sever the tie and is found, comes or is brought back.⁵⁴ This relationship appears to be one of proximity, of closeness and accessibility, not necessarily of *captivity*.⁵⁵ Yet, although women are not explicitly held captive against their will in violent intimate relationships, it can be incredibly difficult for them to leave. As Martha Mahoney argues, women are rarely the autonomous actors posited in legal definitions. As mothers, for example, women "continually make decisions on the basis of extended, collective, multiple self-interest (their children's as well as their own, their husband's as well as their children's)."⁵⁶ Often, when people ask, "why didn't she leave?" they fail to ask the second question: "Where could she go?" Leaving a battering relationship may mean leaving all the precious and familiar possessions of the home. For some women, in moments of desperation, it may mean leaving their pets and children.⁵⁷ Like the prisoner, a woman who is battered is not

53. Gelles and Straus argue that intimate violence occurs because people hit people "because they can." GELLES & STRAUS, *supra* note 14, at 17-36. As they observe, it is extremely difficult to break off a relationship with a family member, and family members who are violent have continuous access to their victims. They also argue that mere proximity is not the only factor that increases and ensures access by abusers to the victims of violence. In addition to the extensive time family members spend together, the wide range of activities, interests, and emotions create a uniquely intense and resistant bond. *See id.* at 78.

54. *See generally* Mahoney, *Separation*, *supra* note 14.

55. Lenore Walker's psychological approach explains women's tendencies to remain in battering relationships as the product of a cycle of "learned helplessness." *See* WALKER, *supra* note 14. Using Pavlov's dogs as a model, she portrays women as conditioned to violence and unable to perceive of the possibility of exit. While this may be a helpful tool in a courtroom and an expeditious means to clarify the nature of battering relationships to jurors and judges who may be unfamiliar with the dynamics of domestic violence, I am not convinced that it is either accurate or beneficial to women. I do not intend to rely on it here. In drawing the analogy to torture, I do not insist that women are literally captive, merely that violence among intimates often occurs over time; that men who hit their wives once often do so again; that this is not the case when one stranger assaults another.

56. Mahoney, *Separation*, *supra* note 14, at 19. *Cf.* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688, 742 (1998) (discussing images of battered women as mothers).

57. One woman wrote to Erin Pizzey: "The next day at 5 a.m. he started banging my head. Then he kicked me. I closed my eyes and he just beat me in front of my children and he stamped on my feet. I was beaten all day and night." Eventually she ran outside and told two women. She believed they had called the police, and went back into the house, "I only took the baby and thought later I would get some-

free to come and go, and remains continuously susceptible to attack.⁵⁸

B. *Pain and Abuse*

Amnesty International identifies the deliberate infliction of pain as another defining element of torture.⁵⁹ In *The Body in Pain*, Elaine Scarry explores the nature of the pain inflicted during torture and argues that pain is “language destroying.” She suggests that the infliction of pain has two consequences for the sufferer and those who are not in pain. The person in pain is effortlessly and inescapably aware of pain — for her “having pain” is “what it is to ‘have certainty.’”⁶⁰ For the person who hears of pain, on the other hand, it remains elusive — unsharable: “‘hearing about pain’ may exist as the primary model of what it is ‘to have doubt.’”⁶¹ For Scarry, pain’s “resistance to language is not simply one of its incidental or accidental attributes but is essential to what it is.”⁶²

Scarry reveals the aspects of pain by identifying three phenomena that occur invariably and simultaneously in the infliction of torture. If isolated, and ordered, she says, they would occur as follows: “First, pain is inflicted on a person in ever-intensifying ways. Second, the pain, continually amplified within the person’s body, is also amplified in the sense that it is objectified, made visible to those outside the person’s body. Third, the objectified pain is denied as pain and read as power. . . .”⁶³ Just as it defines torture, this practice of inflicting pain and transforming pain into power is a central element of domestic violence.

body to come back for the other two.” ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR 53-54 (1977).

58. See also *infra* at II.C.1 (discussing separation assault).

59. REPORT ON TORTURE, *supra* note 37, at 31.

60. SCARRY, *supra* note 42, at 4.

61. *Id.*

62. *Id.* at 5.

63. *Id.* at 28. On the torture and the infliction of pain generally, see REPORT ON TORTURE, *supra* note 37; McEntee, *supra* note 43. On the torture of women in particular, see Amnesty International’s 2001 report on the worldwide torture of women, at <http://www.amnesty.org/ai.nsf/Index/ACT40012001?OpenDocument&of=thEMES/WOMEN>. I do not document the infliction of pain during torture in detail in this Article both as a function of limited space and because it is adequately conveyed by Scarry’s account.

In 1996, over 1,800 people were murdered by intimates.⁶⁴ The same year, there were nearly one million rapes, sexual assaults, robberies, aggravated assaults, and simple assaults perpetrated in an intimate relationship.⁶⁵ The victims of these violent crimes were overwhelmingly women.⁶⁶

The National Crime Victimization Survey reports that about half of the women who are victims of intimate violence were injured. Their injuries include: rape or sexual assault; gun, knife, or stab wounds; other serious injuries including "broken bones, internal injuries, being knocked unconscious, and any injuries requiring two or more days in a hospital"; and other injuries such as "bruises, black eyes, cuts, swelling, chipped teeth, and unspecified injuries requiring less than two days hospitalization."⁶⁷ One can imagine the nature of such injuries and the pain resulting by considering for a moment the types of objects men use as weapons to attack their wives and girlfriends:

64. U.S. Dept. of Justice, Bureau of Justice Statistics Factbook, *Violence by Intimates*, March 1998, at v. [hereinafter *NCVS*]. Of those killed by intimates nearly 75% were women. *Id.*

65. *Id.* at vii. The *NCVS* defines intimate relationships to include spouses, ex-spouses, boyfriends, girlfriends and former boyfriends and girlfriends. *Id.* Although the term "domestic violence" generally evokes images of women battered by their husbands or ex-husbands, abuse against intimates is not confined to married or divorced couples. While the literature does generally recognize the presence of intimate abuse among dating (and formerly dating) couples, it rarely mentions the presence of such violence among teenagers. Although throughout this Article I tend to refer to women and the men who batter them (or battered wives and husbands), it is important to remember that the same forms of violence occur between teenage boys and girls. See Carole A. Sousa, *Teen Dating Violence: The Hidden Epidemic*, 37 *FAM. & CONCILIATION CTS. REV.* 356 (1999). Sousa reports that nearly forty percent of young people in the U.S. experience intimate violence. *Id.* at 357.

66. The Department of Justice reports that over eight in ten of these crimes involved a female victim, but does not report how many of the assaults by women against men occurred in relationships in which the woman was the victim of ongoing abuse. See *NCVS*, *supra* note 64, at vii. The National Institute of Justice and Centers for Disease Control and Prevention's report on domestic violence reveals similar results. U.S. D.O.J., National Institute of Justice, CDC, Research in Brief, *Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*, November 1998. The National Violence Against Women Survey (hereinafter *NVAW*) demonstrated that women are much more likely to be assaulted by an intimate than men are. "Twenty-five percent of surveyed women, compared with eight percent of surveyed men, said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their life." *Id.* at 6. The differences between the rate of assault against men compared to women became greater as the assaults became more serious. Women were seven to fourteen times more likely to report that "an intimate partner beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them." *Id.* at 7.

67. *NCVS*, *supra* note 64, at 21.

[P]istols, shotguns, knives, machetes, golf clubs, baseball bats, electric drills, high-heeled shoes, sticks, frying pans, electric sanders, toasters, razors, silverware, ashtrays, drinking glasses and beer mugs, bottles, burning cigarettes, hair brushes, lighter fluid and matches, candlestick holders, scissors, screwdrivers, ax handles, sledgehammers, chairs, bedrails, telephone cords, ropes, workboots, belts, door knobs, doors, boat oars, cars and trucks, fish hooks, metal chains, clothing used to smother and choke, hot ashes, hot water, hot food, dishes, acid, bleach, bases, rocks, bricks, pool cues, box fans, books, and, as one woman described her husband's typical weapons, "anything handy."⁶⁸

The weapons of domestic violence are frighteningly similar to those used in torture:

During initial interrogation and later, attacks with fists, boots, knees and blunt instruments, including pistols and rifle butts, batons, broom handles, chair-legs, rubber hoses, electric cable and makeshift or ready-made whips and scourges, have been reported almost everywhere that ill-treatment occurs. Beatings have also been conducted with barbed wire.⁶⁹

As the range of weapons, the extent of injury, and the women themselves reveal, the degree of pain suffered may vary considerably from couple to couple and even within the course of a individual relationship. Incidents of domestic violence consist of the most severe types of attack recognized by the criminal law and result in injury and pain suffered by the victims.⁷⁰

68. Nadelhaft, *supra* note 16, at 39 (citation omitted). As Nadelhaft goes on to discuss, this is not a twentieth century phenomenon and recent times have only added more modern "weapons" to an already lengthy list. In 1878, Frances Cobbe also listed the weapons of intimate violence, saying: "if he does not wear clogs or hob-nailed shoes, he takes up some other weapon, a knife, a poker, a hammer, a bottle of vitriol, or a lighted lamp, and strikes her with it, or sets her on fire. . . ." *Id.* at 41, quoting Frances Power Cobbe, *Wife-Torture in England*, THE CONTEMPORARY REVIEW, 1878 at 73. Similarly, the court in *Fulgham v. State*, 46 Ala. 143, 146 (1871), observes that "the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law." See also RAOUL FELDER & BARBARA VICTOR, GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE 45 (1996), quoted in Margaret A. Cain, Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 377 (1999) (discussing tactics used by battering men and rate of violence in U.S.).

69. Mike Jempson, *Torture Worldwide*, in GLIMPSE OF HELL: REPORTS ON TORTURE WORLDWIDE, *supra* note 39, at 46, 54.

70. See James B. Halstead, *Domestic Violence: Its Legal Definitions*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 143 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). These comments may sound like the obvious reasons we are concerned with domestic violence, but it is essential to recognize that at a basic level, domestic violence involves the purposeful and repeated infliction of pain

While I insist that we recognize domestic violence as the infliction of pain and injury, we must do so without resort to a *merely* incident-centered approach to intimate violence. Intimate violence cannot be described along the rubric of the bar-room brawl — it is not one fist fight and a parting of ways.⁷¹ Instead, intimate violence involves separate attacks of physical injury, strung together by patterns of domination, coercion, and control.⁷² Rape in marriage does not happen once, but often.⁷³ A woman is not hit once, but repeatedly.⁷⁴ Intimate violence takes place over time in the context of an ongoing relationship of unequal power and the violence that occurs may be merely one tool of domination among many. Nonetheless, pain or the threat of pain pervades women's lives.

and injury. While issues of power, control, coercion and autonomy are central to analysis of domestic violence, at the heart of the issue is the fact of injury and the presence of pain. The visceral reaction to the subway posters depicting bruised and battered women, to the stories in the newspapers of women violently attacked, set on fire, the urge for sympathy when we see a woman at work or on the street whose face is black and blue, are all responses to the recognition of another's pain. When we want to provide shelter and a safe place, when we ask women to leave abusive relationships, we instinctively act to protect women from further pain and injury. But, as with child abuse, there is always a denial. When we are willing to accept a woman's explanation that she "walked into the door" or "fell down the stairs," we ignore the fact that the injury we can clearly see happened and the pain that accompanies it. As Martha Mahoney observes, "[s]ocietal denial amounts to an ideology that protects the institution of marriage by perpetuating the focus on individual violent actors, concealing both the commonality of violence in marriage and the ways in which the state and society participate in the subordination of women." Mahoney, *Separation*, *supra* note 14, at 12.

71. See SCHNEIDER, *supra* note 29 at 12-13; Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1540 (1998); see also Mahoney, *Victimization or Oppression?*, *supra* note 14, at 65 (noting that "an incident - focused approach to battering misses patterns of power and control in abusive relationships").

72. Cf. Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757 (1996) (analyzing intimate violence as a form of private tyranny exercised by abusive men over women).

73. See NCVS, *supra* note 64. The force of these statistics is brought home by one woman's story. Married to an abusive husband for twenty-two and a half years, she writes, "I wouldn't even kiss him. He would force himself on me every single morning (wham, bam slam not even a thank you ma'am) and off to work." Anonymous, *Is There an End*, available at <http://www.famvi.com/end.htm> (last visited Jan. 1, 2000).

74. Nearly one third of women victims of nonlethal intimate violence were victimized - including rape, sexual assault, robbery, aggravated and simple assault - were attacked at least twice during the previous six months. NCVS, *supra* note 64, at 15.

The similarity between their pain to torture is apparent not only in the academic literature on domestic violence, the stories of women told by scholars, the facts related by judges and attorneys, and newspaper columns, but also in the writings of battered women themselves.

Monique's personal account of violence, which she posted on the internet, is an exemplar of women's experiences of intimate assault. Like many women, she experienced simultaneously the physical attack of being hit repeatedly in the face and body; her husband's pride in and enjoyment of the physical act of attack and his ability to do so; the dissolution of her ability or desire to resist; a sense of shame at being beaten; and, finally, the sense that her self had been eviscerated and reduced to "less than nothing." These elements comprise both the *incident* and the *continued relationship* of intimate assault: the form of the one is the same as and is replicated in the other.

Monique is a woman who wrote to a family violence internet site describing "The Beating" her husband inflicted on her. Her story is the story of many victims and she conveys the experience of abuse with startling clarity:

Will, what were you, a 200 pound, over six foot man thinking as you pulled your right arm backward in a full furious arc and slammed your fist into the flesh and bones of my unprotected face?⁷⁵

Like Monique, seventy percent of women who were victims of intimate violence are hit, knocked down or attacked. The other thirty percent were threatened with such attacks.⁷⁶

75. Monique, *The Beating*, available at <http://www.famvi.com/beating.htm> (last visited Apr. 25, 2001). Will is her husband.

Monique's story is fascinating not only for the first-person account of domestic violence that she offers, but also for the juxtaposition of one woman's experience of attack with the law's description of such an attack. Revealing the fact that she must have had at least one encounter with the police, the court's and lawyers' descriptions of domestic violence, Monique clarifies the attack she describes so vividly in a parenthesis after her signature. Signing the story simply "Monique 1998," she explains that she has described "(My account of the assault on my person by Will on June 21, 1998)." The stark contrast between the image of knuckles crashing back and forth against a woman's face with "speed and deftness" and the law's identification of the incident as an "assault on [a] person" is breathtaking. For me, Monique's story forces the reader to confront and to remember when reading cases and statistics, that when we speak of "assault," "attack," "abuse," or "violence" we in fact speak of knuckles slamming into faces, nails dug into a woman's arm, and knees pounding into flesh. The sterile language of the law conceals the harsh reality of assault and injury.

76. *NCVS*, *supra* note 64, at 14.

Did you admire the speed and deftness at which you crashed your knuckles back and forth against the side of my head? Was it pride you felt, as you landed vicious punches that split my lips and chipped teeth? He was pleased, it seemed, when I began to scream like an animal in the beginning blows of slaughter.⁷⁷

Many men who batter their wives and girlfriends brag to both their victim and their friends about the power they hold over the woman's life. Just as Will is, they are proud of their masculinity and their authority in the relationship.⁷⁸

Driving your knees into my side and breasts — embedding your hard nails deeply into each of my forearms — slamming me against the ground — could be, you felt any resistance I had dissolve into fear. Did I sense some enjoyment as you watched my pathetic hands beg for it to be over — one hand made useless by 15 surgical stitches only a day ago?⁷⁹

Women who are battered repeatedly may stop trying to resist or respond, and instead focus merely on surviving the attack. Intimate violence tends to escalate, moving from one incident of abuse to another, each time more serious than the last.⁸⁰ After a particularly brutal attack, the relationship may return to a state of calm before the pattern of escalating assaults begins again.⁸¹

And while I was pleading for the freedom of unconsciousness, I doubt that you cared that I was fighting to escape from the hurt; but especially from the shame.⁸²

For Monique, as for many women, the experience of domestic violence brings a sense of shame and responsibility. These feelings, as well as a fear of reprisal, often prevent battered women from seeking help.⁸³

77. Monique, *supra* note 75.

78. See, e.g., Leah Simpson Subotnik, *Men Who Batter Women: From Overcontrolled to Undercontrolled in Anger Expression*, in *VIOLENCE IN INTIMATE RELATIONSHIPS* 203, 205 (Gordon W. Russell ed., 1988) (discussing "under-controlled" batterers who feel no guilt and assert that their violence towards their wives is due to their "macho" natures). For example, one man interviewed by Subotnik said "I was bragging to family and friends that I'd shoot M. [his wife] when she was jealous of men. I think it [the gun] gives me an upper hand — family and friends won't fuck with me. I like to play with it when drunk. Another macho thing." *Id.*

79. Monique, *supra* note 75.

80. See, e.g. Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221, 241 (1998) (discussing patterns of abuse in the context of evidentiary rules governing the admission of prior bad acts).

81. See WALKER, *supra* note 14.

82. Monique, *supra* note 75.

83. R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE AND SOCIAL CHANGE* 4 (1992).

When the buzzing in my head became unbearable, I was thankful for so much pain — enough pain to push back the horror of knowing, that you had used your fists to reduce me to less than nothing.⁸⁴

The violence of intimate assault is not merely the barrage of physical and emotional injury, but the assault on a woman's autonomy and distinctive identity — her self and personhood.⁸⁵

This replication and constitution of incident and relationship demonstrated by Monique's story occurs not only *within* an individual couple's relationship, but across society. The same elements are present as a tripartite figure of intimate violence — the three levels each replicating, constituting, and shaping the others. First, the incident of battery; second, the relationship between one man and one woman; and third, the presence of similar relationships and incidents and dynamics across a substantial segment of the population. One woman is at one time, beaten, cowered over, conquered, shamed, and eviscerated. She experiences these elements repeatedly and continuously as the framework of her relationship, and her experience is the experience of millions of women in the United States. Each woman experiences the battering relationship as comprised of patterns of abuse and coercion as well as love, and experiences her larger life and place within society as shaped by her relationship with the man who abuses her and her embeddedness in that relationship. The relationship additionally exists within larger societal, cultural, and legal structures and the presence of similarly situated women and relationships that shape each individual man and woman's conception of the appropriateness, normalcy, or flexibility of their relationship. The perception of the acceptability of the man's behavior, the possibilities of exit, or the availability of legal recourse or aid from others depends upon the commonality of the experience and general norms and public acceptance of domestic violence. The relationship is, to that extent, determined by the larger social forces at play. And, each incident of violence takes place within and is shaped by both the larger dynamic of society and by the dynamic of the relationship itself. These three

84. *Id.*

85. The attacks on women that are designed to make them stay in a relationship or to overbear their desire to leave are attacks on the women's will and volition, and to maintain control over her choices or ability to choose where and with whom she will live. See Mahoney, *Victimization or Oppression?*, *supra* note 14, at 65-66. Cf. REPORT ON TORTURE, *supra* note 37, at 38 (discussing effect of torture on its victims' will).

elements — incident, relationship, and social meaning — are homologous yet distinct and together comprise the “experience” of intimate assault. Monique’s story then allows insight into all three of these elements at once — the battery, the relationship, and the position and experience of many women. As her story and the statistics reveal, pain or the threat of pain plays a central role in many women’s experiences of domestic abuse.

Monique’s story demonstrates that domestic violence is more of a parallel to torture than we may want to admit.⁸⁶ As Isabel Marcus insists,

Like terror directed at a community, violence against women is designed to maintain domination and control, to enhance or reinforce advantages, and to defend privileges. Like other individuals or communities who experience politically motivated terrorism, women whose partnering and intimate relationships are marked by violence directed against them live in a world similarly punctuated by traumatic and/or catastrophic events, such as threats and humiliation, stalking and surveillance, coercion and physical violence.⁸⁷

In intimate assault, as in torture, pain is a defining aspect of the relationship and fists and boots may be the primary weapons.⁸⁸ As demonstrated by the stories above, domestic violence and torture both consist of complex relationships of coercion and control dominated by the infliction of pain and injury over time.

C. *Interrogation, Self-Betrayal, and the Destruction of Language*

Interrogation is a defining element of both torture and domestic violence. In both torture and domestic violence outsiders seek to identify a reason for the violence, and in both cases, they

86. Isabel Marcus describes torture:

Regimes or groups seeking to terrorize populations utilize three tactics to enhance their credibility: unannounced and seemingly random but actually calculated attacks of violence; psychological as well as physical warfare aimed at silencing protests and minimizing retaliatory responses from the targets of violence; and the creation of an atmosphere of intimidation in which there is no safe place of escape.

Reframing “Domestic Violence”: Terrorism in the Home, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 13, at 31.

87. *Id.* at 32.

88. Duncan Forrest, *The Methods of Torture and Its Effects*, in GLIMPSE OF HELL, *supra* note 39, at 104, 107 (“The basic tools of the torturer are his fists and boots.”).

make the mistake of accepting the victim's response or confession as the valid cause of the injuries incurred.⁸⁹

Using torture to force the prisoner to answer gives the torturer a certain legitimacy: even if the information obtained is insignificant, if the pain is inflicted for a reason, the torturer suddenly seems less brutish and his actions more comprehensible. Suddenly, it is the prisoner's actions that are incomprehensible and irrational — he appears either to deserve the injuries or to be able to escape them by answering. In asking the prisoner a question and forcing his answer, the torturer makes the prisoner himself the agent of his destruction, as the betrayal blinds others to his fate and the scream of the answer “records and objectifies” the world-destroying nature of intense pain.⁹⁰ As Scarry says, “the question, whatever its content, is an act of wounding; the answer, whatever its content, is a scream.”⁹¹

In intimate violence, a similar dynamic occurs. Just as the torturer controls and injures his prisoner, a man in an abusive relationship with a woman both manipulates and attacks her, making her appear to be the cause of her injury. As in torture, the injury consists of a primary verbal act as well as a primary physical act of assault. Although the verbal act may, like torture, be one of interrogation — a question and a demand for an answer — it is not necessarily so. In his study of women seeking restraining orders, James Ptacek documents the strategies used by men who batter.⁹² He documents four main types of strategy:

89. SCARRY, *supra* note 42, at 35. As Scarry describes, in torture, the torturer's “question” accompanies the injury and is made to seem *as if* it is the cause of the pain. The prisoner's answer is perceived as betrayal — of himself, his friends, or his cause. For Scarry, torture consists of the primary physical act of the infliction of pain and the primary verbal act of interrogation. The question is misunderstood to be the motive — the cause — of the torture. The prisoner's answer is understood to be the “betrayal.” This misunderstanding of motive and response is a mistake that “discredits the prisoner, making him rather than the torturer, his voice rather than his pain, the cause of his loss of self and world.” *Id.* That is, others discover that the prisoner has answered and view his act of answering as an act of betrayal of himself and his cause. They blame his loss of self on the fact of his response, not the fact of the torturer's infliction of pain.

90. SCARRY, *supra* note 42, at 29. Duncan Forrest observes that “Many survivors [of torture] show paradoxical feelings of guilt. This may be because they imagine that they have betrayed their companions or let down their organization, but it seems often to be a feeling that has been deliberately inculcated by the torturers, who have formed a bond with their victims.” Forrest, *supra* note 88, at 120.

91. SCARRY, *Supra* note 42 at 46.

92. JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSE* 79 (1999). In explaining a “gender strategy,” Ptacek uses the work of Arlie Russell Hochschild and her definitions of both gender strategy and

“(1) separation assault; (2) punishment, coercion, and retaliation against women’s actions concerning children; (3) retaliation or coercion against women’s pursuit of court or police remedies; and (4) retaliation in response to other perceived challenges to men’s authority.”⁹³ There appear to be two overarching strategies, however, each with its own primary verbal act and a primary physical act: separation assault and retaliation. In each, as discussed below, the verbal dynamic of the torturer’s interrogation and the two remaining elements of the definition of torture — “breaking the victim’s will” and “systematic activity with a rational purpose”⁹⁴ — reappear in altered form.

1. Separation Assault

Men beat women while relationships are ongoing, and women are attacked when they try to leave. As Martha Mahoney demonstrates, some of the most severe assaults on women take place at moments of separation: when a woman in a violent relationship attempts to leave, assert herself, or seek aid.⁹⁵ She defines this phenomenon thus:

Separation assault is the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship.⁹⁶

Separation assault, as Mahoney explains, involves an assault on a woman’s body in order to control both her physical being and her volition. The National Crime Surveys do not identify the frequency of separation assault, but it appears to occur with alarming frequency. In this scenario, men assault women in order to maintain a connection in the relationship. They may assault women to prevent them from leaving, to force them to return, or to retaliate against women who have left.⁹⁷ In the first of these sce-

gender ideology. Gender ideology, as used here, is a “set of beliefs about men, women, and relationships. . . .” A gender strategy is “the attempt to implement this ideology in daily life.” *Id.* at 78.

93. *Id.* at 69-91.

94. REPORT ON TORTURE, *supra* note 42, at 30.

95. See generally Mahoney, *Separation*, *supra* note 14.

96. *Id.* at 65-66.

97. See PTACEK, *supra* note 92, at 80; see also Mahoney, *Separation*, *supra* note 14; Mahoney, *Victimization and Oppression?*, *supra* note 14. Separation assault may even occur while the relationship is ongoing. Changes in intimacy between a man

narios, the verbal act is not interrogation, but is a threat and a plea. As in the act of torture, separation assault effectively displaces responsibility for injury from the batterer to the woman who “abandons” him. The women who suffered “preventive” assaults were those who attempted to get a divorce or asked for separation, who tried to leave themselves, and who asked that the men who abuse them leave the home or relationship. While the battering man’s verbal act does not appear in the form of the question, it is often a threat — a threat to kill the woman, to injure her children, or to destroy her property.⁹⁸ One woman in this situation describes the relationship in terms strikingly similar to Scarry’s description of torture: “We are like a prisoner in the home . . . My husband told the kids that I can’t get him out of there . . . By breaking the door he is proving to me that I can’t do anything.”⁹⁹ Here, the prisoner — the wife — does not even have to “answer” the question in order to reveal and record her inability to act. Like the torturer insisting through the use of the question that he is torturing for a purpose, the husband who insists his place is in the home with his children uses language to convey his authority to be in a certain place and to act in a certain fashion. His assertion that this is *where he belongs* undermines and shifts focus from the injury caused by his actions. His assertion of place and authority reduces the observer’s revulsion and leads him to treat the abusive husband as someone who is acting with a motive and who must, to some extent, be accommodated.¹⁰⁰

Similarly, women who have left abusive relationships are often subject to additional violence by partners who attempt to

and a woman, such as marriage or pregnancy, may create a dynamic like that of separation. For example, upon marriage, a man may attempt to assert his authorities, and the “connectedness” between the couple just as he attempts to assert the strength of the relationship by battering at moments of separation. See, e.g., Donald G. Dutton & James J. Browning, *Power Struggles and Intimacy Anxieties as Causative Factors of Wife Assault*, in *VIOLENCE IN INTIMATE RELATIONSHIPS*, *supra*, note 78, at 163, 165 (discussing intimacy as causes of intimate violence). Similarly, sexual jealousy may create a dynamic similar to that of separation, as the man perceives his wife’s friendship or communication with another man as a “loss” of her love or his control over her. See *id.* at 165, 167-69.

98. PTACEK, *supra* note 92, at 80; see also Mahoney, *Separation*, *supra* note 14.

99. PTACEK, *supra* note 92, at 80.

100. Cf. Forrest, *supra* note 88, at 118-19 (discussing control and assertion of authority in torture). Forrest observes that “Torture demolishes or dismantles, deliberately, the systems of integration, cohesion, control and defense [sic] against dissolution, both physical and mental, that people ordinarily maintain, mostly without thinking about it, to keep themselves together as independent being.” *Id.* at 118.

force them to return to the relationship. These violent assaults also involve both a physical act and a verbal act that together undermine the woman's claim to recognition, autonomy, and assistance. These attacks involve combinations of threats and physical assaults. The abusive ex-partner may threaten to kill himself or to kill the woman he abused. He may call repeatedly and demand her return. He may demand to know why she left or why she refuses to come back.¹⁰¹

Alvino Borrega's attack on his girlfriend, Nydia Cedillo, is typical of this pattern. When Nydia ended the relationship, quit her job, and made arrangements to leave town, Borrega broke into her house. Nydia attempted to call the police, but Borrega ripped the phone out of the wall and knocked Nydia to the floor with it.¹⁰² He forced her into a car with him, and later beat her face into the dashboard and punched her. He forced her to remove her shirt and bra and threw her out of the car, saying "I'm going to drop you off over here so somebody can rape and kill you for me and I don't have to do it myself."¹⁰³ He then forced her back into the car and continued to hit her. When Borrega threatened to kill her, Nydia believed him. He had previously forced a gun into her mouth, made her walk outside naked, and thrown beer bottles at her. Twice she had been to the hospital after attacks.¹⁰⁴

Just as Alvino Borrega did, men who batter may subject women to retaliation for leaving. Often the threats are the most terrifying and invasive elements of this attack. Years after a relationship has ended, an abusive man may continue to call the woman he battered and threaten her, her children, or her new partner with death or injury.¹⁰⁵ These threats and accompanying attacks leave women fearing for their lives. They are continuous, aggressive, and intimidating, leaving women feeling constantly vulnerable, unable to be secure in their homes or their movements, unable to escape from the battering relationship.

Unlike torture, the verbal act of separation assault is not necessarily a question. Instead it takes the form of a threat — an order from the man commanding the woman to "do this or else."

101. *See id.*

102. *Borrega v. State*, No. F94-43676-UM, 1998 WL 519444, at *1 (Tex. Ct. App. Aug. 24, 1998).

103. *Id.* at *2..

104. *Id.* at *1-4.

105. *See PTALEK, supra* note 92, at 80-81.

Return or I will kill you, love me or I will hurt you. Although it is not a question that demands information, the threat insists upon response or destroys the possibility of answer. The combination of the verbal act of threat and the physical act of injury and force compels an abused woman seeking to leave to stay in the violent relationship, to return to it, or to drastically alter her lifestyle from fear of her batterer's return. The verbal act of threat and the physical act of injury are used as tools to destroy the woman's autonomy.¹⁰⁶ She is then blamed for staying in the relationship, and her response to the batterer's verbal act may be seen as her betrayal of herself and of her children. A woman subjected to separation assault cannot speak to assert her independence or desire to leave for fear of future or immediate injury.

The destruction of voice is accomplished in a slightly different fashion during separation assault. In interrogation, Scarry reveals that the prisoner's inability to answer — or his ability to answer only in a scream — “records and objectifies” the world-destroying power of pain. In separation assault, the woman's voice is destroyed even before she opens her mouth to speak. Instead of recording the deconstructive power of pain by answering the interrogation, the battered woman records and objectifies the destruction of her voice and world when she is unable to answer — or when there is no answer to be given — and she is left screaming and crying on the floor.¹⁰⁷ By both asserting their ability to injure and reducing the women to inhuman forms, men who batter transform and dehumanize the women they assault.¹⁰⁸ As one woman's writing reveals, this namecalling and threatening on the part of the abuser has the same effect as the torturer's demand for an answer. Although the threats leave the woman unable to speak, they force her to scream or cry. Suzanne writes:

106. See Mahoney, *supra* note 14.

107. While Ptacek does not make this argument explicitly, he does document that women who attempt to assert independence from abusive men are verbally degraded as well as threatened. “According to women's affidavits, they are called ‘whore,’ ‘fuckin bitch,’ ‘cunt’ and other misogynistic names” as well as threatened with violence. See PTACEK, *supra* note 92.

108. See *id.* As Ptacek notes, these tactics are similar to the tactics used by the United States military to train soldiers to kill. By using verbal tactics such as referring to the enemy as “gooks” or “japs,” the military teaches soldiers to perceive the opposing soldiers as less than humans — as animals who deserve to die. See LT. COL. DAVE GROSSMAN, *ON KILLING* 161 (1995). As Grossman notes, these tactics have proven remarkably successful: naming and dehumanization through language greatly increases soldiers' willingness to kill and injure. See *id.*

“How dare you reduce me/ To crying fetal on the floor/ While yelling at me/ I am nothing but a whore.”¹⁰⁹ Suzanne’s use of the imagery of the fetus, lying on the floor sobbing, illuminates the way in which the verbal act of threat and degradation can strip an adult woman of her and her ability to speak, and with it her humanity and identity. As in torture, this use of name-calling and verbal degradation and dehumanization recurs over time.¹¹⁰ It may happen every time a man assaults a woman with whom he has an intimate relationship, or he may constantly verbally assault her but rarely physically injure her. This repeated use of verbal tactics destroys the self and forces a betrayal surprisingly similar to that accomplished through torture. Suzanne exposes this effect in her poem, asking, “How dare you kill my spirit/ The girl inside of me/ By telling me I am worthless/ Everyday and constantly”?¹¹¹ Through their use of torturers’ verbal tactics, battering men see the women they beat as objects that are the proper subject of violence and effectively deny the possibility that the woman could exist as an independent speaking subject.

2. Retaliation

A second dominant strategy in the practice of domestic violence is retaliation for actions that the battering man believes are challenges to his authority.¹¹² Two of the most striking of these are retaliation against women who report domestic violence and retaliation as a result of sexual jealousy.

109. Suzanne, *How Dare You*, available at <http://www.famvi.com/howdare.htm> (last visited Apr. 25, 2001).

110. See Forrest, *supra* note 88, at 118-19.

111. *Id.*

112. Ptacek distinguishes among three different strategies of retaliatory attack. He identifies “punishment, coercion, and retaliation concerning children,” “retaliation and coercion concerning court activities,” and retaliation for “other perceived challenges” to the man’s authority. See PTACEK, *supra* note 92, at 82-89. I have altered his order, and address separation assault, retaliation for challenges to men’s authority, and retaliation for seeking help from the law in that order. Punishment and coercion concerning children seems to me to fit within Ptacek’s category of retaliation for challenges to the batterer’s authority and I do not address it as a separate issue. See also Dutton & Browning, *supra* note 97, at 166-68 (discussing power issues and batterers’ need to assert authority in intimate relationships); Copelon, *supra* note 34, at 333-37 (discussing the ways in which physical violence is used as a form of punishment in intimate relationships just as torture may be used as punishment in political or military regimes).

a. *Retaliation for Contact with Others*

In a relationship of intimate violence, the battering man often seeks to restrict his victim's contact with other men, with friends, and even with her family as much as possible.¹¹³ If a woman leaves the house without permission, speaks to other men, or seeks aid from her family, a battering man may respond with a violent physical attack. These attacks are, like separation assault, attacks on women's autonomy. By beating a woman for speaking to other people, the batterer insists that she remain bound to him and under his authority. Angela Browne retells the story of Molly, who suffered from many such attacks, one of which occurred when she went to a bar with her husband Jim:

On this occasion, Jim told Molly to put money in the jukebox. She was standing by the machine when the bartender walked over to put in some quarters and said something to her about a selection. Jim got up so fast he knocked over his chair. He picked the bartender up off the floor and accused him of having an affair with his wife, threatening to kill him. Someone phoned the police and Jim and Molly left. In the van, Jim knotted one hand in Molly's hair and pounded her head against the dashboard.¹¹⁴

When Jim attacked first the bartender, and then Molly, he did so as a direct response to her conversation with another man. This attack on her autonomy also paralyzes her ability to speak outside of the battering relationship. Many have noted the "silencing" effects of domestic violence, but often "silencing" is used as a metaphor, to describe the consequences of a long-term relationship of continued violence. Instead, I want to focus here on the fact that violence and voice are closely connected: the act

113. See Cohen, *supra* note 72, at 768. Battering men often urge their wives or girlfriends to quit their jobs, to cease leaving the house. They insist that they stay at home. Men may also insist that the women in their lives dress and act a certain way - generally in a way that would make them less sexually attractive to other men. Angela Browne describes this isolation as growing increasingly stringent as the relationship progresses. See BROWNE, *supra* note 1, at 43. The men discussed had a constant need for knowledge of the women's whereabouts and a strong insistence that the women not interact with anyone other than themselves. This led to severe restrictions on the women's autonomy and contact with people outside the relationship. See *id.* As Browne explains, this isolation leaves women in abusive relationships at great risk, since they have fewer resources and little chance that others will notice the danger they are in or be willing to help them. *Id.*

114. BROWNE, *supra* note 1, at 56-57. Eventually, the police pulled them over. They arrested Jim, but for drunkenness, not for the assault on Molly. *Id.* at 57. Jim demonstrates an extreme jealousy and possessiveness that is not uncommon among battering men.

of violence is prompted by the desperate need to silence a woman's voice.

The battering dynamic both mirrors and distinguishes itself from the verbal act that Scarry describes as occurring in torture. In torture, as discussed above, the pain may precede the interrogation — and the verbal act that documents the torturer's power is the *answer*, or the prisoner's self-betrayal. Just as the prisoner's answer is perceived as betrayal and is credited as the cause of the violence,¹¹⁵ the woman's act, misconstrued as "flirting" or "defiance," is also misunderstood as the cause of the violence. This mistake, as in torture, shifts the blame from the abuser to the victim. In torture, Scarry explains, this mistake "discredits the prisoner, making him rather than the torturer, his voice rather than his pain, the cause of his loss of self and world."¹¹⁶ Similarly, in retaliatory domestic violence, the woman in pain is made to feel that *her voice*, her act of speaking without her husband's permission, is the cause of the loss of self she experiences.¹¹⁷

115. See Forrest, *supra* note 88, at 120.

116. SCARRY, *supra* note 42 at 35.

117. Gelles and Straus discovered through their research that women who are the victims of intimate violence may go to extreme lengths to take responsibility for the violence. GELLES & STRAUS, *supra* note 14, at 132. Some of the stories they report are shocking because they reveal the depth and sincerity of the woman's belief that it was her fault her husband beat her. One such story is June's:

Tim [her husband] is really jealous. I remember once when we were at my girlfriend's house. I had to use the bathroom. The bathroom is upstairs. Well, my girlfriend's brother's room is next to the bathroom. I stood in front of his door and talked to him for a minute on my way back downstairs. When I got to the stairs Tim was waiting for me. He called me a whore and a tease and slugged me 'side of my head. I fell down the stairs. "I can't blame Tim, though. I guess I shouldn't have talked to my girlfriend's brother. I mean, I know Tim's real jealous."

Id. (emphasis added).

June's story is strikingly similar to the relationship Scarry describes between the torturer and the prisoner and between the two of them and the outside world. Like the prisoner, June experiences her conversation with her friend's brother (like the prisoner's betrayal) as the cause of her injury. She, and perhaps her friends who also know that Tim is exceedingly jealous, may see the conversation as the cause of injury and defer condemnation of Tim. See also Sonja Peterson-Lewis, Charles W. Turner, & Afesa M. Adams, *Attribution Processes in Repeatedly Abused Women*, in *VIOLENCE IN INTIMATE RELATIONSHIPS*, *supra* note 78, at 107-130 (discussing victims' tendency to attribute blame for violence to their own words and actions). Rhonda Copelon also draws this parallel between the verbal act and interrogation of domestic violence and the confession that is an intrinsic element of torture. See Copelon, *supra* note 34, at 332-33.

Jim's attack on Molly was not precipitated by interrogation, because he observed her conversation with the bartender himself. Other battering men, however, suspect that their wives are having "forbidden" conversations with other men, friends, or family members. These men may indeed interrogate before they retaliate through violence. As Copelon observes, "whether precipitated by rage, jealousy, or a real or feared loss of control, domestic violence has its own interrogation, its own questions, accusations, insults, and explicit or implicit orders: 'Where were you today? Who were you with?' 'Who visited you today?' 'Someone was in this house.' . . . 'Why is the coffee cold? The house a mess? This item moved?'"¹¹⁸ Through domestic interrogation, the abusive husband provokes "dread, humiliation, and submission"¹¹⁹ in his wife.

The act of violence and the infliction of injury in response to what the battering man perceives as inappropriate or impermissible speech by a woman effectively silences her voice. The infliction of pain as a response to speech has three mechanisms by which it may control the woman's voice. First, as in the example of Molly and Jim, the act of violence directly interrupts and ends Molly's conversation. This is the immediate act of silencing. Second, after a woman is injured for having once spoken to another man, or to her friend, she is much less likely to do so again. This is the future effect of the intimidation wrought by the infliction of pain. Third, the act of violence controls the woman's voice by making her cry out in pain. This is the "generative effect" of violence: through violence, the man makes the woman "speak" in a certain way — he makes her scream in pain. The battering man seems to need to hear the sounds of "protest, anguish, pain, misery, and desolation" in order to confirm his authority over the woman he batters.¹²⁰ In torture, the prisoner "records and objectifies" the world-destroying capacity of pain when he screams or betrays in response to interrogation. Likewise, in domestic vio-

118. *Id.* at 333.

119. *Id.*

120. Cohen, *supra* note 72, at 771. Cohen analyzes domestic violence as a "regime of private tyranny" and characterizes the control over voice as a complement to violence. She says:

The constriction of voice, the flattening or heightening of affect on verbal command or as a conditioned response to repeated rage, the strict assignment of particular voices to particular persons under the domination of the regime, all of these are multiple manifestations of one and the same phenomenon: It is the voice of the tyrant that dictates the terms of the existence of the ruled.

lence, when a woman's conversation is stopped, when she must conform her future behavior to her husband's dictates, or when she screams in pain, she is forced to record and objectify the self- and world-destroying capacity of pain. The immediate, future, and generative consequence of domestic violence destroy a woman's ability to speak in her own voice. For her, as for the victim of torture, they destroy the possibility of autonomous language.

b. Retaliation for Contact with State Authorities

Battering men may retaliate against the women whom they abuse if their victims seek aid from the police, the courts, or an attorney.¹²¹ Statistics reveal that if a man is automatically arrested for battering his wife or girlfriend, violence in the relationship is likely to increase over the long-term.¹²² As the development and analysis of separation assault reveals, attempts to break the relationship or to assert autonomy by leaving the

Id. at 772-73. Pushing Cohen's point even further, it is clear that it is also the voice of the batterer and his use of violence that dictates the terms on which the woman he batters will be allowed to speak, to whom, and how.

121. Ptacek found retaliation in response to legal actions was a motive in twelve percent of the cases he studied. PTACEK, *supra* note 92, at 84. See also Debra Raye Hayes Ogden, *Prosecuting Domestic Violence Crimes: Effectively Using Rule 404(B) to Hold Batterers Accountable for Repeated Abuse*, 34 GONZ. L. REV. 361, 365 (1998-99). See also, e.g., *State v. Legg*, No. 03C01-9801-CC-0025, 1998 WL 754993 (Tenn. Crim. App. Oct. 19, 1998) (discussing wife kidnapped by her husband who testified that she was afraid to leave the hotel room in which she was held with police officers the first time they arrived because she was afraid her husband would shoot her and/or the police officers).

122. See Mills, *supra* note 25, at 564-68. Mills focuses on mandatory arrest policies, and notes that although they generally have a short-term deterrent effect, over the long term violence is likely to increase in households where battering men have been subject to mandatory arrest. See *id.* at 565-66; see also Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1233-34 (1996); David A. Ford & Mary Jean Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 70, at 182-207 (noting different results in likelihood of violence depending upon prosecutorial approach, and finding that policies allowing for probation with counseling following on-scene arrest actually increased the occurrence of violence). The differential in effect is not the same across all classes and races, however. The frequency of violence increased among the unemployed, unmarried, high school dropouts, and African-American couples. For employed, married, and white couples the frequency of violence decreased following mandatory arrest. See *id.* These results are based on a study conducted in Milwaukee, Wisconsin. Another indication of the effect of police or court action on the batterer's behavior is the women's own perceptions of the likelihood of retaliation. The NCVS reports that just under half of the female victims of intimate violence *did not* report the incident to the police. The second most important reason they gave for not reporting was their fear of retaliation. See NCVS, *supra* note 64, at 19.

home, reporting the violence to the police, or obtaining a protective order, increase the risk of short-term violence.¹²³ Violence or the threat of violence following a woman's report of intimate abuse to the authorities is yet another strategy through which battering men force women to "betray" themselves. As in the retaliation discussed above, and the case of the prisoner, the men's use of violence destroys the woman's language and shifts blame to her for any past or future injury. This dynamic becomes most apparent in women's desire to recant their testimony or refusal to testify and prosecutors' and judges' responses to that recantation or refusal.¹²⁴ Often, "battered woman syndrome" is introduced through expert testimony at trial in order to explain a victim's decision to recant her testimony.¹²⁵ The way the recantation and explanation occur in the courtroom make clear the silencing effects of intimate abuse.

Arcoren v. United States is one example of this dynamic. In *Arcoren*, the defendant was convicted of aggravated sexual abuse for his assaults on his pregnant wife, Brenda Brave Bird.¹²⁶ For several hours, Arcoren imprisoned Brave Bird and her niece in his bedroom. He verbally and physically abused Brave Bird and repeatedly raped her. When he finally fell asleep, Brave Bird was able to escape from the apartment. She flagged down a police office and reported what had happened. She then went to

123. See Mahoney, *Separation*, *supra* note 14; PTACEK, *supra* note 92. See also *Women and Violence: Hearings Before the Committee on the Judiciary, U.S. Senate, on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 2d 145 (1991) (statement of Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition Against Domestic Violence); *Fletcher v. Town of Clinton*, 196 F.3d 41, 51-52 (1st Cir. 1990) (discussing dangers to women of seeking police aid).

124. Battered women are often uncooperative in attempted prosecutions of their batterers. See Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367-68 (1996) (estimating that domestic violence victims are uncooperative in as many as eighty to ninety percent of attempted prosecutions).

125. See Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67 (1998). Rogers argues that the use of expert testimony should be limited to explaining the general effects of battered woman syndrome, and should not address the particular characteristics of the victim or the individual reasons for her decision to recant or to refuse to testify. See generally *id.*

126. *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991). Arcoren was also convicted of one count of abusive sexual contact and one count of sexual abuse of a minor. The Eighth Circuit Court of Appeals overturned the conviction for sexual abuse of a minor and remanded for a new trial. It affirmed convictions and sentences on the counts involving Arcoren's wife Brenda.

the hospital, following the officer's advice. There, she received medical treatment and gave the nurse, the attending physician, and a criminal investigator for the Bureau of Indian Affairs a complete description of the beatings and rapes she had suffered from Arcoren.¹²⁷ Three days later she testified before a federal grand jury, repeating in detail the sexual and physical assaults.¹²⁸ At trial, however, Brave Bird recanted her prior testimony and statements and denied that Arcoren had raped or beaten her.¹²⁹ In order to explain Brave Bird's about-face, the prosecution used an expert to testify as to the general effects of the "battered woman syndrome." The psychologist, Carol Maicky, testified that women who suffer from battered woman syndrome share several general characteristics, including: "(1) the belief that violence to the woman is her fault; (2) an inability to place responsibility for the violence elsewhere; (3) a fear for her life and the lives of her children; and (4) an irrational belief that the abuser is omnipresent and omniscient."¹³⁰ Brave Bird's fear of her husband and her feelings of self-betrayal probably played a significant role in her decision to recant her testimony. It is impossible to know, from the court's brief summary of the facts, what occurred between Brave Bird and Arcoren in the four months between the indictment and the trial. Like the jury, however, we can use our knowledge of the repeated violence and threats in the relationship to understand Brave Bird's fear of retaliation from her husband and her consequent refusal to testify against him.¹³¹ This

127. *Id.* at 1237. At trial, Brave Bird's account was supported by the eyewitness testimony of her niece, Bordeaux, as well as the testimony of the police officer, the receiving nurse, the attending physician, and the criminal investigator. *Id.* at 1238.

128. *Id.* at 1237.

129. *Id.* at 1238.

130. *Id.* at 1239. Evidence adduced at trial indicated the Brave Bird has been subject to repeated attack by Arcoren throughout the course of the marriage. Maicky did not, however, testify directly to the issue of whether Brave Bird suffered from "battered woman syndrome."

131. Alana Bowman explains that psychological testimony regarding battered woman syndrome can play a significant role in the successful prosecution of batterers. See generally Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992). Such testimony has been used extensively to defend and explain women who kill their batterers in self-defense. See BROWNE, *supra* note 1, at 177. As Browne explains, however, the use of battered woman syndrome contributes to an "image of maladjustment of pathology" surrounding women who kill in order to save their own lives. *Id.* Although I do not wish to address the merits of dangers of battered woman syndrome as a defense here, it is important to note its shortcomings. As Elizabeth Schneider makes clear, the use of the syndrome as a defense tool contributes to

fear can be understood even without using the psychological tool of the battered woman syndrome. Brave Bird feared that if she testified at trial, she would be subject to another violent attack from the defendant. Like any form of witness intimidation, the witness's awareness of the defendant's capacity for and prior use of violence, coupled with either an implicit or explicit threat from her could easily have dissuaded Brave Bird from testifying. The direct consequence of Arcoren's violence is Brave Bird's inability to publicly accuse him and her assumption of the responsibility for the injuries she suffered.

The Court's opinion in *Santos v. Greiner*¹³² also demonstrates the silencing effect of domestic violence in dramatic fashion. Jose Santos was convicted of rape, sodomy, sexual abuse, and assault of his wife, Betzabet Gonzalez.¹³³ Santos broke his wife's ankle, choked her, and threw her to the floor. He took a knife from the kitchen, and "walked like a madman, back and forth, back and forth"¹³⁴ holding the knife and threatening to kill both Gonzalez and himself. The attack moved into their bedroom, where Santos threw Gonzalez onto the bed, ripped her clothes off, and raped her.¹³⁵ After raping his wife, Santos told her he was going to kill her. He plunged the knife into the bed as she dove out of the way.¹³⁶

Gonzalez's efforts to report this assault and to hold Santos criminally liable prompted a series of attempts by the various people involved in the case to control, credit, and discredit her testimony. This attempt to control her speech began when Santos agreed to call an ambulance to take Gonzalez to the hospital *only after she promised not to tell* what he had done to her.¹³⁷ In the ambulance, Gonzalez kept to her bargain with Santos, and told the emergency crew that she had been injured when she fell down the stairs.¹³⁸ Only when she was finally alone with the social worker did Gonzalez completely describe Santos's attack.¹³⁹

women's victimization by acknowledging the validity of their actions as long as they are "damaged." See SCHNEIDER, *supra* note 29, at 20-27.

132. 1999 WL 756473 (S.D.N.Y. Sept. 24, 1999).

133. *Id.* at *1.

134. *Id.* at *2 (quoting Tr. 151-52).

135. *Id.* at *2 (citing Tr. at 153-55, 206-08, 155-59, 199).

136. *Id.* at *2 (citing Tr. 159-60, 203, 212-13).

137. *Id.* at *2 (citing Tr. 162-63).

138. *Id.* at *2 (citing Tr. 169).

139. *Id.* at *3. Later she also told her friend, Ms. Martinez, what had happened. At trial both Martinez and the social worker testified as to that story.

Betzabet Gonzalez testified at trial and gave a full account of Santos's attack. Prior to the trial, however, she had called Santos's counsel and told him that she did not want Santos to go to jail.¹⁴⁰ The prosecution's redirect examination of Gonzalez revealed the fact that Santos's mother had pleaded with her and convinced her to call the defense attorney.¹⁴¹ Gonzalez also signed an affidavit recanting her charges and denying that Santos had raped or injured her.¹⁴² The trial court found the affidavit unreliable and inconsistent with Santos's trial testimony.¹⁴³ Although the first motion containing this affidavit was denied, Santos filed a second motion, reiterating his claims and basing his renewal on his legal inability and Gonzalez's poor command of English.¹⁴⁴ In a second affidavit, Gonzalez alleged that the prosecutor had pressured her into testifying at trial. She stated:

[The prosecutor] told me I could go to jail for filing a false report. I repeated that Jose, my husband, didn't really rape me, and *she became upset and told me that if I didn't stick to the original story I would be put in prison and my children taken away.* I began to cry and she told me to be strong. That everything would be okay, and my husband would be home within six months anyway. She said that the six months would do him some good and teach him to respect a good woman like myself.¹⁴⁵

As Gonzalez's second affidavit demonstrates, the prosecutor exerted tremendous pressure to convince her to testify, even going so far as to threaten to throw her into prison and to take her children away from her. Even if we agree with the prosecutor that Santos did in fact attack Gonzalez as she originally alleged, the tactics described in this affidavit do not suggest a willingness to take seriously Gonzalez's fears or words. The trial court was also skeptical of Gonzalez's statement, and denied the motion

140. *Id.* at *3. This evidence came out during the defense's cross-examination of Gonzalez.

141. *Id.*

142. *Id.* at *4. In the affidavit, Gonzalez alleges that she consented to have sexual intercourse with Santos, that she was not physically abused, that the fracture of her ankle was the result of an accident, and that she had contacted the prosecutor and sought to withdraw the charges. *Id.* The affidavit was submitted as part of a motion to vacate the judgment on the grounds that Santos had received ineffective assistance of counsel due to his attorney's failure to inform the court that Gonzalez has recanted and prosecutorial misconduct in allowing Gonzalez to commit perjury and not recant.

143. At trial, Santos testified that he did not have any sexual intercourse with Gonzalez on the day in question.

144. *Id.* at *5.

145. *Id.* (citing Pet. Ex. L:12/12/96 Gonzalez Aff. ¶7) (emphasis added).

because he found “the recantation of a victim of domestic violence [to be] particularly unreliable.”¹⁴⁶ The appellate court denied Santos’s petition for a writ of habeas corpus and affirmed the trial court’s resolution of these motions.¹⁴⁷

As the story of Jose Santos and Betzabet Gonzalez demonstrates, when a battered woman seeks aid through the criminal justice system she may be subject to threats and pressure from the authorities as well as from her husband and his family. The cold record presented by the appellate court cannot possibly reveal all of the factors that influenced Gonzalez’s attempts to recant her testimony and to withdraw the charges against her husband. Fear of future violence, pressure from her mother-in-law, anxiousness about a lack of financial support, a feeling of dependency, and the multivalent aspects of “battered woman syndrome” may have all played a role in her decision. What we *can* tell even from this partial account, however, is that the history of violence and coercion exercised by a battering man over his partner severely curtails her ability to articulate her story. From the moment Gonzalez entered the ambulance until the final decision on appeal regarding her affidavit, she shaped her story to the demands of others: her husband, his mother, the prosecutor. Gonzalez is not alone in doing so. As the trial court observed, many women who are victims of domestic violence are wary of testifying, and many recant their stories. Pursuing prosecution against an abuser can be emotionally damaging as well as physically dangerous, and women who have been subjected to continued abuse may, for many reasons, not want to pursue their cases.¹⁴⁸ The batterer’s power and effect is much like the tor-

146. *Id.* The trial court also relied on a part of Gonzalez’s affidavit where she explained that Santos “had sex with me and though I was telling him to stop I have never denied sex to my husband.” *Id.* (citing Pet. Ex. L:12/12/96 Gonzalez Aff. ¶¶3-4).

147. *Id.* at *1.

148. *See, e.g.,* Arcoren v. United States, 929 F.2d 1335, 1238-39 (8th Cir. 1991) (discussing recantation); Cronin v. West Whiteland Township, 994 F. Supp. 595, 596 (E.D. Pa. 1998) (refusing to credit defendant’s wife’s attempt to recant her testimony of domestic violence); Commonwealth v. DiMonte, 692 N.E.2d 45 (Mass. 1998) (discussing victim’s recantation of domestic violence charges as “common” but refusing to allow hearsay testimony of her statements made eight and eleven hours following her assault and imprisonment by her husband); State v. Waters, 706 A.2d 1342, 1343 (R.I. 1998) (noting victim of domestic assault recanted); Tejada v. State 905 S.W.2d 313, 315 (Tex. Ct. App. 1995) (discussing victim of assault by her husband who recanted her testimony despite the prosecution’s threats to cut off her welfare benefits and the trial court’s threat to hold her in contempt of court if she left the courtroom during the proceedings).

turer's: by inflicting pain and instilling fear, he forces his victims to doubt themselves and to question the benefits and wisdom of coming forward with their stories.

In the practice of domestic violence, it is not the battering man alone who destroys a woman's ability to speak.¹⁴⁹ The ways in which state authorities respond to domestic violence victims and perpetrators create the context in which the practice of domestic violence occurs.¹⁵⁰ A prosecutor's treatment of women who are abused, and of men who are accused of abusing them, determines the consequences of each incident of assault and the balance of power in the ongoing relationship. By either refusing to prosecute or prosecuting vigorously, the district attorney tells the battered woman whether or not her life and safety are valua-

149. It may strike the reader as odd and awkward to shift so drastically from Scarry to an analysis of domestic violence to the courtroom. Most "Law & . . ." Articles tend to include a section on theory, then proceed to discuss the law's role in the topic. I have — I hope to some degree successfully — insisted on including law here, as part of the discussion of the verbal act and destruction of language that occurs in the practice of domestic violence. The law, as I see it, is not separate from some sort of insular experience of domestic assault. Instead, the law, the social and political response, and cultural attitudes toward domestic abuse *all* constitute elements of the practice of intimate violence. The man who hits the woman is not the only actor — he is not the sole "torturer" who makes the abused woman understand that she has no voice, he is not the sole speaker who reveals the "unmaking power" of pain. Instead, each time a woman's response to or explanation of her position in a relationship of intimate violence is discounted, condemned, or unheard she is in the position of the prisoner whose response to interrogation is viewed as "betrayal." Like the prisoner, the woman's response and loss of voice shift the focus from condemnation of the outright act of injury and veer toward accommodation and acceptance — or, and amounting to the same thing — the turning of a blind eye. It is relatively easy to perceive a battering husband who screams threats at his wife, and calls her a whore, and asks her why she has been out all night, as performing a verbal act and eliminating the possibility of response. We can better understand domestic violence, and its legal, cultural, and social force, if we are willing to examine the multiple sites in which such verbal acts occur. It may be that there are multiple torturers at work in the practice of domestic violence — those who inflict pain, and those who demand response and deny the possibility of speech. The law is not *outside* the event, but is constitutive *of* it and is constituted *by* it.

150. In order to encourage victims of domestic violence to testify, some courts allow them to testify outside of the presence of the defendant, as a child victim of sexual abuse does. For example, in permitting such action, the Court of Appeals of Texas explained that Olivia Taylor, the wife of the defendant, "was trembling and crying when she was brought into the room with Applicant." *Ex parte Taylor*, 957 S.W.2d 43, 44-46 (Tex. Crim. App. 1997). Arguing that the lesser requirements of a parole revocation hearing combined with Olivia Taylor's apparent dread of her husband and inability to testify in front of him, as well as the state's "interest in protecting victims of domestic abuse from further trauma caused by testifying against the alleged perpetrator" were sufficient to allow her to testify out of the defendant's presence.

ble, revealing to the batterer the repercussions, or lack thereof, he will suffer for continued violence.¹⁵¹ In Gonzalez's case, the prosecutor's insistence that she testify, and her use of threats to compel that testimony, reveal both the prosecutor's recognition of the need for repercussion and her lack of understanding of Gonzalez's position. She fails to ask *why* Gonzalez fears testifying, or to consider the consequences of sending Santos to jail on the basis of his wife's testimony only to have him return to her, perhaps angry at her actions, a mere six months later. Here, the prosecutor appears to fail to see that a return of a battering husband after six months in jail may not ensure the safety and security of his victim — especially if he blames her for his arrest, conviction and prison sentence.

As the dynamics of *Santos* and *Arcoren* reveal, a history of intimate violence and the fear of its return severely constrict a battered woman's ability to tell others of her pain. For the woman who seeks aid, as Gonzalez and Brave Bird did, the experience of domestic violence does not end at the moment she contacts the police or the hospital. Instead, she may live in constant fear of violence or under constant threats and pressure to recant her story. In addition to her husband's constant intimidation, she may also be threatened by the prosecutor or by the judge. Each person in contact with her — her husband, the hospital, the social worker, the prosecutor, her in-laws — demands that she speak in a certain fashion and tailor her story to meet their demands. The destruction of voice, then, occurs not only at the moment when a woman is choked, beaten, or raped. It continues throughout her attempt to attain medical aid and a legal remedy.

For those who come in contact with a battered woman, as for those who encounter a torture victim, "pain comes un-

151. For example, one victim of intimate violence wrote to a family violence web site to warn others about bringing charges against the men who batter them. The disdain with which the prosecutor treated her, and the failure to charge her boyfriend with a felony (instead of a misdemeanor) made her "wish now that [she] would never have tried to do 'the right thing.'" Following her unsuccessful attempt to bring her batterer to justice, both she and he know that the law will not protect her if he attacks her again:

This man is only going to get AT MOST [sic] a slap on the wrist, though he nearly killed me. He already knows this and has left me messages to that effect. *So he knows he's going to get away with it.*
What's to stop him from doing it again, certainly not the law.

C.W., *Many women do not press charges*, at <http://www.famvi.com/clw.htm>, (last visited July 14, 2002)(emphasis added).

sharably into [their] midst as at once that which cannot be denied and that which cannot be confirmed."¹⁵² In a legal and practical as well as theoretical sense, the fears of testifying and retaliation, the threats from all sides, render a battered woman's pain unspeakable. Not only can the prosecutor in *Santos* not understand Gonzalez's pain, she cannot understand why Gonzalez cannot or will not articulate her injuries in the courtroom. As in torture, the interrogation and the perceived self-betrayal of the victim are integral elements and acts of injury. Here, for the prosecutor and the judge, the woman's "answer" — that she recants her testimony, or refuses to testify — is perceived as the cause of her injury just as the prisoner's "betrayal" is accepted as the cause of his.¹⁵³ The Texas Court of Appeals, for example, complains that "[i]ntervention in domestic disputes is one of the most distasteful, dangerous, and thankless tasks we ask of our law enforcement officers. When the police investigate such cases, the victims are typically reluctant to prosecute their assailants."¹⁵⁴ It then implies that if the victims had called the police or agreed to prosecute sooner, they would not have been injured, saying "[b]ut when this conduct escalates into injury or death, the police are criticized for failing to intervene earlier and more forcefully."¹⁵⁵ In this opinion, the battered woman's failure to speak is directly blamed for her injury. Her batterer's assault disappears entirely from the picture, leaving only the woman's interaction with the police as a possible cause of, or bulwark against, violence.

Medical practitioners may also find it difficult to confirm or deny their suspicions that a woman is being battered. Just as Betzabet Gonzalez was, many women may fear retaliation and refuse to offer the true explanation of their injuries the first time someone asks them what has happened.¹⁵⁶ A reasonably astute

152. SCARRY, *supra* note 42, at 4.

153. Recantation or refusal to testify is often perceived as the woman's decision to "stay" in the relationship not as a manifestation of the fear in which she lives. As such, prosecutors and police may discount any future claims of injury she makes because she will not be considered "serious" about seeking aid for herself or legal consequences.

154. *Torres v. State*, No. MA97-58100-F, 1999 WL 415380, at *2 (Tex. Ct. App. June 23, 1999).

155. *Id.*

156. Euphemisms for abuse have become part of our culture. For example, author Roddy Doyle chose one such euphemism for the title of his novel about a battered wife: *THE WOMAN WHO WALKED INTO DOORS* (1997). While "walking into a door" or "falling down the stairs" may be recognized as common cover stories for the injuries received from a violent partner, people seem to remain willing to take

nurse or doctor may guess, from the woman's appearance and fear, the nature of her injuries, or the presence of her husband, that the first story is not the "true" story. They may greet this original explanation with doubt and press harder for the real cause of the woman's injuries. The injured woman may then offer a more complete explanation of her husband or lover's attack. She may change her story yet again, however, as Gonzales did. Fear and second thoughts may induce the woman to recant her story and deny the battery. Even if the medical professionals and the district attorney sincerely believe that a woman has been in severe pain, and is again in danger, her recantation may cast their beliefs into doubt. She appears uncertain and inconsistent. Perhaps, to the prosecutor, she begins to seem like a bad witness, or to the doctor like a patient who will be difficult to treat. The woman's stories are each suspicious — at once doubted and believed.

The strategies of violence and coercion employed by battering men are direct attacks on women's ability to assert themselves as independent actors with voices and lives outside of the intimate relationship. When Jim slammed Molly's head into the dashboard because she spoke to another man, he used pain to silence her speech and to prevent her from speaking to any other men in the future. Like the torturer, Jim displaces culpability for his assault by making it appear as though *Molly's* words were the cause of her injury. Thus, for others in the room and for Molly herself, she was the source of injury. Similarly, when Juan Santos intimidated Betzabet Gonzalez so that she no longer wished to testify, the prosecutor blamed and threatened Betzabet and coerced her into testifying by threatening to take her children away and to throw her into prison. The use of violence has the twofold effect of torture: the infliction of injury reduces the victim to physical pain and the verbal acts accompanying the injury make the woman appear to be the source of her suffering. The dynamics of pain and injury contribute to a culture where millions of women are being injured but the lines of culpability remain blurred. Through the infliction of pain and the destruction of voice, battering men undermine the image of women as agents in their own lives.

these tales at face value. It is a more comfortable story to tell — both for the woman telling it, and the person who hears it. The euphemisms allow battered women to keep their stories private, and others may be willing to believe them to avoid confronting the uglier truth.

III. STATE RESPONSES TO DOMESTIC VIOLENCE

Just as the victim of torture experiences the act of torture as the infliction of pain and evisceration of his identity by the forces of the regime, victims of battering relationships experience abuse as violence that is affirmed and supported, either explicitly or implicitly, by the state.

Serious prosecution of domestic violence is a relatively recent phenomenon.¹⁵⁷ Prosecutors have historically refused to take domestic violence cases seriously, have been reluctant to bring charges, and have treated (and in many places continue to treat) domestic violence as a private matter, inappropriate for state action.¹⁵⁸ Similarly, judges have been extremely unsympa-

157. Elizabeth Pleck offers a thorough historical overview of domestic violence in the criminal law in *Criminal Approaches to Family Violence, 1640-1980*, in *FAMILY VIOLENCE* 19 (Michael Tonry & Norval Morris eds., 1989). She explains that although the Puritans did have laws against wife beating, no new laws prohibiting it were enacted between 1672 and 1850. *Id.* at 29. During this period, there was little interest in family violence and little zeal for enforcement of existing laws. *Id.* at 30-31. District attorneys did not prosecute and police rarely arrested battering husbands. *Id.* at 31. Among those cases that made it to court, judges rarely imposed sanctions against men even if they acknowledged that wifebeating was against the law. *Id.* at 32-33; *see also*, *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 455 (1868) (stating that "unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain") (citation omitted); *Bradley v. State*, 1 Miss (1 Walker) 156 (1824) (allowing "moderate chastisement" in order to protect "family broils and dissensions" from public exposure). With the rise of the temperance movement, agitation against domestic violence increased, and criminal sanctions were reinvigorated. *See Pleck, supra*, at 35. As Reva Siegel demonstrates, however, even as judges and legislators repudiated the right of marital chastisement, they often condoned marital violence and expressed little interest in battered wives. *See Reva Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *YALE L. J.* 2117, 2141 (1996) [hereinafter *Rule of Love*]. Rejecting the rule of chastisement, jurists began to define marriage as a "relation of love" and one of privacy. *See id.* at 2151-52. By defining marriage as "a companionate relationship based on an affective bond that flourished best in a sphere separate from civil society," *id.* at 2169, the courts both distanced themselves from regimes of marital chastisement and coverture and allowed wife-beating to continue free from the sanctions of the criminal law.

158. *See Naomi R. Cahn, Innovative Approaches to the Prosecution of Domestic Violence Crimes: An Overview*, in *DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE*, *supra* note 70, at 161, 162. On an internet site, one victim of domestic violence explains that "many women do not press charges because of the treatment they receive after they press charges." *See C.W., supra* note 151. Her experience with the police and the prosecutor made her feel as though her injuries were not serious or worthy of attention. Although she had been attacked by her boyfriend and suffered a gaping head wound that required nine stitches to close, she reports that the prosecutor "gets annoyed" every time she calls, "keeps referring [her] to other departments" and decided to charge her boyfriend with only a misde-

thetic to domestic violence, as demonstrated by their condescending and dismissive attitudes toward the victims in their courtrooms, their sympathy for defendants, and the leniency of their sentences.¹⁵⁹ Judges' hostile attitudes toward domestic violence victims make them feel "ignored and unseen" in the courtroom.¹⁶⁰ The judges' responses, like the prosecutors', can make battered women feel ashamed of their injuries and feel as though their pain is too insignificant for consideration by the court.¹⁶¹ Police responses to domestic violence often have similar demeaning effects.¹⁶² And finally, the lawmakers of many states con-

meanor. *Id.* The way in which this prosecutor's response to C.W. devalued violence against women is strikingly apparent in C.W.'s exclamation: "He has a history of violence against people – not just women!!" *Id.*

159. See generally PTACEK, *supra* note 92 (discussing judicial attitudes toward domestic violence). Cheryl Hanna condemns judges and prosecutors who prefer treatment to jail sentences for those convicted of domestic assault. See generally Hanna, *supra* note 71. She warns about the message such sentences send to women, the men who abuse them, and to society in general: "The reasons for disparity in sentencing between offenses involving violence against women and illegal substances are indeed many, but we should not ignore the implicit value judgment about which offenses constitute the greater social harm." *Id.* at 1541-1542 (comparing prison sentences for drug offenses with treatment recommendations for domestic assault). Appellate judges as well as trial judges are often hostile to domestic violence victims. Battering men who kill their victims are less likely to be charged with capital murder even when their murders are as reprehensible, cold-blooded, and brutal as many stranger murders. See Elizabeth Rapaport, *The Death Penalty and the Domestic Discount*, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 13, at 224. Appellate judges have been more lenient in their review of capital cases that were also separation assaults, and have created doctrines and standards which discourage the prosecution of intimate murders as capital crimes. See *id.* at 227.

160. PTACEK, *supra* note 92, at 154.

161. The women Ptacek interviewed recounted their own experiences of embarrassment and uncertainty as to whether they were believed or heard by the judge.

[The judge] kind of made me feel intimidated, like I was on trial. Like he was belittling and didn't take it serious, like it wasn't a big deal. . . .

Very quick and rushed through. He didn't take much concern for me, didn't feel like he cared, cold. . . . Made me feel a bit jumpy, like I was smaller than him. . . . No eye contact with me. . . I was trying to be formal and make eye contact so he knew I was telling the truth. . . ."

Id. Another woman recounted a similar experience with a judge who refused to grant a ten-day restraining order against her husband: "Felt like I did something wrong, embarrassing in front of all these people. . . . Totally awful experience. . . [The judge] was a jerk. He wouldn't listen: 'Answer yes or no.' . . . Felt like I didn't matter, I wasn't a victim, my fault. . . . Harsh, nasty, unfeeling." *Id.* at 154-55.

162. See, e.g., Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape, & Stalking*, 78 MARQ. L. REV. 79, 108-10 (1994) (discussing inadequacy of law enforcement responses to domestic violence and disparate treatment given domestic and non-domestic violence). Gelles and Straus explain that police are reluctant to respond to domestic violence calls. GELLES & STRAUS, *supra* note 14, at 23. In the police culture, domestic police work is generally considered low prestige, and "few police officers are rewarded or

tinue to treat assault or rape perpetrated against an intimate as less serious than crimes committed against strangers.¹⁶³ The responses, or failure to respond, by prosecutors, judges, the police, and lawmakers are all constitutive elements of the practice of domestic violence.

When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence. Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. Society permits such violence to go unchallenged through the isolation of families and the failures of police to respond. Public, rather than private, patterns of conduct and morals are implicated. Some police officers refuse to respond to domestic violence; some officers themselves abuse their spouses. Some clerks and judges think domestic violence matters do not belong in court. These failures to respond to domestic violence are public, not private actions.¹⁶⁴

These failures are part of the practice of domestic violence in both palpable and subtle ways.

It seems obvious that the criminal justice system's failures to respond to domestic violence as a serious crime, its disregard of women's complaints, and its failures to punish battering men are inadequate responses to the problem of intimate violence. One

promoted for being especially effective in dealing with domestic assault." *Id.* Following the landmark lawsuit and decision in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), police departments have altered their practices somewhat to be more serious in their treatment of domestic violence complaints. See Schneider, *supra* note 29 at 390. In *Thurman*, Tracey Thurman repeatedly begged the police for assistance over a period of many months when her estranged husband continuously threatened to kill and maim her. They failed to follow through on almost every complaint. *Thurman*, 595 F. Supp. at 1524-26.

163. During the first of four years of Congressional hearings prior to the enactment of the Violence Against Women Act, Congress found that seven states still did not define marital rape as a crime and twenty-six other states allowed prosecutions only under limited circumstances. See S. Rep. No. 102-197, at 45 n.50 (1991) (citation omitted). See also Siegel, *Rule of Love*, *supra* note 157 (discussing modern manifestations of regimes of coverture and marital chastisement in the criminal law); Schelong, *supra* note 162, at 102-108 (discussing lingering presence of marital rape and chastisement in the criminal law despite legislative efforts to be more responsive to domestic violence). The California Legislature even continues to require mediation in domestic violence cases. See Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355 (1999). California's requirement reflects the legislature's continued belief that domestic violence is a family problem, not a problem for the criminal law. See *id.* at 367.

164. Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1671-72 (1990).

might look at the police, prosecutors, judges, and lawmakers and condemn them for *allowing domestic violence to continue unpunished*. The systemic failure to take the injuries suffered by women seriously is a crucial constitutive element of the practice of intimate abuse. The public actions of legal and political figures help create the social and cultural meaning of domestic violence, as well as its legal significance, by adding to the cultural understanding of what is and what is not acceptable behavior within an intimate relationship, what the law will and will not tolerate. In its treatment of domestic violence, the state, like the battering man, performs a verbal act that constructs the social status of the battered woman. When a man batters his wife or girlfriend, he asserts his authority over her, tells her and shows her through threats and fists that she is worthless and subordinate to him. When the state refuses to acknowledge domestic violence as a crime of injury deserving of punishment, and tells women and men that intimate violence will be treated differently than other crimes, it tells them through the pronouncements and punishments of the courts that battering women is not a serious crime — and that women who are involved in intimate relationships are susceptible to unredressed injury.

The Second Circuit Court of Appeals announced such a policy in *Eagleston v. Guido*.¹⁶⁵ Mrs. Eagleston brought a civil rights action against the police department and police officers of Suffolk County, alleging that they had deprived her of equal protection of the law under the Fourteenth Amendment of the U.S. Constitution by failing to protect her from her husband.¹⁶⁶ Mrs. Eagleston had obtained two orders of protection, and had complained to the police on at least nine separate occasions.¹⁶⁷ The police made an arrest on only one of these occasions: They arrested both Mr. and Mrs. Eagleston following an incident in which Mr. Eagleston alleged that Mrs. Eagleston had violated the order of protection, and she claimed he had beaten her.¹⁶⁸ Three days following Mrs. Eagleston's last call for help, Mr. Eagleston stabbed her thirty-three times with a carving knife.¹⁶⁹ Miraculously, Mrs. Eagleston survived. She filed suit claiming that the police department had discriminated against her by treating wo-

165. 41 F.3d 865, 878 (2d Cir. 1994).

166. *See id.* at 868.

167. *See id.* at 869.

168. *See id.*

169. *See id.*

men's claims of domestic assault less seriously than other, similar, nondomestic crimes.

In one brief paragraph, toward the end of its opinion, the Court of Appeals explicitly approved of police and community policies that treat assaults upon women in intimate relationships less seriously than other, similar crimes that occur outside the domestic arena.¹⁷⁰ The Court opined that "[a] community may decide that mediation makes more sense, or is more promising, in disputes between members of the same family, or between neighbors, than in disputes between strangers, or that Family Court or counseling is a useful alternative to the criminal courts in certain situations."¹⁷¹

In the case at hand, a man stabbed a woman thirty-three times with a carving knife. Prior to the attack, she had called the police on nine separate occasions. Is this a case for Family Court? For counseling? To say that the police should have assisted Mrs. Eagleston by recommending counseling or mediation is to treat this violent relationship and its bloody result as mere "marital discord" and not a series of events that led to a violent stabbing.¹⁷² The Court's dismissal of the appropriateness of a criminal approach to domestic violence in a few short sentences informs battering men that their acts of threat, violence, coercion, and injury are not forbidden criminal acts, but are mere expressions of marital disagreement, best resolved as a "family problem."¹⁷³

170. *See id.* at 878. The Court quotes the Eighth Circuit's opinion in *Ricketts*, saying "[b]ecause of the inherent differences between domestic disputes and nondomestic disputes, legitimately different factors may affect a police officer's decision to arrest or not to arrest in any given situation." *Ricketts v. City of Columbia*, 36 F.3d 775, 781 (8th Cir. 1994).

171. *Eagleston*, 41 F.3d at 878.

172. The Second Circuit's opinion fits alarmingly well into Professor Siegel's analysis of the courts' treatment of domestic violence as "preservation-through-transformation." *See Rule of Love*, *supra* note 157, at 2176-94. She reveals how men's prerogative to injure women with whom they had intimate relationships was preserved through the language of affective privacy even as the courts, the public and the legislatures rejected marital chastisement laws and doctrine. *See id.* at 2129-30. Similarly, even as the Second Circuit recognizes the existence of "domestic violence," by permitting — and nearly encouraging — the relegation of domestic violence cases to family courts and to counseling, it preserves the notion that men who assault women with whom they are intimate are less culpable than those who injure strangers and the notion that violence within the home is not as serious — nor as "criminal" as other forms of violence.

173. Battered women suffer from severe disadvantages when they are required to engage in mediation as approved by the Second Circuit. The notion that mediation will resolve domestic violence has been roundly condemned:

As in the example of Molly and Jim,¹⁷⁴ the Second Circuit's decision is a verbal act that has three obvious consequences. First, it has the immediate effect of ending Mrs. Eagleston's appeal and telling her that the police do not have to treat domestic violence cases as they do other criminal cases. Second, it has the future effect of determining police, prosecutorial, and public policy. It allows police departments and district attorney offices to continue to treat domestic violence as a "family matter" best resolved through mechanisms other than the criminal law. Finally, it has a generative effect, naming an assault in which a man stabs a woman thirty-three times with a carving knife as a "dispute between members of the same family." The court's opinion classifies intimate violence falsely in two ways: (1) it presumes that the battering man and the battered woman were equally powerful within the relationship and describes what occurred between the Eaglestons as a "dispute" and; (2) it reaffirms the traditional notion that women within families are subject to a certain degree of male control and male violence when it classifies the assault as a "family" problem. When a woman who is assaulted within her family is to seek redress for her injuries through mediation or counseling, she is not being perceived as an independent and autonomous actor, but as someone who is embedded in a relationship that renders her vulnerable to violence.

Although not all batterers explicitly recognize the advantages granted them by legal decisions like the Second Circuit's, many threaten women by invoking their ability to beat them with impunity. The batterer's knowledge and assertion that he can assault his partner without legal repercussions weighs heavily in his favor, enhancing his power over the woman whom he assaults. In *Rhames v. Alaska*,¹⁷⁵ for example, John Rhames defied the law's ability to prevent him from attacking his estranged wife, Carrie. The two were separated and were in the final stages of a divorce, yet Carrie feared John would try to harm her. She ob-

[mediation] ignores the fact that the violence, and resulting fear, taint all aspects of the negotiation process. Threats made prior to the session, or one look inside, can force victims to give up rights and remedies to which they are entitled, in exchange for the illusion of safety. The extraordinary power imbalance and the batterer's refusal to negotiate in good faith usually sabotage even well-intentioned mediations."

Sarah M. Buel, *Domestic Violence and the Law: An Impassioned Exploration for Family Peace*, 33 FAM. L.Q. 719, 731 (1999).

174. See *supra* II.B.2.a.

175. 907 P.2d 21 (Alaska Ct. App. 1996).

tained a restraining order, but when she called to tell Rhames, he exclaimed, "What restraining order? A restraining order doesn't mean anything to me!"¹⁷⁶ A few minutes later, Rhames pulled up in front of the apartment and began shooting at Carrie and her friend.¹⁷⁷ For Rhames, as for other violent men, the law is no impediment to attack. In many ways the law constructs the intimate relationship as a sphere within which it has no force — a space in which the law is reluctant to act and inept in its actions.

Like Rhames, other batterers use the law to their advantage. In *Gibson v. State*,¹⁷⁸ for example, Gibson broke into his estranged wife's house and stabbed her with a knife.¹⁷⁹ She lived and testified at trial that Gibson had threatened to kill her and had often said that if he killed her he would be found insane at trial and be exonerated.¹⁸⁰ Like Rhames, Gibson asserted to his victim that the law would have no control over his actions. He then went even further and told his wife that he could (and would) kill her with impunity. Assertions like Gibson's create in their victims' minds an absolute power — to Gibson's wife, he must have appeared as a man who held her life in his hands yet answered to no one.

Furthermore, a woman's knowledge of the unlikelihood of police or prosecutorial assistance, or the likely inefficacy of any assistance that is provided may compel her to stay in the relationship or make her reluctant to call for help. Following an unsuccessful attempt to bring her batterer to justice, both the battered woman and the man know that the law will not protect her if he attacks her again. As one woman observes, "[t]his man is only going to get AT MOST [sic] a slap on the wrist, though he nearly killed me. He already knows this and has left me messages to that effect. *So he knows he's going to get away with it.* What's to stop him from doing it again, certainly not the law."¹⁸¹ The police and prosecutor's failure to respond adequately to this man's attack are clearly not neutral actions. Although domestic vio-

176. *Id.* at 23.

177. Rhames' attack lasted for some time. He entered the apartment through a window, and chased the others down a hall into the bedroom where he wrestled Carrie's friend to the ground while Carrie hid under the bed. Rhames pointed the gun at the other man's head, and pulled the trigger, but the gun did not fire. *Id.* at 23-24.

178. 516 S.E.2d 816 (Ga. Ct. App. 1999).

179. *See id.* at 817.

180. *See id.*

181. C.W., *supra* note 151 (emphasis added).

lence does not satisfy the plain meaning of the United Nations Convention requiring that it be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” the men and women involved understand that domestic violence has the sanction of law in one form or another. Both the battered woman and the violent man know precisely how vulnerable she is. Not only will the police fail to protect her during or prior to an assault, but the prosecutor will impose no serious consequences after the fact. Like the officially sanctioned torturer, many battering men assault women without the law’s interference or condemnation.

IV. THE DOMESTIC

The long history of the state’s refusal to address domestic violence reveals that women have been damaged and abandoned by the tendency to treat the home as a sacrosanct private space. Just as the secrecy surrounding state torture prevented international legal remedies,¹⁸² the fact that domestic violence takes place behind a “veil of privacy” delayed legal action. Many feminists have correctly and insightfully criticized the relegation of women to the so-called private sphere and have argued that the events and treatment of private life may have devastating political and personal consequences. Domestic violence is particularly dangerous not only because we — the state, the public, the neighbors — refuse to gaze behind the curtain at the private violence of the home,¹⁸³ but because it, like torture, destroys the private.

The room or, more expansively, the home, serves a twofold purpose. On one hand, it protects and encloses the self: “it keeps warm and safe the individual it houses in the same way the body encloses and protects the individual within; like the body, its walls put boundaries around the self preventing undifferentiated contact with the world.”¹⁸⁴ At the same time, the room is distinct from the self, a separate entity, with walls that are “independent objects . . . which stand apart from and free of the body, objects which realize the human being’s impulse to project himself out into a space beyond the boundaries of the body.”¹⁸⁵ Because it encloses and protects the body by standing apart from it,

182. See generally REPORT ON TORTURE, *supra* note 37.

183. See *Rule of Love*, *supra* note 157.

184. SCARRY, *supra* note 42, at 38.

185. *Id.* at 39.

the home becomes the point of departure from which each individual enters the world. "It is only when the body is comfortable," suggests Scarry, "when it has ceased to be an obsessive object of perception and concern, that consciousness develops other objects, that for any individual the external world . . . comes into being and begins to grow."¹⁸⁶ Thus the room or the home is a port of both safety and of departure.

In torture, the room becomes a weapon. Everything that provided safety and comfort, that separated the body from the world outside, is used to penetrate and injure. The objects of civilization and comfort disappear.¹⁸⁷ In domestic violence, as in torture, the safe space of the home collapses in upon itself; its walls, chairs, tables, and beds disappear. They no longer exist as the means of comfort and care, but are transformed into weapons — into the means of injury. In domestic violence, a bed becomes a bonfire;¹⁸⁸ a phone, a club;¹⁸⁹ a bathtub, a pool of gasoline;¹⁹⁰ a hammer is used to destroy, not to build;¹⁹¹ and a man may use the floor to bludgeon his wife's head.¹⁹² We could say of domestic violence as easily as of torture that the "world is reduced to a single room or set of rooms" and is "literally converted into another weapon."¹⁹³ All aspects of the basic structure — walls, ceiling, windows, doors — undergo this conversion. The bathtub, the wall, the chair, the refrigerator become bludgeons. The room *and with it the fact of civilization* is transformed into a weapon and thus undone. With this use of the weapon,

[T]he domestic act of protecting becomes an act of hurting and in hurting, the object becomes what it is not, an expression of individual contraction, of the retreat into the most self-absorbed and self-experiencing of human feelings, when it is the very essence of these objects to express the most expansive

186. *Id.*

187. *See id.* at 41.

188. *State v. Wilds*, 515 S.E.2d 466, 473 (N.C. Ct. App. 1999).

189. Alvino Borrega broke into his girlfriend's house. She attempted to call the police, but Borrega ripped the phone out of the wall and knocked her to the floor with it. *See Borrega v. State*, No. F94-43676-UM, 1998 WL 519444, at *2 (Tex. Ct. App. Aug. 24, 1998).

190. Curtis Wilds dumped gasoline into the bathtub while his wife Tonya was taking a bath. *See Wilds*, 515 S.E.2d at 474.

191. While Angela Smith was sitting on the couch in her home, her husband Lloyd struck her in the head with a hammer, severely injuring her. *See Smith v. State*, 521 S.E.2d 7, 7 (Ga. Ct. App. 1999).

192. Before Brian Forant beat his wife's head against the floor, he threw her into their coffee table. *See State v. Forant*, 719 A.2d 399 (Vt. 1998).

193. SCARRY, *supra* note 42, at 41.

potential of the human being, *his ability to project himself out of his private, isolating needs into a concrete, objectified, and therefore sharable world.*¹⁹⁴

In domestic violence, pain is not only inflicted, but it is inflicted within the spaces of safety and comfort: within the home as well as within the intimate relationship. Those spaces, which in their best form both protect the individual and enable her to move out into the world, become the spaces of danger and of injury.

In this sense, domestic violence *is* different from violence committed by strangers in important ways. When the home becomes a weapon, its existence as a haven is irrevocably destroyed. The home cannot protect and shelter the woman if every object within it and every piece of its structure can be used as a weapon to injure her. In stranger violence, we imagine people being injured on the street, in shops, in public places. For victims of stranger violence it is the world *out there* that is dangerous. By locking the doors and windows, installing security systems and joining Neighborhood Watch, we expect to avoid violence. Or, if we are its victims, we expect to be able to return to the safety of the home to heal. For victims of domestic violence, the distinction between *out there* and *in here* evaporates. While the law refuses to look behind the walls, the walls themselves no longer exist *as such* — they have been transformed into weapons. The infliction of pain renders the body inescapably present and the infliction of pain with the objects of the home destroys the “ability to project [one]self . . . into a concrete, objectified, and therefore sharable world.”¹⁹⁵ With the infliction of pain, battering men make real the bodily presence of women long envisioned by political theorists.¹⁹⁶ The body overwhelms the self and its pain renders participation in public life impossible.

V. CONCLUSION

The dynamics of torture affirm public perception of the torturer’s power and deprive the prisoner of voice and identity. Likewise, the practice of domestic violence perpetuates inequality between men and women by affirming men’s domination and

194. *Id.*

195. *Id.*

196. As Elizabeth Spelman notes, “woman has been portrayed as essentially a bodily being, and this image has been used to deny her full status as a human being wherever and whenever mental activity as over bodily activity has been thought to be the most human activity of all.” Elizabeth V. Spelman, *Woman as Body: Ancient and Contemporary Views*, 18 FEMINIST STUD. 123 (1982).

perceived power by eroding women's ability to speak. As Scarry explains, "Through his ability to project words and sounds out into his environment, a human being inhabits, humanizes, and makes his own a space much larger than that occupied by his body alone."¹⁹⁷ The torturer, through inflicting pain and eviscerating the prisoner's voice, destroys this ability. Lacking the ability to "project words and sounds" into the world in a way that they will be understood and not discounted, the prisoner is reduced to a mere "body in pain." No longer a fully constituted self, the victim is reduced to mere physical being. The consequences of domestic violence are the same. The battering man's act of inflicting pain and eliminating voice holds as its consequence the reduction of women to injured bodies.¹⁹⁸ Through domestic violence, the autonomous woman is returned to her body and deprived of her voice and public self. This effect is not lost on battered women themselves. Suzanne protests to her boyfriend in a poem, asking, "how dare you kill my spirit?"¹⁹⁹

197. SCARRY, *supra*, note 42, at 49.

198. I am aware that this is a dangerous and essentializing claim to make. Again, I do not mean to suggest that every woman is an injured body, or that every injured body is always and only a victim. While in this section of the Article I want to emphasize that women who are battered — who are slammed into doors, walls, and dashboards — are victims and are in pain, I never mean to suggest that that is all they are. To do so would be to make the critical mistake of denying that every choice or act made within a marriage, or for oneself or one's children is an act of choosing and an act of agency. As Mahoney insists,

when women experience violence in intimate relationships, we assert ourselves in a variety of ways. We attempt to change the situation and improve the relationship; we seek help formally or informally from friends, family or organizations; we flee temporarily and make return conditional upon assurances of care and safety; we break off relationships.

Mahoney, *Victimization and Oppression?*, *supra* note 14, at 73. This dual sense of being both a victim and an agent is eloquently captured in one woman's story of her life with an abusive husband. Seamlessly intermingled in the story of their marriage are the ordinary events of life and the brutal attacks of her husband. Neither the abuse nor the ordinariness dominates: Both are simply elements of life that this (anonymous) woman dealt with through each week and each month. See Anonymous, *supra* note 73. These are all acts of agency and of choice. However, I do want to take seriously Scarry's claim that the generative effect of the infliction of injury is the reduction of a person to a body in pain. To inflict such injuries and cause such pain is to deny the autonomy and the integrity of the person attacked. Denying that integrity and autonomy is a refusal to see the woman assaulted as a person worthy of respect and a person who cannot be injured with impunity. This effect is reflected in one woman's comment. Hearing that the district attorney was doing nothing to prosecute her boyfriend, she exclaimed in disbelief, "he has a history of violence against people — not just women!!" C.W., *supra* note 151.

199. Suzanne, *supra* note 109.

Similarly, Monique described her experience of pain as “the horror of knowing that you had used your fists to reduce me to less than nothing.”²⁰⁰ And one woman makes explicit the separation between body and soul during the abuse. She is able to survive the beating by “leaving” her body behind to be beaten and letting her soul slip out and away:

I go to the Island of Catatonia
Where the voices of despair cry
 This can't be happening again.
Where the waters of forgetfulness
 lap the shores of unconsciousness.

Until I remember the trick
 Of jumping out of my body
So that I can slip through the crack in the wall
 Where my soul becomes whole once again.

I wait.
The fury will subside.²⁰¹

Scarry insists that the goal of the torturer “is to make the one, the body, emphatically and crushingly *present* by destroying it, and to make the other, the voice, *absent* by destroying it.”²⁰² The battering man does the same.

“The destruction of voice” through domestic violence is both a metaphor and a social and legal fact. As such, it captures the debilitating and eviscerating effect of discrete instances of violence: the restriction of battered women’s connections to family, work, and friends, and the difficulty battered women experience in telling their story in terms the law will recognize.²⁰³ Describing domestic violence as torture allows us to name these multiva-

200. Monique, *supra* note 75.

201. Anonymous, *in* BROWNE, *supra* note 1, at 55.

202. *Id.* at 49.

203. This last category is perhaps the subject of another Article. In many cases where battered women are killed by their abusers, prosecutors experience enormous difficulty in introducing evidence of past abuse. The victim’s statements to her friends and family may be excluded as inadmissible hearsay, or the defendant’s past arrests excluded as inadmissible prior bad acts. Although there is probably leeway within the rules of evidence to admit such evidence, many judges apply the rules strictly to exclude it. *Stoll v. State* is one of the more egregious examples of this practice of exclusion. 762 So. 2d 870 (Fla. 2000). There the defendant was convicted of premeditated murder and sentenced to death for strangling his wife to death. The Supreme Court of Florida reversed and remanded, holding that the victim’s statements that she believed the defendant would kill her and her statement written to support a prior domestic violence charge were inadmissible hearsay. For another example, *see* Robertson v. State, 780 So. 2d 94 (Fla. Dist. Ct. App. 2000) (reversing conviction due to inadmissibility of defendant’s domestic violence toward his previous wife).

lent effects as part of a social practice and legal crime. It adds a political dimension to the criminal offense, helping us to define domestic violence as the use of pain and coercion to quash opposition and maintain power imbalances in relationships that restrict independence of will and movement. By defining domestic violence as torture, we identify a practice of domestic violence which acknowledges both the context and particularity of abuse. This definition allows us to situate each story within a larger framework that recognizes the seriousness of the injury, its public consequences, and its duration over time while simultaneously conveying something of the depth of experience and injury experienced by the individual victims like Monique, Terry Biggers, and Tonya Wilds. Defining domestic violence as torture does not tell us how to end it, but it does, perhaps, provide a framework for understanding and addressing it that encompasses both its private and its public nature.