The Dissertation Committee for Melissa Hamilton
certifies that this is the approved version of the following dissertation:

JUDICIAL DISCOURSES INVOLVING DOMESTIC VIOLENCE AND EXPERT TESTIMONY

Committee:

William R. Kelly, Supervisor

Sarah M. Buel

Sharmila Rudrappa

Lester Kurtz

Amy Wright

JUDICIAL DISCOURSES INVOLVING DOMESTIC VIOLENCE AND EXPERT TESTIMONY

by

Melissa Hamilton, B.A., J.D.

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

May 2006

JUDICIAL DISCOURSES INVOLVING

DOMESTIC VIOLENCE AND EXPERT TESTIMONY

Publication No._____

Melissa Hamilton, Ph.D

The University of Texas at Austin, 2006

Supervisor: William R. Kelly

Feminist scholars and activists broadly perceive the criminal justice system as perpetuating gendered norms. The justice system is more likely to maintain the status quo of cultural and familial relations between women and men than to accept feminist ideologies that seek to promote understanding of the status of women in violent relationships. These concerns are highlighted in the realm of the justice system's understanding of the needs and strategies of battered women. Domestic violence activists have been successful in encouraging legislative reform in certain jurisdictions to permit expert testimony on battered women's experiences in criminal trials. The focus of this research is how judges, applying this law, select and frame the evidence, as well as interpret the social meaning of the evidence to develop judicial knowledge on the subject.

This study systematically analyzes the text and rhetoric of over 60 California appellate decisions to achieve a better understanding of how the justice system socially constructed the issues and identities related to intimate abuse between adults. Building on feminist and social constructivist theories and using an analytical induction model, I

explored and described the ideological definitions of battering that permeate judicial discourse and affect judicial decision-making.

In this analysis, two sets of discourses emerged. The discourses of resistance focus on the abused woman's actions in regard to whether she resisted the immediate assault and whether she took steps to permanently end the relationship. The second discourse relates to expert testimony on Battered Women's Syndrome and other issues to explain the common practices of battered women, battering men, and the dynamics of abusive relationships. Such expert testimony strongly influences the judiciary's knowledge of domestic violence.

Table of Contents

CHAPTER 1: INTRODUCTION

> Defendant then removed a tire iron from the car and began striking [his girlfriend's] abdomen and legs with it. [She] "agreed" to get back in the car.
>
> *People v. McCart* (2003)

> And we can't change her mind set, and I'm sure that if you found him not guilty of everything, she'd be back with him tomorrow because at this point she is beyond being able to protect herself because of what being in a relationship like this has done to her psyche. So although she is not at this point willing to fight to protect herself, you have to do it for her. This is just the way domestic violence is and sometimes you have to just reach out and help people who don't help themselves and the only way that you can do this here is to find the defendant guilty of these crimes charged.
>
> Expert witness testimony in
> *People v. Mijares* (2004)

Consider the quotations selected above, which derive from two judicial opinions analyzed in this research. The first quotation is the judicially constructed summary of a violent episode. Does it convey whether the writer believed the woman had true choice in re-entering the car? Who is in control—the man or the woman? The second is from an expert witness who testified at trial in a prosecution of a male batterer. Does it convey the idea that abused women make intelligent relationship decisions? Does it suggest whether female victims are capable of protecting themselves? These are just two examples of how judicial writings convey and interpret information about domestic abuse.

This research is a critical discourse analysis concerning the judicial construction of domestic violence. Framed within feminist and social constructivist ideologies, the research explores how the judiciary relates to issues of female victims of abuse, their male batterers, and abusive relationships. The data derive from the convictions of male offenders for violent acts committed on their female partners. Evolving attitudes about relationship violence and changes in evidentiary laws in certain states in the 1990s ushered into the criminal courtroom new forms of knowledge about domestic violence. In 1992, the California state legislature enacted a law that expressly permitted expert witness testimony on the dynamics of domestic violence in a criminal trial. The focus of this research, the California judiciary, has come about as a consequence of that law. I seek to discover how one state's judiciary reacts to the expert evidence and how it influences judicial knowledge.

I use appellate opinions as signifiers of the creation and perpetuation of judicial knowledge within the criminal justice system. The judicial discourses conveyed in the opinions offer a view of gendered expectations regarding incidents of domestic violence between couples. Common myths and stereotypes about abusive relationships, in part perpetuated by the vestiges of the Battered Women's Syndrome, are parsed by the appellate judiciary, although, as I will show, competing images sometimes emerge. Still, there was sufficient consistency among the reports of expert testimony that an "ideal type" of batterers, victims, and battering relationships emerged.

A. The Problem and Purpose of this Study

> If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.
>
> *State v. Oliver* (N.C. 1874)

Domestic violence[1] has been a pervasive phenomenon, though not publicly recognized as such, throughout much of history. Domestic violence finally achieved national attention in the United States in the 1970s through the public efforts of feminist activists (Buzawa and Buzawa 1996; Daniels 1997; Dobash and Dobash 1979; Hoyle 1998; Walker 1989). Despite its prevalence and harm, abuse among family members often has been considered a private problem, not appropriate for the involvement of public officials (Daniels 1997; Felter 1997; Grana 2002; Hoyle 1998; Naranch 1997). In the last few decades, feminist advocates zealously pushed legislatures and justice systems to formally and legally recognize that domestic violence exists, causes substantial damage, and is a social problem that should be publicly addressed (Felter 1997).

Feminist advocacy on issues of domestic abuse prodded a variety of changes in the criminal justice system. The more widely known of these include modifying police arrest policies, improving the availability and feasibility of protective orders, and providing victim assistance. Another strategy of domestic violence advocates has been to

[1] In this paper, I use the terms "domestic violence," "domestic abuse," "family violence," "battering relationships," and "abusive relationships," relatively synonymously. While all of these terms may involve violence within familial and/or sexual relationships, this study is interested in violence between adults within dating, cohabiting, or married relationships.

lobby for changes in law that broaden the types of evidence that can be introduced in criminal trials involving domestic abuse. There are two main categories in which these legal changes occur. One category includes laws that expressly permit factual evidence about the batterer's propensity to commit acts of domestic violence. The second category, and the one that is the focus of this paper, involves evidentiary statutes that would permit the introduction of expert testimony regarding the dynamics of battering relationships in criminal trials. An expert witness is one who, by knowledge, skill, expertise, training, or education, may give an opinion during trial about a specific scientific matter. For both categories, the assumption is that issues of domestic violence are beyond the knowledge and experience of the ordinary juror or judge, for that matter. The evidentiary changes were meant to provide contextualizing information, within the realm of abusive relationships, to answer such common questions as: Why does the batterer engage in violent behavior? If a woman stays in a relationship with a man, doesn't it mean there is no violence? If there is violence, why does she stay?

Feminist activists have achieved some success in convincing legislators in a number of states to enact evidentiary laws regarding one or both categories during the last 15 years. The judicial trend has been toward widening the scope of evidence, both lay and expert, that is admitted to explain issues regarding domestic violence during trial (Harvard Law Review Association 1993; Parrish 1995). Presumably, more evidence is not only relevant to juror understanding, but also may be reflected in the judicial construction and knowledge of domestic violence.

In the face of this evidentiary trend, I was interested in studying the judiciary's social construction of domestic abuse issues in recent times. The evidentiary code

changes offer new opportunities for the judiciary to view domestic violence as a social issue. I desired to explore any typologies of batterers and victims that are created by the judiciary in forging its official knowledge of domestic abuse. Further, I wished to analyze the impact of expert testimony on such judicial knowledge.

I did not expect, however, that the judiciary would simply internalize any information expounded by witnesses as a certainty. A controversy emerged in the 1980s as an explicit critique of the methods and strategies used by professionals to typify women suffering in an abusive relationship. The most popular theoretical perspective in the literature to describe the typical battered woman is referred to as Battered Women's Syndrome ("BWS"). Popularized by the psychologist Lenore Walker, BWS refers to a collection of conditions that exemplify battered women who suffer long-term abuse. Feminists, however, criticize the overgeneralization of BWS for essentializing the battered woman within a confined personality that deprives her of any agency or personal strength (Daniels 1997). Not all battered women fit the singular profile of BWS and they have, therefore, encountered difficulties in using traditional legal defenses to justify their violent actions or in explaining other dynamics to explain their decision to remain in violent relationships.

When initially conducting my research, I had hoped to conduct a comparative analysis across states. With significant variations in the laws of evidence, however, this was not possible. In state courts, the evidentiary laws are generally found in that state's law. Thus, evidentiary rules in criminal trials can, and do, vary between the states. I found this to be particularly true as applied to evidence laws unique to domestic abuse. Some states have passed new laws to address domestic violence evidence, while others

have not. Because the scope and language of the laws differ in dramatic ways, I decided to focus on a single state and one that had a broad statute on domestic violence evidence. This state hopefully would be an arena with a rich source of discourse in which to observe how the judiciary perceives and constructs issues related to domestic violence. I chose California.

California, generally considered a progressive state and influenced by feminist advocates, enacted two statutes in the early 1990s to address evidence in domestic violence cases. One of the laws permits the prosecutor to proffer evidence that a defendant accused of domestic abuse had engaged in similar behaviors previously, either against the victim in that case or others. The second statute permits expert testimony in trials involving charges of domestic violence. The original purpose of the expert statute was to serve in the defense of battered women charged with violent crimes, for which the history of abuse by their male partners is relevant to help establish that the female defendant was acting in self-defense or to otherwise mitigate the severity of the offense (Baker 1994; Klis 1994; Schneider 2000). Advocates were concerned that abused women were being convicted of serious felonies when they were merely defending themselves. Expert testimony could help frame the common characteristics of battered women and/or battering men and dispel common myths and stereotypes that jurors may hold concerning domestic violence.

However, the statute was not written to limit expert testimony to cases of battered women defendants. Nor does the language permit such evidence to be introduced only by the defense. The statute is far broader, allowing evidence on domestic violence by the prosecution or defense and in cases involving male batterers as defendants. While slow

to pick up on the implications of the broad scope, prosecutors in California started to use the statute to gain convictions of male abusers. Expert testimony was particularly useful in the face of factual deficiencies, such as alleged victims refusing to testify or recanting. The prosecutorial use of the statute makes California relatively unique, as prosecutors in few other states have been permitted to introduce domestic violence expert evidence against male offenders (Parrish 1995).

The California evidentiary statute also was compelling because it expressly invoked the controversial concept of BWS. I suspected that the controversy could become a problem that the judiciary would face.

I chose California for additional reasons. California provides a larger sample size, as compared to other states, because of its large population. I also noticed that the California appellate judiciary appears to have a pattern and practice of writing lengthy and informative opinions. This provides a rich source for ascertaining how courts are socially constructing the battering relationship and for assessing the influence of expert testimony on judicial knowledge.

B. Justification for this Study

> [A judicial] opinion works in differing but related ways. Like a novel, it portrays a human conflict. Like a letter, it intervenes in the conflict it portrays. Like a treatise, it gives a systematic analysis meant to be applicable to many situations. Like a work of history or criticism, it compares disputes that have occurred over the years and analyzes what past authors have proposed. Like a dialogue, it embraces clashing approaches to the conflict before the court. Like a script or computer program, it gives instructions to those who act and decide. Like an oration, it seeks to persuade.
>
> John Leubsdorf
> "The Structure of Judicial Opinions," 2001

This research supplements and updates the literature by providing insight into the judicial construction of intimate abuse between adults. As judges act as policymakers, unwittingly or not, the importance of the public rhetoric announced in legal opinions is a crucial part of socially constructing (and deconstructing) battered women. Moreover, these decisions construct the women and their relationships on an ex post facto basis, perhaps minimizing the full contextual parameters of the ongoing personal relationships and the dangers posed within them. As policy initiatives concerning the law's response to issues of domestic violence depend, in part, on judicial decision-making, there needs to be a greater understanding of how judges think and act in regard to these issues.

The presentation of the characteristics of battering and victimization in the justice system may be on a quantitative trajectory. There are clear signs from this study's population that appellate judges in California will likely continue to see an increasing

number of appeals involving battering cases and will, therefore, have to address a wide variety of issues. This study may provide a starting point for further research in testing how the judges' beliefs, attitudes, and decisions change over time.

The conceptual framework here is grounded on literature and research techniques guided by an interaction between two traditions: sociology and law. Using social science research methods to study legal codes and practices makes this research unique, as legal academicians typically analyze the law using legal-logical thinking methods, rather than combining logical analysis with empirical, inferential methods (Epstein and King 2002). Further, the introduction of sociological analysis to law can provide a more complete understanding of the interrelationship between law and society and how law reflects social movements and public consciousness (Schneider 2000). More particularly, the presentation of a legal case within statutory and procedural guidelines shapes how the lawyers, litigators, and jury members perceive harm and deviance. Instead of the conventional juridical view of power as a constraint on personal rights, the socio-discursive practice understands power as producing truth, rights, and how individuals are perceived (Powers 2001). Accordingly, sociological research practices can uncover how the law and case processes shape social reality (King and Wincup 2000). Research on judicial decisions

> has been primarily concerned with explaining the objective outcomes of cases (e.g., judges' votes) and is less focused on the social processes through which judges make sense of a legal rule, frame their decisions, select or create justifications, and embed their interpretations of specific statutes within broader systems of meaning. (Phillips and Grattet 2000:569)

In some sense, the two traditions of sociology and law may conflict. For example, the traditional legal system assumes that a criminal trial can evoke the "truth," while the sociological perspective questions whether there is any single "truth." Still, this study is not designed to assume that, or assess whether, the testimony and evidence produced at trial are indicative of objective reality. Rather, the research seeks to understand how the text creates and influences the judiciary's social construction of reality and the consequences of the application of certain aspects of the law to women. In other words, this investigation does not seek to understand the underlying events as much as how officials interpret and give meaning to the substantive and evidentiary laws.

This framework and research focus derives from relatively recent scholarship in analyzing interpersonal violence as constructed by the criminal justice system. MacMartin (2002) used discursive techniques to study the discourse of offense descriptions in criminal trial judgments in cases of child sexual abuse in Canada. Matoesian (1993) studied the transcripts of three rape trials, two of which were stranger rapes and one of which was an acquaintance rape. While Matoesian's study provides some background for a sociological analysis of gender and violence as portrayed in criminal trials, it is not entirely applicable to addressing the complexities of portraying abuse in intimate relationships or to the construction of abused women as criminal defendants.

Along the lines of analyzing courtroom behavior involving intimate abuse, Ptacek (1999) observed court hearings on the issuance of protective orders. Ptacek's method offers a different, albeit important, perspective than this study, though he could not fully capture careful, reasoned judicial decision-making in the context of a hearing requiring

an immediate ruling. Perhaps the closest in design to my proposal are the trend analysis by Parrish (1995) and the discourse analysis by Crocker (2002). Parrish used appellate courts' reporting of expert testimony in battered women's defense trials, while Crocker analyzed judicial decisions in Canada where wife abuse was discussed.

This research also makes a theoretical contribution in using scholarly inquiry framed by multidisciplinary theoretical perspectives. First, this research complies with a recent call by some criminologists for research and writing in crime and criminal justice to consider creative discourse as appropriate models (Arrigo 1996; Daly and Maher 1998; Smart 1995 and 1998; Walker and Boyeskie 2001). King and Wincup (2000) indicate that the scant criminological research that has been accomplished in regard to court processes is largely simplistic descriptive studies, with no evaluative or theoretical assessment. This appears to reflect a gap in the work of feminist criminologists regarding the social portrayal of battering as spun by the judiciary, and this research is intended to address the breach.

The theoretical inquiries of this research are different than those other studies of judicial decision-making in domestic violence cases. Other studies tend toward finding predictors to judicial decisions, whereas this research targets the social meanings revealed in the rationales for the decisions and in the rhetorical or discursive (that is, the process involved in creating, writing, speaking, reading, and hearing) patterns and stories evident in them (Becker 1964; Richman 2003). Thus, instead of being limited by strict causative models, a discursive practice permits one to conceptualize judicial behavior as giving meaning to legal concepts, with a view toward judicial behavior as social action (Phillips and Grattet 2000). Moreover, using a theoretical technique that has not been previously

used is consistent with the dictate from feminist criminology that research methods should be adapted or created to further a gender-conscious theoretical position (Wincup 1999).

CHAPTER 2: REVIEW OF RELATED LITERATURE

This section presents the theoretical perspectives that guide the proposed research and includes an initial literature review. The methodological agent is found in the process of discourse analysis, while the main theoretical frameworks include feminist and social constructivist theories. The interplay between them provides a postmodernist and fresh perspective for conducting this qualitative analysis. An underlying assumption is that legal language has socializing consequences (Stygall 1994). A judge's words to describe a particular act or a particular person cannot be separated from the underlying events. Language in a legal setting gives meaning to those events and creates certain realities and identities. More specifically, the language the justice system uses in regard to domestic violence affects the victim's identity (Naranch 1997). For example, using the term "appellant's wife" to identify the female victim in a written opinion (*O'Brien* 2003) carries a social meaning that undermines her separate identity and reinforces the traditional assumption that a wife is owned by the husband.

A. Feminist and Constructivist Theoretical Traditions

> [F]orms of law [are] made by men, interpreted by men, administered by men, in favor of men, and against women.
>
> Susan B. Anthony
> Stanton, Anthony, and Gage
> *History of Woman Suffrage*, 1881

This research is designed using the ideologies of feminist theories[2] and social constructivist theories, both independently and in collaboration. The feminist philosophy I use is related more specifically to the postmodernist variety that critically analyzes social relations for gendered relations and how we take them into account or ignore them (Flax 1997; Powers 2001). Gender differences are not hierarchically determined by biology, but are socially constructed (Benton and Craib 2001). The abuse of women exhibits the hierarchy of power relations between men and women (Schneider 2000).

While I have described feminism as a theoretical paradigm in this research, it is important to note that the methodological practices are also informed by feminist research designs. A feminist science agenda questions the established methods of gathering and analyzing data in sociology and other social sciences (Benton and Craib 2001; Powers 2001). In the postmodern philosophy, we challenge the traditional assumptions that "science" and reason developed and reinforced by upper-class, male academics represent

[2] The use of the plural here underscores the position that there is not a single feminist theory (Schneider 2000). Thus, instead of confining the analysis to any particular brand of feminist theory, the intention is merely to address what feminist theories tend to have in common. As one author states, feminist "perspectives share a concern with identifying and representing women's interests, interests judged to be insufficiently represented and accommodated within the mainstream" (Simpson 1989:606).

any objective, reliable, or universal foundation of knowledge (Benton and Craib 2001; Flax 1997; Powers 2001).

Unlike the presumption that the use of the "scientific method" eliminates bias, feminist empiricists find that hypotheses, methodologies, and analytical techniques, from traditional research are already socially biased by an underlying androcentrism that shaped the processes (Harding 1997). In one example of how the feminist agenda alters traditional scientific courses, the philosophy encourages a closer relationship between the researcher and research subjects within a reflexive framework, although it accepts the derivative ethical implications. This new paradigm could be coined a "feminist epistemology."

Taylor (1998) describes the five essential features of feminist methodology in sociology:

Gender and inequality. Feminist research is particularly interested in gender and gender inequality.

Experience. Feminist researchers are motivated by their everyday experiences of gender inequalities and seek to challenge traditional methods by looking at the social world through a woman's eyes.

Reflexivity. Feminist methodology de-emphasizes the traditional notion of objectivity in acknowledging that social research is inherently shaped by the values and experiences of the researchers.

Participatory methods. The feminist researcher wishes to become involved with the subject of her research and to empower activists.

Action. While feminist research builds knowledge, feminist methodology embraces an activist ideology that uses that knowledge for social change.

Feminist methodology is thereby consistent with the discourse analytical model employed in this research. Indeed, feminist criminologists Daly and Maher (1998:4) use the term "women of discourse" to refer to studies that explore how women are constructed in and by legal and social discourses.

A major consideration of feminist theories is related to the sociology of knowledge, also referred to as the social construction of reality approach. In a leading text on the social construction of reality, sociologists Peter Berger and Thomas Luckmann (1966) discuss the purpose of the sociology of knowledge as understanding how people create, through their actions and interactions, shared realities that are both objective (known in the humanly created social order) and subjective (meaningful at the individual level). The theory assumes that society obtains its objective reality through human conduct and that individuals must therefore be viewed as social products. Social constructivists acknowledge the "contingency and creativity of human action" (Shotter 1993:11).

The importance of social constructivism to feminist analysis is the instruction on suitable methodologies to analyze how subjectively defined meanings have become objectively recognized facts, portrayed as if they were noumena. In pursuing this analysis, feminists propose to reveal how socially constructed gender roles and institutional practices that affect women have become reified and are continuously reproduced without conscious thought (Bartlett 1990). Indeed, Bem (1993) reminds us

that the "lenses of gender" shape and potentially distort how we view and categorize others based on our gendered expectations.

Importantly, social constructivism does not necessary conflict with empiricism or the scientific endeavors directed toward discovering reality. Rather, it suggests that reality may be influenced by social position and social processes (Higgins 1995; Rafter 1990). From a sociological perspective, the reference to social reality refers not to some universal, scientifically, proven reality, but is "a quality appertaining to phenomena that we recognize as having a being independent of our own volition" (Berger and Luckmann 1966:1). Indeed, Phillips and Hardy (2002) contend that the social constructivist epistemology is a strong correlate of the discourse analytic framework and is an important process toward understanding social reality.

> [D]iscourse in a social practice sense is not only representational but also *constitutive*: not only a form of knowledge about cultural ways of thinking and doing, but also, more powerfully, a potential and arguably actual agent of *social construction*. (Sunderland and Litosseliti 2002:13) (italics in original)

Feminist and social constructivist theories specifically address gendered violence. Notably, legal feminist theory maintains strong views regarding violence as a social, not personal, problem (Anderson 1997; Smart 1995). Feminist theorists maintain that domestic violence is grounded in gender and power and exemplifies man's endeavor to maintain dominance and control over women (Anderson 1997). Research supports this ideology, whereby male batterers admit that they use goal-oriented violence to gain control of their spouse (Barnett and Lee 1997). The relative status relationship between men and women is also shaped by cultural views about masculinity and femininity. One study reveals an inverse relationship between the man's relative status with his female

partner and his commission of domestic violence (Anderson 1997). In other words, the more the female partner earns relative to her male partner, the higher the risk that the male will physically assault her. This implies that, due to men's actions to reestablish masculinity, the gains that women have achieved in the workplace do not necessarily correlate with greater power in the home (Messerschmidt 1993). Nancy Chodorow (1978) argues that the masculine identity is harder for men to achieve than a feminine identity is for women because, for men to be considered real men, they must proactively prove that they are not feminine. Violence may be one mechanism they use to supply this proof. Further understanding of the use of violence as a gendered tool of control and power is where the social constructivist perspective becomes useful.

SOCIAL CONSTRUCTION IN THE JUSTICE SYSTEM

> Once a lawyer was arguing a case before three lord justices in the court of appeal, dealing with an elementary point of law at inordinate length. Finally, the master of the rolls, who was presiding, intervened: "Really," he protested, "do give this court credit for some intelligence." Quick as a flash came the reply: "That is the mistake I made in the court below, my lord."
>
> Anonymous
> Archibald Edgar Bowker
> *A Lifetime with the Law*, 1961

Reality is an understanding that is created and can be constructed by various means. Reality can be constructed through personal experience, interactions with family and peers, official statistics and reports, laws, actions by state officials, media accounts, and research literature. The social construction of reality is interactive among its various

sources to form common realities or to mediate constructions of reality created by others. The role of the law and judicial decision-making is particularly important in the social construction of norms and of deviance. The reaction of the criminal justice system to a particular incident or behavior, for example, can mediate or counteract the social reality of that incident or behavior that had been based on one's personal experience. Indeed, the actions and reactions of the criminal justice system, as an official source of social control, may be seen as the foundation for what some perceive as "objective reality" of social norms of behavior.

Through the creation of penal laws, making arrests, prosecuting cases, and incarcerating individuals who violate the official social norms, the justice system offers a version of social reality to the public. Individuals, then, can, individually and collectively, become assimilated to the reality created and managed by justice officials, without substantively questioning that reality. The criminal justice system provides a basis for patriarchal domination of social structure and of placing blame on individuals, even on victims (Matoesian 1993).

The justice system's social construction of reality can reinforce social inequalities between groups. From an historical perspective, gendered inequalities in power have been officially sanctioned through laws that precluded women from divorcing their husbands, owning property, refusing their husbands sex, or voting (Websdale 1999). Gelles (1993) notes that it is not the characteristics of the individuals within families, but the family structure itself, and the demands placed on the family structure, that is responsible for motivating and rewarding acts of family violence. Maintaining the family and home to be the private sanctuary with males at the helm further undermines the

power of women (Einstadter and Henry 1995) and perhaps fosters continuing violence. Religious practices also underscore gender differences. Traditional, Christian wedding vows oblige the woman to "love, honor, and obey" while the man needs only to "love, honor, and cherish" and, in both cases, they agree to remain together "for better or worse, until death us do part" (Buzawa and Buzawa 1996). This research involves some of the consequences of each of the foregoing promises for wives in enduring domestic violence.

The law reinforces gender inequalities in implicit ways, too. The standard in law often assumes a male (Chng 2002; Grana 2002; Powers 2001). In the U.S., the social construction of the normal legal subject is a white male. White men socially construct women in law based on the white male's perspective (Schneider 2000). Hence, feminists argue that court personnel and judicial procedures further victimize women by failing to understand their needs, ignoring their wishes, and largely failing to protect them.

In a general context, as a socially-created institution that regulates human behavior and ostensibly penalizes those that harm others, the criminal justice system is a worthy focal point for feminist analysis to discover ways in which the dominant male class has historically excluded the voice, viewpoint, and experiences of women (Chng 2002; Smart 1995). For example, there has been a feminist call to identify and pursue criminal penalties regarding gender-specific injuries that have eluded official scrutiny in order to seek social justice (Howe 1987). These include enhanced legal protection of feminine women from harm by aggressive men through laws regarding rape, incest, and domestic violence. Still, feminist jurisprudence maintains that the gains women's rights groups achieved in enhancing official reaction to domestic violence did not socially

appreciate women's gains in the public sphere, but merely enhanced the social conception of women as powerless and in need of external intervention (Smart 1995).

Further, despite advances in addressing aggression directed at powerless women, the criminal law also serves to severely punish women who deviate from norms of femininity, domesticity, and weakness (Frankel 1979; Schneider 2000). American culture often tends to polarize gender roles, with individuals exhibiting behaviors not consistent with dominant schema being marginalized or labeled deviant (Grana 2002). The fusion of feminist analysis with the social constructivist agenda can help to expose how policymakers have created the label of deviant and the underlying assumptions in determining how individuals labeled as deviants should be treated (Rafter 1990). The language in judicial opinions regarding battering is particularly conducive to assessing the relationship between judicial decision-making and the social construction of gender.

In a criminal prosecution, various players attempt to construct reality for the judge and jury (King and Wincup 2000; Taslitz 1999). The justice system represents a setting for a retrospective construction of events, where some versions of events are discarded, while others become accredited (Edwards 1994). The lawyers often offer competing stories for the fact-finder(s) to evaluate (Miller 1994: O'Barr 1982). The prosecutor proffers evidence that the defendant engaged in behavior that is enjoined by criminal law. The defense attorney is expected to vigorously defend her client by arguing that it was someone(s) other than the defendant who committed the act and/or that there are circumstances to mitigate or justify the criminal responsibility of the client. None of the attorneys may be representing the account the victim would give. One reason is that

litigators desire to present the case in a way that may be most favorable to the decision they seek.

Miller (1994) suggests that traditional case theorists encourage defense attorneys to develop case theories without input from the client and that, as a result, the lawyer and her client may tell different stories in trial. Lay witnesses testify to their observations and experiences regarding the alleged offense and defendant, while expert witnesses offer scientific, technical, or other specialized knowledge to assist the judge and jury in understanding the evidence. Along with the lawyers, these witnesses construct accounts or stories, which are often conflicting, regarding the 'facts' of the case (King and Wincup 2000; Taslitz 1999).

At the appellate level, the foregoing is replayed and "facts" and representations of individuals can be recreated. Certain testimony or evidence given at trial can be reinforced or de-emphasized as each attorney attempts to mold her best case to present to the appellate court. While appellate judges have access to the full trial transcripts, they also instrumentally use the legal briefs by the opposing sides as guides in synthesizing, categorizing, and focusing the case. Moreover, sociological interests inform us that the "plain meaning" of statutory law or of precedent is a mythical ideal. Judges actively interpret law and can be guided by social expectations (Chng 2002; Phillips and Grattet 2000; Van Hoecke 2002).

The diversity among judicial opinions has important implications in my interpretive and rhetorical strategies here. One author describes how discourse characterizes the common law judicial opinion:

> There are of course differences even within the common law tradition in the way in which the judgment is given and reported. Nonetheless, one shared tradition is the individual tenor of judgments. That is to say, common law judges do not regard the application of the principles of law to the facts of the case as a purely mechanical process. Reasoning is involved, a kind of reasoning by analogy, and the choices abound (and will have been pressed by counsel) for the premises or bases on which the reasoning will proceed. A number of judges may come to the same conclusion, but by different reasoning processes; or they may come to entirely different conclusions. (Maley 1994:43)

At the same time, a written opinion is not entirely an objective or logical piece, but represents the judge's own creation of the story and, while purportedly based only on law, it frames the social story in a way to justify her result (Mertz 1996). The story is one of a social conflict and its conclusion.

Feminist researchers in criminology have concluded that the criminal justice system is a patriarchal institution that uses gender stereotypes to perpetuate social norms of male power and female submissiveness (Chng 2002; Grana 2002). Yet, the postmodernist researcher does not let the issue as a researchable topic end there (Foucault 1984). Further investigation is appropriate to determine the nuances and discrepancies in social "truths" (Carrington 1994; Powers 2001). It is too simplistic and convenient to assume an essentialist approach that blurs all distinctions (Allen 1987). We know, for example, that women of different social classes and races fare differently within the criminal justice system, even under the patriarchal umbrella. As feminists, we acknowledge and embrace the potential for social institutions to reduce their reliance on the patriarchal model, particularly in areas of great concern to the health.

The use of stereotypes to convey social models is particularly emphasized in criminal cases, for which the prosecution and defense need to convey intelligible stories

to the decision maker(s) in a limited amount of time. Referring to gender-role typecasts allows the attorney to provide quick imagery that is intended to convey that her version of events is the more credible one (Keitner 2002). As Gillespie (1989) notes:

> [t]he trial courtroom provides a forum for a biased or cynical prosecutor to trot out every myth and stereotype and misconception about women that could conceivably inflame a jury against the defendant and could encourage the jurors to ascribe the worst possible motive to her actions. (p. 23)

The polar typifications by the adversarial system of a couple in a domestic violence trial can further the social construction that seeks to view victims as entirely pure and perpetrators as absolutely evil. Lamb (1996) indicates that, when a couple is not compliant with these expectations, we may be more likely to blame the victim, while relieving the perpetrator of any moral responsibility.

For example, common stereotypes in the justice system in recent decades focus on an inability to understand why the battered woman did not end the relationship (Ayyildiz 1995; Danforth and Welling 1996; Leonard 2001; Taylor 2001). By not leaving, players in the courtroom define the woman as the deviant one. Often, it is the prosecution that raises the issue to prove the case of legal culpability. In *Ibn-Tamas v. United States* (1979), the prosecutor argued overtly during closing arguments that the defendant was at fault for having stayed in the abusive relationship. The prosecutor in *Pennsylvania v. Stonehouse* (1988) argued to the jury that the woman could not be an innocent victim where she stayed in the relationship with her abuser, thereby implying it was her own fault that she continued to suffer abuse. The prosecution in *People v. Humphrey* (1996) likewise argued to the jury that the female defendant could not be truthful, as if she really felt threatened, she would have left.

The judiciary is not entirely responsible for its adherence to male and female stereotypes of intimate abuse. The paternalistic assumptions that judges make are reflective of a philosophy of paternalism within broader society, as "the criminal justice apparatus serves to facilitate the process by which inequality is reproduced socially" (Lowman and MacLean 1992:4). Then the judicial opinions themselves reproduce the inequalities because of the judiciary's emphasis on the value of precedent and consistency in decision-making (Cardozo 1921). Because judges generally review only the evidence brought before them by others, they also can face restrictions. To the extent that lawyers and expert witnesses continue to focus on a solitary characterization of abused women under the BWS, judges may presume that no other models exist.

CONSTRUCTIVIST POSITIONS IN THE JUSTICE SYSTEM ON DOMESTIC ABUSE

I have previously touched on the notion that justice officials may deem a woman to be unreasonable if she remains in an abusive relationship. Here I will discuss further the social expectation, in recent times, that the woman must permanently end an abusive relationship and stay away from her batterer.

Yet, in discussing the issue of leaving, the judicial system often ignores evidence that escalating violence is a common retaliatory consequence by men when their partners attempt to leave or seek legal protection (Hart 1996). Leaving an abusive partner is a dangerous option for a woman (Smith, Moracco, and Butts 1998). They are frequently pursued and further attacked by their partners (Skinazi 1997), and the death of battered women is most likely to occur when they are attempting to leave the relationship or seeking legal redress (Hart 1996). The Florida Governor's Task Force on Domestic

Violence concluded that "forty-five percent of the murders of women were generated by the man's rage over the actual or impending estrangement from his partner" (Orr 2000). Likewise, in a small sample of intimate murders in Florida, in over 60 percent of the cases, the couple was separated at the time the man killed the woman (Websdale 1999).

Another common theme stressed by battered women's advocates to help explain why the woman did not leave is that she faces opposition from the criminal justice system. Often, the battered woman defendant had tried to gain protection from the court system and failed (Ayyildiz 1995; Browne 1987; Ewing 1987; Finkel 1995; Hoyle 1998; Lenoard 2001; Rosen 2001; Skinazi 1997; Sleutal 1998; Websdale 1999). Restraining orders often fail to prevent re-abuse, with recidivism rates between 50 and 60 percent within two years (Harrell and Smith 1996; Klein 1996).

The criminal justice system may further victimize the woman by its processes and make her feel more alienated and isolated (Danforth and Welling 1996; Hoyle 1998). In two different studies, many women reported negative experiences with justice agencies, making them feel deserving of the abuse (Ptacek 1999; Taylor 2001). A significant majority of the women in another study reported that police were ineffective and often rude (Baker 1997). Police also may seem sympathetic to the batterer (Ewing 1987). Delays in case processing, prosecutor indifference, and lack of victim protection, are some of the factors that can render the experience frustrating and dangerous (Hart 1996). For example, the results of a comprehensive study by the California Judicial Council Advisory Committee on Gender Bias in the Courts show that prosecutors and judges commonly used gender stereotypes in court proceedings to treat domestic violence as trivial or the fault of the woman (Danforth and Wellington 1996).

Prosecutors and judges also blame battered women for consuming too much of the court's time in petty matters of family business that ought to be taken care of privately (Hart 1996). Justice officials also often disbelieve women complaining of abuse. A survey of California judges by the Committee found that 41 percent of state judges agreed, and 6 percent strongly agreed, that testimony and evidence concerning the commission of domestic violence was often exaggerated (Danforth and Welling 1996).

One sign of the gendered ideology behind the social construction of reality concerning domestic violence is the common focus on why the battered woman does not leave, instead of concentrating on *why the man batters the woman* (Barnett 2000; Dubin 1995; Schneider 2000). From a psychological perspective, BWS labels the female as the one with the illness instead of the batterer (Dubin 1996). In recent times, social agencies reinforce these social constructions by reiterating the message that directs women to leave the relationship, call the police, go to a shelter, and seek counseling (Baker 1997). There is no similarly strong direction from service agencies that men leave the relationship, live elsewhere, and seek counseling. It is possible that, instead of being empowered, the women feel that they are facing social pressure to behave in specified ways that, again, deprive them of personal control and choices.

B. Battered Women's Syndrome[3]

> Battered women's affective, cognitive, and behavioral responses often become distorted by their single focus on survival.
>
> Lenore Walker and Angela Browne,
> "Gender and Victimization by Intimates," 1985

Lenore Walker (1979; 1989) popularized the theory of the Battered Woman's Syndrome (BWS). A psychologist, Walker employs two main concepts, the cycle theory of violence and learned helplessness, to help explain the behaviors and perceptions of the so-called typical battered woman. In her conceptualization of BWS, Walker specifies a typical three-stage cycle of battering. First is the tension-building phase, with a series of minor incidents and assaults. This may include slaps, throwing things, shaking and, in many cases, accompanied by verbal criticism and complaints. Notably, the barrage of verbal harassment is commonly tied to gendered issues, such as criticizing how well she cleans, cooks, mothers, or keeps her appearance. The second stage is the major explosion of violence, whether triggered by things that actually occurred or happened only in the man's imagination. Customary accusations of infidelity in these relationships show the man's acute sexual jealousy (Foster, Mann, and Fogel 1989). The final stage of the cycle is the man's expression of contrition and attempted reconciliation. This last honeymoon phase may be a respite from the abuse, although its occurrence tends to diminish as the

[3] Lenore Walker (1984; 1995) employed the term "Battered Woman Syndrome" using the singular woman. It was quickly metamorphosed in the literature and among domestic violence community to the plural, as "Battered Women's Syndrome." I employ the latter term, except in certain references to Walker's work.

length of the relationship grows longer. With continuous cycles, the woman falls into a state of learned helplessness, characterized as becoming passive and perceiving that there is nothing she can do to stop the violence. Walker's BWS is so popular that one author estimates that between 80 and 90 percent of references in case law regarding battered women refers to Walker and her work (Downs 1996).

In addition to the cycle of violence, Walker conveys a philosophy of learned helplessness. This philosophy was derived from experiments with dogs and electric shocks. Martin Seligman (1975) wrote about the results of giving random shocks to dogs trapped in cages. After repeated shocks, the dogs lost the motivation to alter their situations and refused to attempt to escape the cages, even when given the opportunity. Walker (1979) related this to battered women, for whom abuse was analogized to the electric shocks in teaching them that their efforts to prevent the abuse would be fruitless.

There are many critics of the BWS theory. The underlying basis of BWS may imply that the woman did not have the capacity to act reasonably. If the jury believes that the woman who stays in an abusive relationship must be sick, then they may be unable to also see her as acting reasonably or as being able to accurately assess the potential danger to herself (Skinazi 1997). Even when judges are enlightened enough to consider the gender bias in the law of self-defense, they may rely too heavily on the BWS stereotype of the woman's helplessness and further perpetuate the singular social construction of the battered woman (Schneider 2000). The narrow construction also fails woman who are different than the construction would predict, such as those who are not entirely helpless or do not lack agency.

An alternative theory views certain battered women as survivors, who are active participants in their relationships and who seek help (Downs 1996). As noted above, abused women often actively seek help in the criminal justice system and are rejected or marginalized. The BWS also may not be racially appropriate for black women who are culturally expected to be assertive, not passive, particularly in front of white persons (Sleutel 1998). The learned helplessness of the BWS theory also tends to lead to experts characterizing battered women as having those psychological problems normally associated with feminine characteristics. Loseke and Cahill (1984) argue, too, that experts have socially constructed battered women who stay in abusive relationships as deviant.

Despite the criticisms, BWS was quickly picked up as part of the popular lexicon in the domestic violence community and in the media during the 1980s and beyond (Downs 1996; Rothenberg 2002). Feminist advocates lobbying for change to address domestic violence often used it in discussing the issues. It is no surprise, then, that the BWS terminology was utilized in statutory enactments. Indeed, Section 1107 of the California Evidence Code, which is the subject of this study, uses it expressly in its language. As I will discuss further in Chapters 4 and 5, there were repercussions in the judicial construction of the statute regarding the term.

CHAPTER 3: RESEARCH DESIGN AND METHODOLOGY

The methodological approach in this study is the discourse analytical design, while the principal social scientific models for the proposed analysis use a constructivist paradigm with feminist designs, discussed in detail above. The broadly stated purpose of discursive analysis is to "put a question to the text" (Carney 1979:36). The researcher then analyzes the data to determine whether they support the researcher's themes (Gee 1999). This is a theory verification study to test propositions derived from feminist and social constructivist theories.

The research is exploratory, explanatory, and descriptive in nature. Considering the purpose of this study, I will apply the methodology of discourse analysis. Discourse analysis builds on content analysis by seeking the latent content of text and is better suited to understanding larger sections of text. It is considered an appropriate qualitative methodology for describing and interpreting social artifacts

A. Critical Discourse Analysis

Influenced by the work of Michel Foucault (1972), discourse theory derives substance from sociological principles.

> Discourse is constitutive of social relations in that all knowledge, all talk, all argument takes place within a discursive context through which experience comes to have, not only meaning for its participants, but shared and communicable meaning within social relations. (Purvis and Hunt 1993:492)

Thus, discourse functionally and instrumentally uses language as social practice (Wood and Kroger 2000).

THE PRACTICE OF DISCOURSE ANALYSIS

Discourse analysis permits an ontological and epistemological interpretation of text and uncovers hidden meanings and ideological assumptions. Discourse analysis attempts to unite, and determine the relationship between, three levels of analysis: (a) the actual text; (b) the discursive practices; and (c) the larger social context that bears upon the text and the discursive practices (Fairclough 2000). Thus, instead of locating static meaning within a single text, discourse analytics conceive the text within the broader contexts of social languages, sign systems, institutions, and social powers (Gee 1999).

The contemporary and progressive nature of this study is apparent, as social theory has recently accorded a more central role to language within the social sciences (Chng 2002; Fairclough 1992; Wood and Kroger 2000). Language plays an important role in conveying social experience, as well as constituting social subjects and their relations (Purvis and Hunt 1993). The methodology seeks to derive socioculturally situated relationships and identities and how they may be stabilized or transformed (Gee 1999). Discourse evokes a "social cognition" whereby individuals in society share mental representations of others (van Dijk 1997:27).

Yet, the discourse perspective is far more than an after-the-fact interpretive device. An important application of discursive practices is the investigation of the role of language in power relations (Fairclough 1992; Habermas 1977; Jäger 2001; Stibbe 2001; van Dijk 1997). Language is active; it is a powerful force used and understood to produce certain functions (Taylor 2001; Wood and Kroger 2000). Discourse not only passively reflects socially created realities, it also actively molds, affects, and even

enables social realities (Jäger 2001:36). These powers of discourse are, in part, wielded by active producers and agents (Jäger 2001).

Unlike other qualitative methods, such as ethnomethodology and semiotics, discourse analysis determinately underscores the power inherent in social relations (Powers 2001). Language, discourse, and communication, can (re)produce dominant ideologies geared toward inequalities (van Dijk 1993). Discourse analysis seeks to uncover hidden ideological features of text (Chilton and Schäffner 1997). The methodology is uniquely practical in moving beyond interpreting social reality as it exists, as it seeks to reveal how social reality is constructed and maintained by dominant forces (Phillips and Hardy 2002). The discourse analyst is properly engaged in analyzing powerful forces in social construction in their specific situated context (Litoselliti 2002; Powers 2001).

It is important to understand how this methodology differs from the historical epistemologies in sociology. Discourse analysis is a multidisciplinary, qualitative method that does not rely upon the traditional, ultra-positivistic techniques that have been adapted from the natural sciences (Howarth 2000; Maravasti 2004; Phillips and Hardy 2002; Wood and Kroger 2000). Instead of seeking objective causal explanations, discourse theorists wish to understand and interpret social texts. They do so by investigating the text within the larger social and historical frameworks (Wood and Kroger 2000). The discourse analyst derives agency from her work. Through detailed and analytical interpretation, the researcher may conclude with a critique of existing social practices and offer ideas on potential reform. Howarth (2000) calls discourse analysis a constitutive theory that does not attempt to falsify or confirm any separately-

derived theory, but rather simply seeks to understand and explain, with a view toward offering a potentially new interpretation of social phenomena. In sum, discourse theorists seek to "understand and explain particular historical events and processes, rather than establish empirical generalizations or test universal hypotheses, and their concepts and logics are designed for this purpose" (p. 131).

CRITICAL DISCOURSE ANALYSIS OF LAW

A discourse analysis of legal language, more particularly, allows one to study the interplay between law and society (Chng 2002). Without the use of culturally derived language, the law would not exist (Gibbons 1994). The law exhibits both instrumental and symbolic significance in creating and reinforcing power and knowledge (Stygall 1994). Statutory law and court decisions have instrumental consequences for individuals' enjoyment of life (such as affirming a conviction) and symbolic impacts by supporting or marginalizing a particular group (such as battered women). Bourdieu (1987) discusses the importance of analyzing legal text for "linguistic and symbolic strategies" because the law has the ability to "do things with words" (p. 809).

An immanent analysis of legal text highlights the normative power of the judicial system (Goodrich 1987). Statutes and written judicial opinions, as noteworthy forms of public discourse, reflect current law and shapes future law and society itself (Coates et al. 1994). Foucault (1972) recognized the normalizing and regulatory function of how society produces its own truths through historically specific regimes of power. As applied to the power of the legal system, a Foucauldian sense suggests that legal writing controls the production of discourse by excluding certain speech, speakers, and subjects,

by rejecting anything it deems unreasonable, and by creating truth by producing its uncontested truth while excluding other potential truths (Stygall 1994). Even the appellate opinion's recitation of "facts" is a contrived editing of only what the drafting judge feels is relevant to the legal issues at hand, a process that is itself a mechanism of control toward creating what happened (Stygall 1994).

At the same time, the law is not an autonomous structure, nor is its processes nonreflexive. In terms of this study, stereotypes of abused women and of the functions of masculinity constructs are not, therefore, solely derived from the legal subculture, but are also drawn from society and culture.

Discourse analysis offers important advantages in critical studies to seek out and potentially destabilize existing assumptions of appellate discourse and about gendered stereotypes inherent in them (Gewirtz 1996). Judicial opinions are significant markers of the legal institution's manipulation and constraint of legal discourse. According to Foucault (1971), society makes a ritual designation of judges as the subjects capable of controlling (and excluding others from) judicial discourse. Arrigo (1996) further calls for discourse examinations of judicial cases, as judicial language has the power to "telegraph a particular attitude," which may well be discriminatory toward oppressed groups, yet the decisions have the unfortunate ability to silence conflicting depictions.

Gewirtz (1996) argues that judicial decisions are important in three respects: as precedent to guide the judiciary and lawyers, to provide accountability to the public, and to form a basis for the underlying ruling. Appellate decisions are particularly important tools for creating social meaning as they carry higher precendential value than do trial court opinions, are more widely available to the legal practitioners and the public and,

unlike juries who are not required to elaborate on the reasoning behind their rulings, appellate judges convey analytical discussion for their result. It is no surprise that appellate decisions explicate the meaning of statutory language, as ambiguities and silences in statutes are common (Phillips and Grattet 2002; Van Hoecke 2002). Goodrich (1987) finds that probing appellate decisions is a form of critique of the state, as legal discourse affects the institutional and social practices the state regulates and assigns roles to people based on the gendered social order. Goodrich further contends that legal discourse challenges the "hermetic security" of jurisprudence and legal theory (1987:132). Rollins (2002) indicates that judicial opinions are ideal for an empirical analysis of a social issue because they provide generous material for content-based coding, provide clues toward the political, social, and cultural realms in the most socially contentious problems, and convey realistic information about disputes between individuals and judges involving important social issues. In conveying a sense of confidence in their legal findings, the judiciary seeks public acceptance of their rulings, which serves to further centralize their power and maintain the status quo (Simon 1998). Hence, socially derived interpretation by judges becomes influential and, eventually, institutionalized (Van Hoecke 2002).

Importantly, neither statutory nor common law can provide algorithmic formulas for applying law. The law's uncertainty provides a high degree of flexibility in judicial decision-making (Mercer 1998), even though judges may couch their decisions in terms of legal determinacy (Simon 1998). The judiciary's interpretation of statutes and existing legal opinions necessarily involves ideological pre-conceptions. Cardozo (1921) recognizes that, in making decisions, judges inherently see things through their own eyes,

which are filled with their own unique outlook on life that is based on "inherited instincts, traditional beliefs, [and] acquired convictions" (p. 12). This means that not all "judge-made law" is objective or consistent, either between different judges or by an individual judge over time. Hence, discourse analysis of legal decisions seeks to flush out bias, stereotypes, and other indications of judge's values.

> In the analysis of discourse examination of the rhetoric/stereotypes used by legal actors necessitates the recognition that rhetoric/stereotypes are situated within the context of the discursive community . . . Effective rhetoric necessarily is based upon premises that audience members already hold as true. The critical starting point of rhetoric is thus the discernment of values and the social context within which they are embedded. (Burns 1999:3-4)

Critical discourse analysis examines the ways social power, abuse, dominance, and inequality are enacted, reproduced, and resisted by text.

Thus, I view appellate decisions as providing fertile ground for a discourse analysis of the underlying issues. Whether the language involves precedent-setting rules or dicta, the voices of the appellate judges speak volumes in socially constructing battered women. The recitation of the selected "facts" conveys both some suggestions of the evidence and legal arguments, as well as provides clues as to what the appellate judges find significant in their observation of cases involving interpersonal violence. The use of this methodology to qualitatively peruse judges' language regarding violent offenders and violent victimization represents an evolving diagnostic protocol for investigators using social theory. Social science researchers have used discourse methodologies to study judicial opinions in such areas as child custody decisions involving homosexual parents (Richman 2003), child custody decisions in West Virginia (Mercer 1998), wife abuse in Canada (Crocker 2002), children's consent in sexual abuse

cases in Canada (MacMartin 2002), motherhood (Miller 1997), prosecution strategies in domestic violence cases in Iowa (Ryan 1998), AIDS-related cases in federal court (Rollins 2002), pregnancy interventions in England (Smith 2000), and sexual assault in British Columbia (Coates 1996).

Certainly, discourse analysis faces constraints in providing absolute answers to any specific social problem. However, this approach allows the researcher to understand the conditions underlying the problem of domestic violence in the judiciary's view and uncover social assumptions that define and characterize domestic violence, its offenders, and victims. The discourse analysis impetus is consistent with the feminist and social constructivist approaches in explicating language and social texts.

There are further advantages of using discourse analysis, as the qualitative technique in this research, in reducing bias and improving validity. Experimental and quasi-experimental designs cannot do justice in an in-depth investigation of sociological phenomena such as this study proposes (Polkinghorne 1991). The intent of qualitative analysis, in comparison, is to seek an understanding of the social world, one that is reflexive and complex (Taylor 2001). Qualitative analysis is well suited to uncovering how social experience is created and given meaning (Denzin and Lincoln 1998; Marvasti 2004). Indeed, qualitative studies of domestic abuse have transformed and molded our understanding of domestic abuse in important ways (Yllo 1988). Hence, by reviewing the narratives that describe battering relationships and their consequences, we can develop social typologies and better understand the processes and meanings underlying the judicial construction of abused women in their naturalistic (as opposed to artificial) setting.

Qualitative methods are also preferred in order to understand contextual implications. For example, content analysis permits the analysis of data rich in detail and embedded in context (Maxwell 1996). Importantly, it is quite likely that the social construction of battered women varies by context and place. LaFree (1989), for example, finds that the social construction of sexual assault varies within the criminal justice system based in part on the stage of criminal court processing of the case, as well as who is doing the constructing (police, judges, or juries).

Discourse analysis also offers the benefits of reducing potential bias from other sources. The techniques I use here are unobtrusive and nonreactive; they do not interfere or interact with the setting (Marshall and Rossman 1998) or vice versa. Hence, the risks of testing bias and the "Hawthorne effect" are minimized (Maxfield and Babbie 1998). The more naturalistic quality of appellate opinions also reduces bias as judges write the opinions without a view toward the purposes of my (or other sociological researcher's) study (Taylor 2001).

B. Research Questions

The research inquiry includes the following core questions regarding the sample:

What are the salient themes, patterns, and categories of meaning given to female victims and their male batterers by the judiciary? Here, I bear in mind that trial judges retain a duty to assess the validity and veracity of the facts provided during trial, while appellate judges assume the facts supporting the winning party's case are true and rule on the merits of the legal claims.

How are trial and appellate judges applying the new evidentiary statute in criminal trials involving battered women? What constraints are judges placing on expert and lay testimony and what reasons are given as related to the California evidentiary law regarding expert testimony? What impact, if any, does the BWS terminology have on the construction and application of the statute? This question relates to how judges are constructing and interpreting law, with obvious social repercussions.

What is the ideal-type of the battered woman and the battering man conveyed by the expert witnesses, as reported and interpreted by appellate judges? This employs the Weberian model of the ideal-type to construct a typical image of the actors in a violent relationship.

C. Research Design

UNIT OF ANALYSIS

The unit of analysis for the study is the social artifact of the appellate opinion. The opinions are not just neutral artifacts conveying social reality. The qualitative researcher recognizes that the speech represented in the writings is a social construction and that it is important to recognize who is speaking and the intended audience (Brookman 1999). A fundamental feature of discourse is that it is social, that the words used and their meanings depend on where they were used, by whom, and to whom. This is the sociological focus on *voice* and on absence of voice (Lincoln 2002). In this research, I remained attuned to the role of the speaker, as well as recognizing the intended audience. Certainly, the role of the speaker in a criminal trial will represent some bias, particularly where litigators have specific, ethical guidelines to follow in

zealously representing their clients, despite their personal beliefs regarding the arguments they make and their views on what truly represents the facts. Still, such bias does not undermine the goals of the research because I am more interested in the social construction than in determining the veracity of the speech or the speaker's belief in her own speech. Consistent with discourse analysis, the focus is not on the underlying actions (here, abuse) as much as on how the judiciary constructs them in socially and publicly available ways.

POPULATION SELECTION

The sample is derived from appellate decisions from California appellate courts. One reason for limiting the study to a single state is to reduce the potential impact of differential state laws that specifically address (or not) the admissibility of prior domestic violence in criminal trials. Since state laws vary in substance, procedures, and language on these evidentiary issues, significant differences in outcomes are likely and make a comparison between jurisdictions risky. An exploratory study of judicial rhetoric within a single jurisdiction seems most valuable. This approach is consistent with the naturalistic nature of qualitative reviews:

> The naturalist is likely to eschew random or representative sampling in favor of purposive or theoretical sampling because he or she thereby increases the scope or range of data exposed (random or representative sampling is likely to suppress more deviant cases) as well as the likelihood that the full array of multiple realities will be uncovered. (Lincoln and Guba 1985:40)

At the same time, California's broad statutory scheme on the admissibility in criminal trials of evidence of prior family violence and BWS enhance the possibilities for language that may reveal stereotypes and gender-role bias or that may reveal a trend

towards greater judicial knowledge of these issues. California is notably unique in its broad application of BWS evidence to cases prosecuting male batterers (Parrish 1995). This permits a comparison in how battered women are socially constructed in cases involving battered women defendants, as compared to battered women as victims of male defendants. Another reason that California is a beneficial site for this study is the relative length and detail common in appellate opinions by California's appellate judiciary as compared to other states.

In this project, the population and the sample are synonymous. In other words, I have attempted to locate all California appellate opinions following convictions in which Evidence Code Section 1107 was mentioned and the violence is between two adults who have had an intimate relationship. The corpus spans an eight-year period. Because Section 1107 was enacted in the early 1990s, there was necessarily some lag time before the first appellate decision addressing it was issued. Thus, the first case opinion was issued in 1996. The last opinion I retrieved is dated August 2004.

By using the entire population and not a select sample, I eliminate external validity concerns and retain empirical inclusiveness. Discourse analysts often, and intentionally, choose against obtaining a representative sample. The exemplary or crucial cases can provide greater benefit to the researcher's intentions than the normal or regular case (Howarth 2000; Maxwell 1996). A socio-historical study of apartheid in South Africa, for example, represents an exemplary case, but with great opportunities to explore social movements. In this study, I have chosen California because it is exemplary in the sense of having a more progressive evidentiary law concerning criminal cases involving

battered women. Still, I overcome the "small N" problem, as my sample consists of all appellate decisions in the state, rather than choosing a smaller set.

DATA GATHERING METHODS

I used three general methodologies to gather the sample/population. The most helpful was a popular legal database system. LEXIS provides an electronic database with extensive search functions of all California appellate opinions. California employs a practice in which few appellate opinions are deemed appropriate for "publication," by this, the state means that "published" opinions are included in official court reporters and may be cited as precedent in other court opinions. This, however, is not a problem for this research project. California appellate opinions that are not deemed appropriate for publication (thereby considered "unpublished opinions") are still available to the public in full and catalogued within the LEXIS electronic database. Together with opinions designated for publication, unpublished case opinions are part of an important source of judicial knowledge, with this database being widely used by legal professionals for research and analysis.

Secondly, I used the www.findlaw.com database search function for more published California appellate decisions. The search feature is slightly different than that of LEXIS, and I was able to find additional cases that fit my criteria. The www.findlaw.com site does not, however, contain unpublished opinions.[4]

[3] Under California rule, only certain opinions are designated for publication. Lawyers are not permitted to rely on unpublished opinions in their legal arguments in court, except under limited circumstances. This does not affect this study because unpublished opinions are publicly available and are still considered valuable resources for legal research. Together, published and unpublished case law represents judicial knowledge.

I used a variety of strings of search terms, such as "battered woman's syndrome" (and multiple variations of it), "expert witness," "domestic violence," and "evidence code section 1107," among others. These yielded hundreds of cases, which I honed to a body of case law in which there is discussion of an expert witness testifying about domestic abuse under rule of evidence section 1107.

The third method for gathering the data included Shepardizing the cases derived from the first two methodologies. Shepard's is a citation service that allows a user to quickly discover the history and progression of a case and locate other cases or annotations that cite the original case. Fortunately, Shepard's is now available as an online automated database.

As a sort of triangulation to verify my population, I also conducted various electronic searches using more generic Internet search engines, such as Google and AltaVista. Additionally, I made note of any reference to a California appellate case contained in the articles and reports that formed the basis of my literature review.

FINAL DATA SET

The data set includes cases that were considered on appeal. Appendix A contains a list of all cases in the data set. There are 64 opinions, representing 63 cases, as one case yielded two opinions, one at the Court of Appeals of California and a later affirming opinion upon redress to the Supreme Court of California. The dates of the opinions range from 1996 through August 2004. The start of the first case is likely the time lag between the codification of evidence code section 1107 permitting domestic violence expert testimony, training prosecutors with the new evidentiary approach, and then seeing a case

through trial and appeal. The length of the opinions spanned from just below 2,000 words to almost 20,000 words. The average opinion was around 9,000 words. Virtually all cases were upheld on appeal, with the exception of two complete reversals, one case reversing a guilty verdict on one of several charges and one case remanded for resentencing.

The guilty counts involve misdemeanors and felonies. Appendix B contains a list of all charges in which juries convicted and the sentences, to the extent that such information could be derived from the appellate opinions. The more common charges are some type of assault or battery. Other frequent convictions included a terrorist threat, assault with a deadly weapon, and false imprisonment. Rape was present in a few cases, while murder was the charge in a single case. Most of the decisions involved more than one charge, with the majority having more than two charged crimes. The courts typically noted the sentence given. There was a wide range of sentences. The least prison time given was six months, and the most severe sentence was life plus four years, eight months. The average sentence was 16.67 years. Twenty-four cases involved sentences of at least 15 years. One reason for the extreme sentences was that two-thirds of the sentences were enhanced by California law because the offender had prior crimes and/or used of a deadly weapon.

I discerned a typical format for the opinions. A prescribed style first lists the name of the case, always "The People v." then the full name of the defendant. Each party is designated as Plaintiff/Respondent or Defendant/Appellant.[5] The appellate district and

[5] The dual designations represent the party at two different stages of the judicial process. At the trial level, there is the plaintiff and the defendant. In criminal cases, the plaintiff is the State of California, while the

division are identified, followed by a unique identifier to locate the case within electronic and/or physical case databases. The panel of three judges is named, using first initials and last names. A single judge then is identified as being in charge of writing the majority opinion.

The opinions then generally begin the discussion with a concise paragraph listing the charges and convictions, a recitation of the claims on appeal, and whether the appellate court affirms or reverses the convictions. The next section often is the appellate court's statement of facts. Several opinions noted that, while the facts are in dispute as between the parties, the appellate court is legally bound to view the facts in a light most favorable to the winner in the lower court. In all cases in this sample, the winner was the prosecution. Some cases presented the defendant's version of the facts, although many did not. A number of opinions let the "facts" speak for themselves by quoting testimony. Others took the transcripts as a whole and constructed their own summary version of the story line.

Often, the facts are presented as moral tales, with a cast of characters centering on the offender and the victim, although often including other family members. The typical format then continues with a description of each of the offender's legal arguments on appeal and the court's rulings thereon. In most cases, the opinions labor to justify the rulings. The last section in most opinions concluded with a short disposition of the case, such as affirming the lower court in full or reversing on a specified basis.

---

defendant is the accused. At the appellate level, the party that is appealing the trial court's ruling becomes the appellant and the non-appealing party is the responding since it is answering to the challenges posed by the appellant.

Unfortunately, the opinions do not yield much demographic information other than the sex of the characters, which could be inferred from the use of terms such as she, he, her, and him. Interestingly, though, social class is evident in the longest opinion in this sample. The most detailed opinion involves an upper-class offender whom the opinion describes as a "celebrity," the actor James Brown. The judges portray Mr. Brown's home in Hollywood, California, as sizable, with two stories, five bedrooms, and four different telephone lines. The court painstakingly summarizes the evidence and carefully reviews each of the offender's arguments. The sentence in this case was also the least amount of time, although the offender was convicted on only a single count of vandalism. The *Brown* opinion is one of the few designated for publication. The foregoing suggests that the socioeconomic status of this offender is related to the appellate court's differential treatment.

The opinions varied in addressing the offender and the victim, conveying gendered structures. Various options for the offender were to refer to him as defendant, appellant, or by the first or last name. The victim was most commonly called by just her first name, followed in frequency by using just her last name. Several cases use initials, as if protecting the victim's privacy. A few cases regularly referred to the woman as "victim," which was far less than expected, considering that the men had been convicted of some violent act toward the women. Two cases were even less familiar, using the term "wife" to refer to the woman. Overall, the opinions were far more likely to address the offender formally, using the impersonal titles of defendant or respondent, while they discussed the victim more personally, most often using some portion of her name. At the same time, even those cases that regularly used the offender's name always used his last

name, whereas the female victim was often referred to by her first name. In sum, the women were much more likely to be personalized in identity than were than men.

DATA ANALYSIS PROCEDURES

Data analysis involves an ongoing, iterative process of reading and rereading the appellate opinions to draw out emergent categories of meaning (Glaser and Strauss 1967). Each case is interpreted individually and comparatively with other cases. The discourse analysis uses a cross-case methodology to compare and contrast language and typifications. By studying the individual cases, in isolation and collectively, we can theorize about their connection to public issues (Mills 1959).

Coding is a material aspect of the qualitative research process. Consistent with grounded theory methodologies (Strauss and Corbin 1994), I read through much of the sample opinions early in the research process in order to begin and to modify the coding scheme as I proceeded through the data. During coding and analysis, I was mindful of fracturing the data and rearranging it into categories that facilitated the comparison of data within and between these categories (Maxwell 1996). The qualitative researcher also sorts the data into broader themes and patterns and creates theoretical memos to note her insights during the process of analysis. As categories and patterns emerged, I searched for those that have internal convergence and external divergence (Marshall and Rossman 1999). In other words, the categories and patterns should be internally consistent, yet distinct from one another. I identified the salient, grounded categories and patterns of meaning ascribed from the discourse analysis.

Together with the categorizing process, a contextualizing strategy emphasizes the context of the text to observe relationships between statements as a concordant whole. The categorizing and contextualizing components of the analysis are both necessary to observe and sort the data, while retaining an understanding of the whole context. Dominant themes were dimensionalized, broken into their constituent elements that can be graphically displayed to show the relationships between them. The themes identified were then examined within the context of the entire opinions to minimize distortions from the fragmentation and categorization of the information (Eisikovits 1999).

I used Excel spreadsheet technology to help categorize and code quantitative data, as well as provide another vision of the cases individually and comparatively. I also loaded data by theme onto separate Word documents. I searched for typologies, meaning that I created categories from the inductive analysis that convey meanings that are not necessarily spoken explicitly, but are grounded in the data. Logical reasoning can apply to cross-classification schemes and lead to general new insights for further exploration of new typologies or new meanings (Marshall and Rossman 1999).

LIMITATIONS

There are several limitations in this study design. First, the restriction to appellate decisions within the State of California reduces the generalizability of the results to other states. However, because no two states have enacted identical laws in this area, generalizing outside any single state is inherently a problem (Mercer 1998). Against this, I weighed the value of focusing on a very progressive state in terms of family violence evidence, as it provides a better view as to how the social construction of battering may

be changing in society's views. The objective in this research is not to elicit authoritarian conclusions (which would in any event be historically- and culturally-bound, as social attitudes and language change over time and across geographies), but to study and contrast the judicial construction and stigmatization of abused women across cases.

Owing to the large size of the California appellate judiciary, as compared to other states, the risk that the sample contains multiple opinions by the same, small group of judges was minimized. It is also highly likely that the sample here is more representative of criminal trials involving battering between intimate adults than would be the case in other states, as the California three-strikes rule has resulted in substantially increased prison sentences in many of the sample cases, thereby providing convicted defendants with greater motivation to appeal. In any event, we can ascertain generalizable conclusions about the role of legal discourse in creating social identities (DeBrovner 2000).

The second limitation is that the sample consists of appellate decisions, which means that it involves only cases in which charges were brought by the prosecutor, the defendant did not plea bargain to avoid trial, and the defendant was found guilty of at least one criminal charge. Accordingly, the sample may include the most severe cases of violence, the more violent offenders. I first note that trial courts are not obligated to give specific rationales to their decisions in trial, nor are they required to draft written opinions or to publish them. Accordingly, it is not possible at this time to conduct any in-depth or large-scale analysis of trial decision-making.

While I could attempt to review the full trial transcripts of battering cases, this would dramatically reduce the potential sample size from the one proposed here, while

not guaranteeing that the trial judge will elaborate on his rulings. Moreover, since the intent is to observe how battered women are socially constructed by the judiciary and the social significance of dominant discourses embedded in what the opinions convey, the evidence provided by this sample remains relevant. I am not as interested in ascertaining the underlying "facts" of the case as much as in how the judiciary constructs these "facts," what issues they focus upon, and how they attempt to persuade the reader to consider the judgment to be a correct one. Other social science researchers have addressed the limitations imposed by using a sample comprised of appellate decisions and have determined the benefits override. For example, Mercer (1998) argues that appellate opinions are beneficial in determining what issues the trial courts are struggling with the most, how the courts are applying the law in a particular situation, and the underlying rationale about what the judiciary believes should be accepted as evidence under the same law. Similarly, Rollins (2002) contends that published, appellate opinions are useful in representing the most salient disputes on an issue, are more readily cited and accessible, and are logistically manageable. Simon (1998) provides a lengthy review of the problems inherent in using appellate opinions to study judicial decision-making, but concludes that:

> the judicial opinion has been accepted in legal scholarship as a useful means for tapping the inner workings of the judicial process. As long as we treat them with due caution, judicial opinions can serve as a fertile and valuable source of data. Reliance on opinions is supported by research that shows that most people's private self and public self are complimentary facets of the self-concept, and there is considerable inter-dependency between these aspects. In particular, it has been shown that the private and public needs for cognitive consistency overlap considerably. In other words, forms of behavior—intended to make people appear consistent with others—correspond closely to behaviors that make people appear consistent with themselves. (p. 38; footnotes omitted)

Third, discourse analysis can be value laden and dependent on the values of the researcher (Maravasti 2004). Discourse analysis involves inferential reasoning that is under the primary discretion of the individual researcher (Marshall and Rossman 1999). Consistent with Weber's (1949) rejection of a value-free science, discourse analysts understand and accept the socio-political nature of social research and the scholarly role that the positive relationship between research and society plays (van Dijk 1998).

Ptacek (1999) argues that research on battering is inherently political, despite the researcher's intent otherwise. While intercoder reliability is one method to reduce bias, I did not have the resources to engage additional researchers in this case. My own view is that most research is likely political (meaning related to one's ideologies) because the researcher tends to choose subjects that interest him or her and for which her or she has some vague pre-formed opinion as to what her or she might find, whether from ideology or experience. Qualitative researchers necessarily bring their personal experience into their studies (Taylor 2001). Still, qualitative researchers have endorsed certain methods for reducing the potential bias by the researcher (Maravasti 2004).

An asset of the discourse analysis technique is the potential for verification and replication since the exact wording of the content continues to exist and can be checked by third parties (Marshall and Rossman 1999). In terms of the dissertation itself, I also address this weakness more specifically by providing multiple examples of quotations that provide the basis of the inferences so that the reader can verify the validity of the analysis. Another validity measure comes from Kvale (2002), who suggests that the qualitative researcher continually check for validity by such methods as assessing

outliers, pursuing surprises, proactively searching for negative evidence, replicating findings, testing alternative theories or explanations, and getting feedback from others.

ETHICAL CONSIDERATIONS

The subject matter of this research is the appellate decision. Since appellate decisions are available as public record, there are few confidentiality issues from legal or ethical perspectives. Accordingly, this research does not involve human participants and does not require approval from the Institutional Review Board.

CHAPTER 4: THE DISCOURSES OF RESISTANCE

In this analysis chapter, I discuss discourses of resistance represented by the appellate opinions. The discourses derive from the common inquiry regarding domestic violence as to why the victim is in the company of her abuser. In other words, the concern is why she does not just leave him. Baker (1997) identified the dominant cultural script imposed on a female victim—that she should get away from her abuser and stay away. To be seen as a legitimate victim, the criminal justice system requires the woman to be almost entirely blameless (Bumiller 1998). Moral judgments are not, then, based solely on the actions of the male abuser. There is a social tendency to also focus on the behaviors and attitudes of the alleged victim.

My investigation discerns a persistent pattern in which the case opinions present evidence of the female's resistance (or lack thereof) to domestic violence. I identified three types of discourses of resistance. First, there is the common theme of the efforts she made to resist the immediate physical assaults, which are described and constructed. Is the victim ascribed to have been a passive accomplice to the assault? Or was the victim appraised as instrumental in fighting off the attack? Do the courts acknowledge a combination of passive and active measures to stave off the abuse or reduce the severity of injury?

The second discourse of resistance involves how the opinions reflect victims' attempts to end their relationship with the abuser. Social expectations favor separation. The third discourse of resistance involves victims' actions, after the relationships end, in

reuniting with their batterers. This third discourse demonstrates the social construction of the extent to which alleged victims resist reestablishing relationships with their abusers. While I have categorized these as three separate discourses, the ambiguous nature of interpersonal affairs means that there is some overlap among the discourses of resistance. Before the in-depth analysis to discern how the data reflect each discourse of resistance, I provide a literature review as background to why I pursued this line of inquiry.

A. Background to the Discourses of Resistance

Cultural evidence exists of differential gender expectations regarding male on female violence. The conventional ideology portrays women as vulnerable to the violence of masculinities (Hollander 2002). Violent men, however, tend to be constructed in dichotomous roles. At times, the social construct for men acknowledges their power in behaving violently with women, while at other times, the normative expectation is for men to be protective of women. These conservative gender ideologies may be based on historical belief systems holding women to be the appropriate (often legal) subject of male control and punishment (Dobash and Dobash 1979). With the view that men may legitimately use violent behaviors on women, there is a tendency for the law to view women as true victims of male violence only if the women are themselves free of guilt (Bumiller 1998).

Despite the historical trends tending to validate men's use of violence against women, there are some recent trends challenging the gendered normative assumptions. Some recent cultural changes foster greater official protection of women from men (Ptacek 1999). Moral entrepreneurs have succeeded in pushing through various reforms

that allow the state to intervene in cases of domestic violence. Ptacek's (1999) found certain judges amenable to issuing restraining orders in cases of domestic violence by men. The researcher found that some judges actually conveyed a sympathetic attitude toward women who claimed to have been abused and who seek legal protection. Nevertheless, Ptacek observed other judges being more sympathetic toward the men charged with abuse.

Another study on judicial decisions regarding male batterers as defendants showed a progression in which judges in recent decades indicate having greater knowledge about domestic violence and abusive relationships than in the 19th century (Crocker 2002). The recent case law showed judges to acknowledge that wife assault was illegal. Still, judicial discourses in both the 19th and 20th centuries tended toward relying on paternalistic rationales in finding guilt or justifying a particular sentence. For instance, Crocker reports a common refrain concerning the social need to provide legal protection for vulnerable women.

Jocelyn Hollander's (2002) discourse analysis of women's vulnerability tested gendered discourses about resistance and violence. She found that the discourses did not always reflect the conventional gendered norms. Evidence from focus group discussions showed some women claiming to have physically resisted their attackers or to be willing to do so if needed in the future. Alternatively, some men were portrayed as fearful of assault. Hollander's research supports a multidimensional approach to discourses of violence and resistance.

My first discourse of resistance concerns the woman's immediate reactions to the assault. Research suggests contradictory norms about women engaging in physical

violence, even if in self-defense. Abused women are often socially expected to be weak (Crocker 2002). However, this may be a contextualized expectation. For instance, a discourse analysis of physical resistance in reports of male rapes of women, Honakatukia (2001) found normative expectations that women fight their raping attackers; otherwise, the sex may be seen as consensual. Violence in the context of a domestic relationship, however, may be assessed differently than in a non-domestic sexual assault. There is evidence that domestic battering may be considered customary behavior, particularly with evidence of both engaging in physical behaviors (Buzawa and Buzawa 1996). Police officers called to the scene of a dispute often blame both the man and woman for the violence. Officers also regarded violence as simply recurrent in certain relationships, unworthy of formal intervention.

This type of police reaction is supported in another study. Ptacek (1999) indicated that, faced with departmental orders to formally act when called to domestic violence disputes, police officers responded by issuing mutual restraining orders. Often the argument is that the officers cannot tell aggressor from victim when faced with signs of injury on both parties. This could be a sign that feminist efforts to transform state responses regarding abuse can have unintended impacts for women in abusive situations. Similarly, Crocker (2002) reports on judicial constructions that consensual fights are lawful, meaning that neither should be criminally pursued. The other potential consequence for women engaging in physical combat is that the self-described self-defense tactic becomes reconstructed as vigilantism (Ayyildiz 1995). The female may be criminally prosecuted for what is defined as excessive force, regardless of evidence that her male partner attacked her.

Other research suggests that successful, physical resistance by a woman to domestic abuse violates gendered norms and thus must be socially deconstructed (Hollander 2002). Accounts by women about successfully defending themselves from a violent encounter with abusive men is often ignored, trivialized, or somehow reframed as victimization. This deconstruction reconveys the evidence of the women's active defense behaviors to conform to more conventional gendered norms of passivity and vulnerability in the face of male aggression.

Thus, there is evidence of historical gendered norms about how women should act in the face of male violence. However, there also is contradictory evidence challenging the gendered construct of female passivity. Since almost all of the appellate opinions upheld the convictions of male offenders, I was interested in how the opinions constructed females who physically fought her abuser. Would the judges view women as legitimate victims when they are also portrayed as fighters?

Then there are normative expectations that abused women will end their relationships with the attackers and stay away. I differentiate temporally between evading an immediate attack and the longer-term action of ending the domestic relationship. As described above, there is some cultural evidence that women are not expected to physically fight their attacker as violence is not feminine behavior. However, there is a stronger, and more unilateral, social expectation that women resist a violent relationship. An abused woman remaining in a relationship with her attacker is herself considered deviant, as she is violating social norms. There is a social re-attribution of guilt in these circumstances. Coates' (1996) study of judicial decisions concerning rape found judicial constructions that violent men are not at fault, based largely on evidence of

the females' actions. In my study, however, appellate judges seem forced to reconstruct the woman as not deviant. Appellate judges must lean towards upholding the man's guilt because they must legally give deference to the lower court's factual findings.

Underlying the expectation that abused women will stay away from male abusers is the cultural assumption that doing so is easy. Yet, researchers outline numerous barriers, internal and external, to why an abused woman stays in the relationship or returns (Barnett 2000; Buel 1999). The barriers underlie the importance of expert testimony in cases of domestic violence. As reviewed in Chapter 2, a common purpose of permitting expert testimony in these cases was to inform the judge and jury about the reasons domestic violence victims stay in or return to abusive relationships and the barriers to remaining that are related thereto.

There is some recognition that the choice to stay or return may be reasonable. For instance, one study shows that marital violence by men tends to be transitory (Feld and Straus 1989). Many violent men did not re-abuse within the next few years. One episode of domestic abuse does not, then, absolutely predict another. Further, the generic question about why abused women stay may be overblown. Many do leave or at least attempt to do so on one or multiple occasions. One study external to this sample of women seeking restraining orders showed that 68 percent had left their abuser at least once, and 15 percent more had made the man leave at least once (Ptacek 1999). Later in this chapter, I will show that attempting to leave and remain away are common behaviors in this sample.

BWS plays a role in questions concerning all three discourses of resistance outlined here. Chapter 2 contained a more detailed review of this syndrome, popularized

by Lenore Walker (1979). That chapter also reviewed feminist concerns about the helplessness ideology imbedded within BWS, such its syndrome ideology revictimizing women (Downs 1996). Still, there is substantial judicial acceptance of BWS, particularly in more recent years (Nourse 2001). Chapter 5 contains a substantive analysis of expert testimony on BWS and its impacts on women's decisions to stay or leave abusive relationships. In this chapter, I focus more on the judicial discourse, considering the particular facts of the case regarding resistance. For now, I note the contradictions within these discourses about the helplessness ideology of BWS, as compared to the strategic use of actions of resistance by women.

I have a few purposes in expounding on these discourses as expressed in the judicial opinions. First, almost all the opinions in the sample discuss one or more of these discourses. Thus, there is a rich body of legal dialogue to dissect. Those opinions that did not contain such a discussion tended to be those where few facts were provided about the incidents anyway or where there did not appear to be any opportunity for the victim to resist. The latter includes situations in which the victim had no physical opportunity to fight back (such as sudden onset and conclusion) and, in the case of resistance to ending the relationship, there was no history of abuse presented.

The judicial opinions reflect the importance of the discourses in litigating domestic disputes. In some cases, resistance is a factual issue in the case. For instance, immediate, physical resistance by the victim may be a fact relevant to charges. Often, physical resistance is discussed in terms of whether there is sufficient evidence that he, not she, was the aggressor and of the severity of the charge(s) underlying the conviction.

As will be seen below, evidence of resistance is also often discussed in terms of the victim's credibility.

A significant factor in pursuing this research is to further understand how discourses of resistance have become a legal issue. Courts distinguish between factual and legal issues. Facts are to be determined by the fact finder, often the jury, except when it is a bench trial. Legal issues are decided by the judge. The legal issue involving resistance is related to justifying the use of expert witness testimony to describe domestic violence. As indicated earlier, domestic violence experts are not permitted to testify about the actual parties (victim and offender) or the facts of the case being tried. The purpose of the experts is often to address the lack of understanding by the public of why abused women, in general, may or may not defend themselves or why they may or may not stay or return.

Overall, the discourses of resistance are of central importance in these legal opinions. I analyze each discourse, beginning with the discourse on the attempt to resist the immediate physical assault. The next discourse involves attempts to end the relationship. The final portion of this chapter examines the discourse on resistance to resuming the relationship.

B. Attempts to Resist the Immediate Physical Assault

I analyzed the judicial opinions for evidence of gendered norms for women who physically fought their abusers' attacks. Earlier, I discussed conventional gendered expectations that accept male violence while co-creating female violence as deviant behavior. A different study of men's accounts of domestic violence indicates a gendered

ideology. Anderson and Umberson (2001) found that men tend to depict their own violence as operative, representing rational, effective, and explosive behavior. In contrast, men minimized their female partners' violence as hysterical, trivial, and ineffective.

SUBMISSIVE ACTS

I start with those cases that convey the conventionally gendered depiction of the female abuse sufferer as offering no physical resistance to one or more attacks. This was mentioned in about one-quarter of the opinions. Just one case portrays the woman as almost completely submissive. In *Simpson* (2002), the court describes how the woman stayed with her abuser all night following a violent incident. The opinion represents that the woman could have attempted to walk out. In describing a separate violent episode, the *Simpson* court indicates that, after an attack, the woman complied with the offender's demand that she get into the car with him. Still, in both scenes, the court defends her lack of resistance because she reported believing that he would have acted violently if she had not complied. In submitting to his demand to get into the car, she testified that she thought she "basically had no other choice" (*Simpson* 2002:8).

Several other cases of non-resistance, however, are presented more strategically. A few courts present submission as a coping strategy to avoid or defuse the man's angry state. In one case, the victim testified that she was "hoping to avoid escalation of [his] anger, [by] hid[ing] from [him] at the campground where they were staying and [laying] down in the dirt" (*Ilyin* 2001:3). Another court establishes a contextual explanation for the woman's decision to submit to the man's demand to return to the car, indicating that

the "Defendant then removed a tire iron from the car and began striking [the victim's] abdomen and legs with it. [The victim] 'agreed' to get back in the car" (*McCart* 2003:3). The court implies that her consent to reenter the car with the abuser was not entirely voluntary, but a strategy to get him to stop clobbering her. The court notes that the man did stop when they got into the car, although the court also observes that it was not an entirely successful campaign since the man escalated the abuse in the car at a later time.

Some courts clearly recognize that what may seem to be submissive behavior was an active stratagem the women used to minimize injury. Examples include laying still to prevent further abuse (*Braddock* 2001), feigning unconsciousness to calm him (*Singleton* 2002), apologizing so he would stop hitting her (*Asprilla* 2002), fearing further harm if she resisted (*Wright* 2001), and laying in a fetal position to either protect her fetus (*Dean* 2002) or her own face (*McGowan* 2003) from his blows. In each case, the courts carefully rationalize the subservient actions as self-protective measures.

Three opinions specifically approve of the use of consensual sex as part of a safety plan. In *Torres* (2003), the ex-boyfriend raped the victim, who did not physically resist in order to minimize physical trauma. The next morning, the court recounts, the two go to church, where the female pursued her "plan to try to keep [him] with her until she could talk to someone so he would not get away from the police" (*Torres* 2003:5). She surreptitiously told other churchgoers about the prior night's abuse and, the court highlights, was successful, since he was then arrested.

In the second opinion regarding a victim using sex as a safety strategy, the court parses various behaviors that comply with and/or violate social norms. In *Piper* (2003), the court figuratively frowns at the woman who waited for her former abuser to be

released from imprisonment, which discounts her victim status. The court describes how he quickly became violent with her upon release, although the court signifies that she consented to sex based on the belief that being intimate would be safer for her. Yet, this did not work, as the abuse continued into the next day. The victim status reappears, though, as the court approves of her action in seizing the car, driving to the protection of a women's shelter.

The third relevant example involves a surprise break-in by an estranged husband (*Gunn* 2004). The court recounts how he choked and beat her, then threatened her and her child unless she had sex with him. The court represents her attempts to calm him and her consent to sex as a protective measure. The court approves, noting her efforts worked, since after sex, he left and she, in a culturally correct response, called the police.

Although the foregoing discussion of submissive behaviors represents a quarter of the cases in which the females are advanced as somewhat submissive in reacting to violence, this percentage is not likely to be truly representative of the population of domestic abuse victims at large. Sample bias is possible because my population considers only cases in which prosecutors pursued the criminal case and achieved convictions on the merits. Thus, my sample likely reflects cases in which the prosecutors are more likely to pursue cases in which the female does not physically resist, thus presenting more clear-cut factual scenarios. Where females do become physical in self-defense, there is a greater likelihood that the criminal justice system will conceive the violent incident as mutual combat or cast the woman as the main aggressor, relieving the male of criminal responsibility. Nevertheless, even if my sample has the more severe

cases in terms of greater male aggression as compared to lesser female resistance, it still helps extend the research.

So, how do the cases representing women as submissive compare to the helplessness epitomized by BWS? These judicial opinions construct the submission more as an active use of defensive tactics. Any submissive behavior tends to be couched in terms of the strategic intent of the submissive posturing. Although there is some recognition that the women at times achieved their desired result in reducing the harm, at other times it did not work. Generally, this sample does not support the helplessness scenario. Next is a discussion of those cases that reflect a great degree of physical response to physical attacks.

THE ROLE OF DRUGS AND ALCOHOL

Feminist theory suggests that judges are likely to assume intoxicants are related to violence in males, as compared to vulnerability in women (Honkatukia 2001). Within the context of domestic violence, studies show that alcohol consumption lessens the blame attributed to male batterers who have been drinking, but it increases the blame attributed to female victims who have been drinking (Aramburu and Leigh 1991; Leigh and Aramburu 1994; Richardson and Campbell 1980). Thus, I reviewed the significance of drugs and alcohol in the judicial opinions and how the judges construed their impact on the behaviors of men as compared to women.

In this judicial construction of accounts of domestic violence, drugs or alcohol were explained as playing some role in battering episodes in almost half of the cases. Thus, when providing the facts of the case, the judges often referred to the impact of

intoxicating substances for the male, the female, or both, in the scenes. In most cases, the presence of drugs or alcohol was not necessary to a consideration of the appellate issues. Voluntary inebriation is not a legal excuse for charges against batterers. Nor is a victim being under the influence a legal justification for violence. In other words, drugs and alcohol are generally not relevant to the criminal charges to be considered.

However, the prevalence of the courts including information on drugs appeared to be important in explaining the actions of violent men and the responses of victimized women. Almost one-third of the opinions discussed the men's use of drugs or alcohol in a fashion that suggested a correlation. Thus, these depictions of the violent episodes implied that intoxicating agents played a strategic role in explaining men engaging in violence.

The role of drugs and alcohol also seemed evident in the courts' construction of facts regarding the interaction between the men and women, as well as the women's involvement or reactions. Ten cases portray both partners as having taken drugs or alcohol at the time of the violent episode. For the men, the drugs and alcohol were still related to help explain the aggression. Another five opinions charged the woman alone as being intoxicated when the events occurred.

The portrayal of the effect of drugs and alcohol for women, either alone or with their male partners, represented three lines of reasoning. First, the writing in several of the cases that involved mutual drinking left the impression that mutual imbibing had set the stage for a violent episode. The man was more aggressive and the female more vulnerable. Second, although represented in only two opinions (*Cruz* 2004; *Mijares* 2004), the woman claimed that her partner either forced her or tricked her into taking

drugs, thus leaving her more vulnerable. However, one of those two is also part of the third line of reasoning, which involves women having recanted or denied and providing an alternative explanation of events. *Mijares* (2004) indicated that, despite having previously claimed that the man had tried to force her to drink wine before raping her, she recanted at trial, testifying that she smoked cocaine, which led to false accusations. Similarly, in several other cases, the women claimed that their use of alcohol or drugs caused them to be the aggressor or to lie about events.

Thus, references to drugs and alcohol were common in this sample, although they were given gendered applications. Intoxication was used to help explain male aggression. For women, drugs and alcohol were more likely to help explain their vulnerability, whether it was just their drinking or both the man and the woman. While a few cases did portray alcohol as making the women aggressive or unreliable, with the verdicts going against the men, that portrayal does not accord great weight from this sample. Instead, the opinions suggest that the stories about drugs and alcohol having a correlation to aggressive actions in women are doubtable.

ATTEMPTS TO ESCAPE

The opinions reflect attempts by the victims to physically get away from the batterers. Several methods are highlighted. Some cases advance more benign attempts, including cases in which the women locked a door to ward off his assault and cases in which the women tried to leave the room or house. Two cases mention that she got away from him after he fell asleep, with the subtext that, for her, escape seemed possible only with him being somewhat incapacitated. One opinion, however, describes her action of

attempting to get away from him as "respond[ing] defiantly" (*Bell* 2003). This opinion reflects gendered interaction by suggesting that her standing up to him was somehow aggressive.

The judicial discourse also discerns constraints to the victim's ability to physically defend herself. Several opinions mention how the man physically detained her from leaving his presence. One goes into a lengthy description of her efforts in attempting to leave. The *Asprilla* (2001) opinion seems to applaud her various efforts. The court reports the events when the woman attempts to lock herself in a bedroom after he punches her, using her own words:

> [The abuser] told her to open the door or he would kick it down. She heard the door hinge crack, so she opened the door to prevent it from breaking. [The abuser] 'just started hitting on me, punching me, kicking me, he kicked my leg, and he hurt me knee.' The first blow was a 'karate kick' to her knee, which caused her to fall down between the bed and dresser. While she was on the ground, he punched her in the head, face, back, arms, legs and ribs. [She] was crying, and 'told him if I did something wrong, I'm sorry don't hit me anymore.' She got up on the bed, and [he] continued to punch her.
>
> [The victim] then asked to use the bathroom. She went inside the room, 'got real dizzy … and just fell down.' She then opened the bathroom window and tried without success to attract the attention of police officers on the street. [He] told her to open the door. She said 'no because you are going to hit me.' Ultimately, [she] opened the door because [he] said he would break the door down and she 'didn't want to get hit her anymore.' . . .
>
> [He] told [her] that he was sorry. At that point, she had 'two black eyes, a bruised lip, a broken tooth, and bruises all over. . . . ' He became angry when she did not want to go back to their room with him, and dragged her there by her ponytail. Back in the bedroom, [he] began punching and kicking her. She asked him to stop, telling him she 'would go by what he says so he wouldn't hit [her] anymore. (Asprilla 2001:6-7)

The *Asprilla* opinion also notes that the victim wanted to call the police and call her sister, but he threatened her if she did and pulled the telephone cord out of the wall. The court reports a witness's statement that the abuser beat the victim "like she was a man" (*Asprilla* 2001:8). The opinion evokes the reader's sympathy for the victim's defensive efforts, instead of condemning her for seemingly submissive language during the violent episode.

Other barriers to preventing or leaving the abuse included threats of further violence unless she stayed and manually disabling the phone line. Two opinions recognized that the woman successfully got away from the home, but upon returning to retrieve children, suffered further abuse. These two cases are consistent with the no-win situation faced by abused women who put themselves in harm's way again when attempting to protect their children. The women's actions in returning to the scene of violence were not condemned as unreasonable by the judicial opinions. Rather, the language characterizes the actions as appropriate for motherhood.

ACTIVE PHYSICAL DEFENSE

A number of judicial opinions refer to the women's active and physical defense tactics. There is evidence, for instance, of the female's actions of biting, slapping, and hitting. An interesting aspect is that each opinion that included a description of the woman's physical behavior does so accompanied by an immediate explanation of the behavior. In *Braddock* (2001), the court indicates that she bit and slapped her abuser, but the court immediately explains that it was to ward off the attack. The physical scenario in *Dillard* (1996:6) is described in context: "[w]hen he attempted to choke her, she bit

him on the arm." The *Colabine* (2004) opinion accepts her hitting his face, in one instance, and grabbing him by the throat, in another instance, in response, respectively, to protect her child and to get out from being pinned down by him. As a sort of clarification, one court considers her testimonial description of the man's violence and her response: "He hit me. I hit him back. He threw me on the floor, and I kicked him" *Sosa* (2002:3-4). The court expresses sympathy, indicating that her responses were not too successful, as it describes him as retaliating by choking her into unconsciousness.

The woman's use of weapons is rarely indicated in these opinions. Still, even when the woman did wield a protective tool, the two operable opinions minimize the effect. The woman in *Gadlin* (2000) armed herself with a butcher knife and hammer, but the abusive man was able to take them and use them aggressively against her. Another appellate court describes how, in the face of a violent threat, the woman grabbed a knife, but indicates that he got up, confiscated the knife, and then used it to stab her to death (*Grayson* 2002).

Three of the cases present women who heartily fought back as heroines. Notably, all three cases involve mothers protecting their children from abusive men. *Colabine* (2004) involves the woman's nine-year-old son and her boyfriend. The young boy refused the boyfriend's request for a beer and the boyfriend then began to strangle the boy, lifting him off the ground. The mother then grabbed the boyfriend's hair and "started beating the crap out of his face" (Colabine 2004:3). In reaction, the boyfriend put the boy down and punched the mother. Unlike the other cases in which the female just tries to escape, here the court recounts that the boyfriend retreats to a bedroom, locking the door. Giving the reader a covert perception of a mother tiger protecting her

cub, the opinion reports that the mother kicked down the door in hot pursuit. We are then reminded of her vulnerability, as the court's story line indicates the boyfriend then grabbed her by the throat and threw her down on the bed. Nevertheless, her actions are portrayed as successful because the boyfriend then departed the residence, leaving her and her son (temporarily) free of harm.

In the case of *Dillard* (1996), the judicial opinion likewise deals with a mother aggressively protecting her children. The court tells the story of a woman who attempted to remove her children from the home to avert a potential blowup by her boyfriend. When he tried to physically stop her, she yelled, punched him "as hard as she could in his eye" (*Dillard* 1996:1424), and kicked him in the groin. She started to run out the door, when he grabbed her, so she bit him on the arm. The court promotes this version of events and accepts her behaviors as sensible. This opinion is salient for another reason. The woman gave conflicting testimony about the events at trial. She testified to the foregoing account, but then also declared she had punched herself in the eyes several times. She explained that she was angry with her boyfriend, but that she also had a history of self-destructive behavior. The court clearly discounts the veracity of the self-abuse testimony: "When asked [on the witness stand] how the injuries occurred, [she] claimed she inflicted them on herself. She even testified she punched herself in the eyes." The court ruled those circumstances justified because of expert witness testimony to explain why she might lie about how was responsible for the injury. In this case, then, the opinion carefully plows through the conflicting evidence of who harmed her, but clearly sides against seeing her as masochistic.

The third case involving a protective mother occurs in *Hobley* (2003), in which the mother phoned the police to report abuse. She told the 911 operator that her children were scared and that she would do anything to protect them. The operator's given response is to instruct her to lock herself and her children in a room to await help. Here, we see a slight shift in perspective from the woman phoning the police as a victim to seeing her as a potentially dangerous player in the scene in her role as a protector for her children.

These three cases portraying a woman as the aggressor or potential aggressor are discursively presented as acceptable where such physical power is to protect children. The suggestion is that, while aggression is not normally acceptable as feminine behavior for women, it may be more appropriate when linked to the maternal role. This is one way in which the dichotomy of being either a victim (feminine) or being an active agent (masculine) is less clear.

AGGRESSIVE BEHAVIORS NOT ACCOMPLISHED AS SELF-DEFENSE

I also analyzed cases in which a woman is presented as aggressive in situations that do not seem to require defensive behaviors as protection from violent men. Violent behavior in women may negate their status as victims. Keitner (2002) presents this as a question of whether the justice system seeks to characterize the woman as a victim or vamp. Three examples representing gender anomalies stand out.

The first case highlighted evidence proposed by the defense to convince the appellate court that the victim was not feminine and not worthy of protection. The defense argument in *Colabine* (2004) was that the victim had a tattoo of "psycho bitch"

on her neck. The allusion here is that she is what her tattoo states. Indeed, the opinion refers to the woman's testimony that she earned the name when she fought with the defendant. The court itself seemed to find it important, indicating that she "proudly tattooed her neck with this appellation" (*Colabine* 2004:18). This leads the reader to believe that she enjoyed and agreed with the label. The defense presented much evidence of her prior aggressiveness, in an attempt to brand her as the aggressor in the relationship, not the man. For instance, the court cites evidence that the woman at other times stabbed her boyfriend with scissors, threw a vodka bottle at him, and attacked him with a kitchen knife. There was also evidence offered she had previous been imprisoned for abusing her ex-husband.

The *Colabine* court noted other instances in which the woman is portrayed as engaging in masculine behaviors. One witness testified that she was powerful and strong and could fight like a man. The opinion describes other evidence that she "did not back down from physical altercations with any man" (*Colabine* 2004:18). Then there was testimony that she attacked her boyfriend, and when he tried to barricade himself behind a closed door to get away, she pursued him through the door like a "football player" (*Colabine* 2004:9). Her apparent acceptance of physical pain, albeit also a masculine trait, is also alluded to with testimony that the woman pierced her own nose with a needle and left the needle in for an hour while she tried to find an earring to use in the nose. Another masculine trait ascribed to her was being a violent person "who went into uncontrollable rages" (*Colabine* 2004:9).

The *Colabine* court stated that the foregoing adds to the plethora of evidence about a woman's "erratic behavior." The court seems to accept all of this as truth. Since

the court in the end upheld the convictions, it had to work around all of this evidence that the victim herself was strong, aggressive, and erratic. The court's opinion circumspectly crafts the woman as both a victim and an aggressor. The court asserts that the victim's own violent behaviors likely explained why the jury acquitted the defendant on two of the original charges. The opinion sums it up as follows: "the couple were engaged in a deviant relationship involving mutual combativeness and a lack of impulse control, in which both of them were aggressors and victims" (*Colabine* 2004:1). But the court contradicts itself, without acknowledgement, when it later revokes the status of victimhood. While positively portraying the woman's aggression when she is protecting her child (discussed above), the court indicates that it sees her son as the only "truly innocent victim in this whole sordid mess" (*Colabine* 2004:17).

The second case involving aggressive behavior by the woman is found in *Vandersteen* (2003). Perhaps to set the reader up for a scenario whereby a woman displayed violent behavior, the opinion at the very beginning, indeed in the second paragraph of a lengthy document, portrays the woman as 5 feet 6 inches tall, but "strong for her size" (*Vandersteen* 2003:2). The opinion notes a difference in stories about the violent incident that was the subject of the prosecution. The woman's story is that, after a verbal fight, her boyfriend wanted to leave the bedroom. She physically tried to prevent him from leaving by standing in front of the door. This behavior, her trying to prevent the man from leaving a fight, differentiates this case from most of the rest of the sample in which physical detainment is ascribed to the male's behavior. In any event, she testified that, in response, her boyfriend slugged her, breaking her jaw. The boyfriend's account was that his girlfriend attacked him and he just slapped her in response. The

court then generally refers to an offer of defense evidence of other incidents in which the victim physically attacked her boyfriend, as well as other incidents in which the couple verbally fought without accompanying physical violence. The opinion describes the foregoing as demonstrating that the boyfriend "did not resort to violence unless [the victim] provoked him by physically attacking him" (*Vandersteen* 2003:10). Thus, the court seems to accept that she also may have been physically abusive.

I discuss *Colabine* and *Vandersteen* at length because they show the intricate path the court must weave when presented with a female "victim" who does not comply with the submissive and helpless idealizations. Not only were the women in the two cases viewed as not overly feminine, but they also convey the other extreme of active and powerful agents engaging in violent and aggressive acts. The opinions somewhat embrace the masculine characteristics, while tentatively holding onto a picture of the woman as a victim of violence in very specifically delineated instances. In other words, the big picture of women being an aggressive person did not necessarily require the court to feel that she may not have been harmed in a single attack.

IMMORAL BEHAVIORS AS NEGATING VICTIMHOOD

The *Vandersteen* court, discussed immediately above, was faced with another attack on the image of a pure, deserving victim. Together with the evidence of her violent assaults, the court addresses evidence of her immorality. More specifically, the court quoted verbatim a letter the woman sent to her boyfriend on his birthday:

> Happy 34th. Here's to your major accomplishments: Addict. Abuser. Molester. [P] The only ones who may seem to like you are the ones who don't know or that you lie to. How does that feel? [P] We know. And more people are laughing at you behind your back than you realize. What could it

> be by next year? Can you guess who? [P] Not to mention: Amway geek. Murdering your own pet! (selfish, neglect) [P] Still only a cameraman. [P] Bad dancer!! (The worst ever!!!!). (Think Elaine you loser.) [P] The poll on your toys: abnormal totally. Here's to you, psycho. Your parents must be proud. You are just not a nice person as well as nothing going for you.[6] (*Vandersteen* 2003:34-35)

The court finds the content of the letter immoral. The opinion indicates that some of the accusations, which she learned in the course of an intimate relationship, were inappropriately used is an "insulting letter" against her confidante (*Vandersteen* 2003:34). Together, the "mean-spirited content" (*Vandersteen* 2003:39) and evidence that she had previously lied about sending it, cast doubt on her credibility. As described above, when the court is struggling to perceive her as a victim, it engages in differential positioning to identify him as the abuser in the face of her sending him a verbally abusive letter. The court's evident strategy here was to place less emphasis on characterizing her as a victim. Instead, the court accepts the boyfriend as having committed one severe act of violence, and thereby legitimately guilty of that specific instance.

Another use of moral conduct against the purported victim occurs in *Gunn* (2004). There, the court recognizes evidence that the woman had three misdemeanor prostitution convictions, which the court labels as crimes involving moral turpitude. The defense argued that her not having told her ex-husband of her past prostitution convictions showed her "readiness to harm him with falsehoods about her sexual conduct" (*Gunn* 2004:4-5). The court finds this evidence relevant to the charge of spousal rape since it

[6] I assume the symbol "[P]" was to denote paragraph breaks in the original note. The quote here is copied from the judicial opinion exactly as presented.

shows that she would lie about sex to harm her ex-husband. Indeed, the jury acquitted him on that charge. This case supports the idea that evidence of a woman's immoral behaviors, even if seemingly unconnected to the violence that is the subject of the charges, can negate her victimhood.

HELP-SEEKING BEHAVIOR

Regardless of a victim's attempt to physically protect herself, the opinions commonly refer to help-seeking behavior. A quarter of the cases specifically note when the woman called police soon after the abusive incident. The importance is often shown to legitimate her as a victim, since she did contact police, and was used to bolster the woman's credibility.

Perhaps more interesting is what the consequences were for those who did not seek help from the police or others. The court in *Asprilla* (2001) was clear that failing to immediately seek help indicates that violence did not occur. To rehabilitate the complaining victim, the court acknowledges that the jury would need to hear expert testimony to explain the failure to seek help.

Another opinion discusses the consequences when the women did not attempt to escape from her ex-boyfriend/kidnapper. The male and female in *Johnson* (2003) had broken up and the woman had a new boyfriend. The ex-boyfriend showed up at her residence, beat her, kidnapped her, and took her to his home. The next day, his father and brother physically extricated her from the home, despite the ex-boyfriend's protests. However, a significant question was raised because there was evidence that she had a previous opportunity to escape but did not take it. The court finds this behavior to be

contrary to what would be expected if she had truly been a victim of kidnapping. Thus, the court permits testimony from the woman that her ex-boyfriend threatened her with further violence if she went to the police.

> The evidence was admitted to explain the victim's behavior during the kidnapping. She had forgone an opportunity to escape. There was evidence that she was acting normal at defendant's residence. For example, there was testimony that while there she played with defendant's dog and that she and defendant went out and brought back food. After the current incident, the victim allowed defendant's mother to take defendant's [and victim's] child to visit him in Tennessee. (*Johnson* 2003:4-5)

Additionally, to support her story, a deputy testified finding the victim "pretty distraught and looked very upset" (*Johnson* 2003:5). The court contextualizes the woman's failure to seek help as a defensive strategy of protection. The evidence "allowed the jury to conclude that the victim had been in sustained fear and had acted as she did in hopes of not aggravating defendant to even more violence" (*Johnson* 2003:5).

DISCUSSION

The data refute the assumption that the justice system steadfastly requires that female victims of domestic violence be submissive, non-aggressive, feminine characters. In some cases, women were so portrayed, without much further discussion. However, several courts recategorize these behaviors away from a tenor of helplessness. These opinions maintain that women sometimes used submissive or calming behaviors as intentional control strategies to defuse the situation or moderate physical harm. While adducing the strategies as not always successful, the stories reflect favorably on the attempts.

While a number of opinions shape the women in culturally feminine terms, many do not. Some courts actually accept some violent behaviors by the women, even while upholding convictions for abuse by the male partners. A few women were constructed as regularly and powerful abusive. Still, the acceptance of violent women as victims of domestic violence was not unlimited. The opinions tend to construct any violence by women in context, such as portraying them as less violent than their male counterpoints. Aggressive behaviors also were more tolerable when portrayed as mechanisms to protect themselves or, even more acceptable, to protect their children, as is expected of mothers. Thus, the women's physical violence often was deflected and explained as self-defensive measures.

Overall, the body of opinions acts to moderate the image of women as helpless amid violence. Anderson and Umberson's (2001) results are supported here, where the judicial discourse conveys women's violence toward male partners as minimal and ineffective. In several cases, even where the women wielded a deadly weapon, the men are reported to easily overpower them. Still, I concede that this sample may be biased in that it likely excludes cases in which women's self-defensive tactics are more effectual or result in severe injury. These cases, as framed by the courts, also represent the judiciary as able to view domestic violence against broader social structures, such as the history of the relationship, family concerns, such as a mother's desire to protect her children from harm, and the impact of whether women seek outside help from police.

C. Attempts to End the Relationship

I have discussed the discourse on a woman's behaviors in the immediacy of an episode of violence. This next discourse considers the longer-term tactic of ending a violent relationship. Discussions and moral valuations about the woman's attempt to end her relationship with her abuser were common across the cases. This concentration is consistent with the general expectation that women can, and normatively should, leave abusive partners. A majority of the cases had some reference to this discourse. Here, I focus on the woman's actions (instead of the man's) for a purpose. The cases themselves seem interested only in her attempts to end the relationship and almost no recognition on whether the male abuser did so, except for the few cases in which the male is represented as having broken the relationship in favor of a new female partner.

THE EFFICACY OF TERMINATION ATTEMPTS

A common theme was that the courts are careful to draw attention to violence occurring when the couple was separated or the relationship had otherwise concluded. Similarly, a number of opinions specifically mention whether the violent attack occurred when the woman was attempting to separate at the time of the attack, such as after she verbally informed him that she did not want to be together anymore. Violence when ending a relationship has been reported in statistical studies. For instance, one study of women attempting to obtain restraining orders showed that 48 percent reported being assaulted in connection with separation (Ptacek 1999:88).

One sign of the importance of this discourse is that expert witness testimony was specifically cited in one-third of the cases as being necessary to explain the reasons that

women stay in abusive relationships and/or reunite with their abusers. Further discussion on the expert witness testimony about separation is contained in Chapter 5. In this chapter, I am more interested in how the judicial opinions construct the factual circumstances surrounding relationship termination.

Support for the idea that women would not remain in abusive relationships is evident in this sample. For instance, *Smith* (2002) cites a prior opinion holding that information is needed "for the purpose of overcoming commonly held misconceptions about women who remain in abusive relationships" (*Smith* 2002:11). "Many lay people believe for example, that if the abuse is bad enough, the battered woman would leave the relationship" (*Smith* 2002:11). Thus, staying in a relationship with a man that the woman claims is violent implies she is not really a victim or at least is exaggerating. Interestingly, the prior California appellate opinion from which *Smith* cites was a case in which a female was successfully prosecuted for fighting her male batterer. This use of language from a prior appellate opinion reinforces one of the foundations of this research regarding the precedential strength of the body of judicial opinions in my sample. Legal discourse in any of these opinions can be, and is likely to be, taken as legal "truth" by other courts, just as conveyed here. Thus, the language in judicial opinions can take on an independent life, conveying social realisms.

The dissenting opinion[7] in one case discusses the appropriateness of continuing a relationship after physical abuse:

[7] A dissent in an appellate opinion occurs when a judge on an appellate panel disagrees with the majority, or ruling, opinion on one or more ideas. While the majority opinion governs and is accorded higher value, dissenting opinions can be, and often are, influential in legal discourse.

> Misconceptions arise when the woman seemingly allows the relationship to continue despite repeated abuse, since uninformed jurors may assume she would leave when the opportunity presented itself. . . . In other words, in situations of domestic violence, it is the repetitive aspect of the abusive behavior that becomes relevant in terms of the victim's counterintuitive state of mind and reactions. (*Brown* 2004:46-47) (emphasis added)

This quote implies that any reasonable woman would leave after repeated abuse. By using the word "allows," the opinion also infers that the woman has complete control and choice about her relationship. Thus, unlike the BWS construction of helpless women, at least when it comes to the existence of a relationship, the woman is seen has having virtual control.

The opinion in *Vandersteen* (2003) displays skepticism when recounting the facts of the case. Several quotations from the opinion may illustrate this point. The court initially summarizes the relationship as "troubled and marked by his violence towards her" (*Vandersteen* 2003:2). This synthesizes the relationship entirely in terms of the violence, without regard to any other aspects that either partner may have found important. "She continued her dating relationship with defendant for nearly two years after he began battering her. And she seemed very bonded to defendant as shown by her begging him not to leave her on numerous occasions" (*Vandersteen* 2003:30-31). The court prominently states that the woman's actions "defy common sense" (*Vandersteen* 2003:30).

Several courts recognize that the victim had not attempted to end the relationship, but generally the opinions endeavor to provide an explanation. Seven opinions represent the more straightforward cases in which only one violent incident is evident, thus serving to weaken the necessity to discuss the continuance of a relationship. In other cases in

which the women did not leave in spite of recurrent violence, a few explanations were given, commonly based on the woman's testimony. As examples, women testified about feeling responsible for the couple's problems, wanting to remain a family, feeling the man would change, and loving him. In an interesting twist, the *Vandersteen* (2003) male testified that he was abused by his female partner and that he stayed with her because of love.

One body of cases in the sample contains dialogue about the woman engaging in actions to end the relationship with her abuser. Often these cases mentioned the methods women used in their attempts. Outside assistance was recognized in some cases. These include descriptions of strategic plans for a relative to assist in moving her to a different geographic location or getting the legal protection of a restraining order. At the same time, I find it noteworthy that restraining orders played such a small role in these cases. Only a few opinions even mentioned them.

A further part of the discourse contends with women verbally announcing their intent to end the relationship. In *James Brown* (2001), the woman stated that she had planned to leave him, although she failed to follow through. The court's opinion generally views her as lying about many things, and as discussed in more detail in Chapter 5, reflects the common construction of female victims as liars when they deny or minimize abuse. Still, in getting to its conclusion to uphold the conviction, the court seeks to construct the abuser as deviant, regardless of the victim's alleged insincerity. The abuser here was prosecuted for a terrorist threat and vandalism to his wife's car, although convicted on the vandalism charge only. The court suggests this is the appropriate result, given her lying. The court goes on, though, to chastise the abuser for

minimizing the severity of the offense. The court disputes the defense argument that there is no evidence the woman was harmed, calling his behavior "a crime of extreme violence" (*James Brown* 2001:86). The opinion also addresses the man's rejection of a sentence of one year in a male batterers' program. This, the court indicates, is a regretful sign that the abuser refuses to acknowledge he has a problem. In sum, this case exemplifies a court's struggle with a less than perfect victim, who made a lame attempt to end the abusive relationship and is labeled a liar. Instead, the court refocuses attention on the male batterer's actions and intentions.

Some courts point out the number of times the woman attempted to end the relationship, in one case describing it as many times, although the woman testified that he would talk her out of it (*Figueroa* 2002). In another case, the court indicates that the woman had attempted to leave him for months, but felt sorry for him (*Zarazua* 2004). Unsuccessful attempts to break up also were noted. In a couple of cases, the man was violent before she could execute the plan to leave (*Asprilla* 2000; *Figueroa* 2002). In another notable case, the man killed the woman before she could carry out her strategy to leave the state (*Sosa* 2002).

DISCUSSION

The multiple courts' analyses demonstrate their view that ending the relationship was the preferred course of action for victims. This was true regardless of the presence of children, meaning that there was no inference that the judges believe that the couple should have remained together for the sake of raising children in a two-parent home. Nonetheless, in these reports, women are constructed as having full control of terminating

their relationships with the men. If the relationship continued, the opinions shaped the women as the ones who allowed it to happen.

The results of my analysis also suggest that judges often seem perplexed by why women would stay with their abusers. The few courts acknowledging the reasons for staying were clearly influenced by expert testimony about various barriers to women leaving. Interestingly, the opinions did not engage in repertoires of blaming the women *per se*, for staying. Still, two types of victims were presented. There was a strong tendency in these judgments to characterize a woman as a genuine victim if she acted to immediately end the relationship. Women who did not do so were given as questionable victims for not fitting the expected model. The opinions accept the behavior of genuine victims without much difficulty, but struggle with comprehending questionable victims' failing to end the relationship.

Despite the confusion concerning why abused women would stay in a relationship, the judicial discourse still had to convince the reader of the abuser's guilt in order to justify the conviction. The courts had to frame the opinion to portray the woman as a victim more deserving of formal protection than was the man. In cases in which the relationship was terminated, this was constructed as a reasonable reaction by the woman, but in cases where the relationship had continued, the judges had to overlook any culpability on the part of the female.

D. Resistance to Resuming the Relationship

The final discourse in this chapter regards resistance to resuming a relationship with an abuser. The cultural expectation is that the abuse victim would permanently stay away from her abuser (Baker 1997). The rhetorical contrast concerns a victim who is evidently unhappy with prior abuse episodes, but them seems positive about re-engaging in a relationship with the abuser. This discourse was not as evident in the opinions as was seen in the prior two.

FAILURE TO RESIST

I observed 13 cases in which the woman is described as reuniting with the batterer without evidence of resistance. Some court decisions attempt to explain the seemingly unreasonable conduct. A few cases cited love as the reason for the reunion, just as love was given as a reason some women stayed in abusive relationships in this sample. Further explanations included his promise to change and the need for housing.

Two cases give us insight into how prosecutorial arguments frame the significance of the discourse on resisting reunification. Both case prosecutors sought to persuade the jury that returning to an abuser is not inevitably a warning that the abuse did not happen. One prosecutor, faced with evidence that the woman alternated between the abuser and another man, argued the following:

> The issue is that she leaves the relationship, she's abused, she leaves, she comes back. What she does while she's gone, granted, it's irrelevant. Whether she lives by herself, moves to Tahiti, goes to a shelter, or whatever, the important part is why she comes back. The important part for the jury to understand is why she was in that hotel [sic] room with him that day after she's telling the cops and other people that he's been so horrible to her. (*Cruz* 2004:93) (*sic* in the original)

Clearly, the prosecutor is attempting to neutralize the woman's actions during the separation. The same prosecutor also mentioned the seeming inconsistency between resuming the relationship and abuse:

> The fact that she doesn't leave. The fact that she goes back and forth between men, that doesn't prove that the abuse didn't happen. You have to look elsewhere to decide that and that's true of the relationship . . . There's no one way that a person who's abused acts. . . . Sometimes people react this way and it may be because they were abused and it may be because they weren't abused. (*Cruz* 2004:106)

The second prosecutor who was quoted by a court contended the following:

> And we can't change her mind set, and I'm sure that if you found him not guilty of everything, she'd be back with him tomorrow because at this point she is beyond being able to protect herself because of what being in a relationship like this has done to her psyche. So although she is not at this point willing to fight to protect herself, you have to do it for her. This is just the way domestic violence is and sometimes you have to just reach out and help people who don't help themselves and the only way that you can do this here is to find the defendant guilty of these crimes charged. (*Mijares* 2004:29-30)

Here, the argument seems to be that the woman is somehow psychologically helpless in staying away. On appeal, the defense argued that the prosecutor's statement was an inappropriate projection of the man's future violence. In other words, the defendant complained that the argument implied that the woman needed the jury to protect her from further abuse. The court rejects the defense argument and re-crafts the prosecutor's comments as merely related to the circumstances of the case, although the opinion does not identify the circumstances or the relation. Instead, the judges claim that the jury was not likely to have been biased by the prosecutor. The opinion represents the jurors as convicting the defendant only because, the court claims, the jury must have

believed the man committed the acts charged. Of course, the appellate court has no real way of knowing this.

As the prosecutorial comments in both cases are reported by and ultimately accepted by appellate decisions, the comments become appropriate arguments in the legal field. Thus, *Cruz* supports the proposition that it is legally permissible for prosecutors to argue to the jury that reuniting with an alleged batterer is not to be considered as absolute evidence that the abuse did not occur. Then, the *Mijares* case adds to the body of judicial knowledge as precedent that a prosecutor can appropriately say to the jury that a woman simply can't help herself from reuniting with her abuser, imply that once she returns the abuse will continue, and suggest that the woman then needs the jury of her peers to protect her from her own actions and his likely further abuse.

IRREGULAR PATTERNS OF RELATIONSHIPS

As with the judges' confusion about why women stay in abusive relationships, my analysis illustrates that the courts also seem confused about the erratic nature of abusive relationships in terms of breaking up and reuniting. The *Gadlin* (2000) court conceives of the couple as having had a "troubled, 'off-again, on again' relationship for two and one-half years" (*Gadlin* 2000:892). *Gadlin*'s simplistic construction of a long-term personal relationship was repeated as truth in a later case, *Dean* (2002:17), thereby reminding us again of how judicial language can become recur as truth. The *Gadlin* court also struggles with the woman's return: "Despite the [prior violent] incident, the victim reunited and resumed intimate relations with defendant" (*Gadlin* 2000:895). The fact that she reunited is a "significant evidentiary fact" in proving guilt (*Gadlin* 2000:895).

Thus, we see confusion as to why the victim would reunite and the fact that she did as being relevant to whether the abuse did occur. The court notes that expert testimony was necessary, then, to "explain the victim's actions in light of the abusive conduct" (*Gadlin* 2000:896).

Several courts simply recite the break-ups and reunions, with no context. In V*andersteen* (2003), the court describes the couple as having:

> reconciled in late January 1998, but they broke up again in March 1998. . . . She and defendant again reconciled in August 1998. They remained together until January 16, 1999. On that date, defendant punched [the victim] in the eye. She contacted the police, and defendant was convicted of battering her on that occasion. (*Vandersteen* 2003:5)

The *Vandersteen* opinion is concerned that the relationship continued for two years after the abuse commenced and that, despite the abuse, the woman begged the man not to leave. The court defines these to be "self-destructive behaviors," although, interestingly, not self-destructive actions of the abusive man, but of the victimized woman (*Vandersteen* 2003:31). Another recitation without context is presented in *Dean* (2002), in which the court describes the couple's "checkered relationship, having been married, divorced, dated, and separated on numerous occasions for over five years, then reunited only a few weeks before the incident occurred" (*Dean* 2002:16).

The case of *Torres* (2003) describes some of the history and the violence, but without actually connecting the two. The couple "lived together for about two years and have a daughter. They were engaged to be married but separated in early 1999" (*Torres* 2003:2). The court then describes an incident after the separation when the man hit the woman during argument about their daughter. The opinion later on indicates that the couple "reconciled for a few months beginning in December of 1999. In April of 2000,

after they had separated again, they had another physical altercation" (*Torres* 2003:3). The two reportedly had almost no contact for a year. The opinion notes that, near the end of that period, a violent episode occurred, although here the court carefully provides some context as to why the couple were living together:

> In March of 2001, [he] began staying at [her] house. He would baby-sit their daughter and [her] other child while [she] attended school at night. [They] were friendly with each other during this period, but they did not resume a romantic relationship and did not have sex." (*Torres* 2003:3)

Despite the lack of clarification on some of the history of the on-again, off-again relationship, this opinion creates a different picture than some of the other cases with latent imagery of a woman finally acting responsibly in separating from the man after more than one violent episode and reunion. The victimhood image is resurrected when she resists a romantic relationship.

WHO IS IN CONTROL?

Three cases stand out in constructing the woman as being in control of whether to reunite with the batterer. The *Williams* (2000) opinion states that the woman:

> allowed [him] to move back into the home about one month after the incident, and they separated again in March 1998. Although they were still married at the time of trial, they were not living together. (*Williams* 2000:1122) (emphasis added)

Thus, the court suggests that the woman was in sole control of reuniting, even after the court discusses evidence that, after she had tried to leave him in the first place, the man had struck her repeatedly with a metal object. In the second case, the court points to a particular witness who chastised the woman for "let[ting] him back" (*Basulto* 2003).

The third example indicates that the victim had lived with abuser for five to six years *Wright* (2001). After a separation, the court represents the following fact scenario:

> She bought a house in June 1999 and let [him] move in with her on the condition that he stop his practice of coming home drunk, turning violent, and forcing her to have sex. Based on [his] assurances that he would change his behavior, [the victim] let him move in. . . . On the night of November 21, 1999, [he] broke his promise. (*Wright* 2001:2) (emphasis added)

The spirit of these three cases is that the woman is in control over the reconnection of the relationship. *Wright* at least indicates that she attempted to negotiate the terms in an attempt to achieve a nonviolent relationship.

DISCUSSION

The widespread assumption is that the female abuse victim does the reasonable thing of breaking away from her batter. Then there is the expectation, confirmed by this analysis, that she should not consider returning to her abuser. In this sample, the judges confronted cases evidencing the conundrum when she does return. Two cases provide appellate precedence to allow prosecutors to argue that reunion does not necessarily mean that the abuse did not occur. One of these cases goes further to permit prosecutorial inferences that, once she does return, further abuse is likely. These cases provide an opening for prosecutors to expand upon who can be a victim. If trials of abusive men can be won and upheld despite the woman reuniting, one can envision one fewer reason for prosecutors to refuse to pursue a case of domestic violence.

The opinions addressing this clearly show more difficulty in comprehending reunion than is shown in the preceding discourse on terminating the relationship. The underlying imagery in these opinions is that the woman was safe when apart; thus, the

discourse grappled with understanding how she could return. Some evidence of this arises with the often disjointed recitation of break-ups and reunions, placing more emphasis on dates than explanations. In creating the "factual" stories behind the abuse and the relationship, then, the historical accounts of the relationship history often are a vague part of the story lines.

An inconsistency is presented between the discourse on resisting the physical attack and this discourse on resisting a reunion with the batterer. In the former discourse, women are constructed as physically incapable and lacking control over the course of the attack and its immediate aftermath. In contrast, the discourse regarding reunion implied the women to be in full control to resist the relationship. In sum, the results suggest that the women were unable to exercise the type of agency that would allow them to avoid the attack, yet they are expected to exercise the kind of agency that would permit them to avoid the resumption of the relationship.

E. Conclusion

This chapter reviewed three themes in the discourses of resistance. I reviewed the discourse on the victims' attempts to resist the immediate physical assault, the attempts to end the relationship; and the resistance to resuming the relationship. I sought to analyze consistencies and contradictions with the historical normative expectations of how the female in a domestic violence relationship is socially expected to behave. Gendered interpretations still abound, but the opinions go to great lengths to construct these women as victims even if they do not meet normative expectations. Moreover, the courts are indicating that they are not as constrained by the norms in seeming to accept alternative,

even contradictory, behaviors that do not comply with femininity. The sample also reflects the judiciary as acknowledging some of the complexity of domestic violence and relationships. Nevertheless, the courts morally judge the behaviors presented, and the results do not suggest that their acceptance of behavior not expected of female victims is limitless.

My expectation is that, as a whole, this body of case law will encourage prosecutors to pursue criminal cases against male domestic violence offenders in cases where the "victim's" behavior may be construed as ambiguous or even tending toward powerful and strategic actions in combating abuse. The focus of the next chapter of this paper is judicial discourse concerning the expert witness testimony.

CHAPTER 5: EXPERT WITNESS DISCOURSE

This chapter renders an analysis of judicial knowledge regarding domestic violence issues as influenced by expert witness testimony. The research sample contains every appellate opinion in California issued during the stated period of this study in which a domestic violence expert testified under a special evidentiary statute in a prosecution of a male abusing his female partner. This particularized statute permitted the introduction of expert testimony on domestic violence issues into evidence in criminal trials where the issues were considered relevant to the case. The idea underlying the statute is that the general population does not have sufficient knowledge of domestic violence and, thereby, an expert can be useful in instructing the jury about the complicated issues.

A major purpose of this research was to explore ways in which expert testimony appears to persuade and shape the judicial construction of domestic violence in general, and of offenders and victims, more particularly. Almost all of the opinions incorporate at least some attention to the expert's testimony at trial, even when there was no evident issue on appeal specifically challenging the expert evidence. Notably, for the purposes of this study, many of the judicial cases devote substantial text to parse the expert testimony and expound upon the inferences therefrom. Generally speaking, the expert testimony plays a central role in these courts' consideration of a variety of themes related to domestic violence. Together, the 63 opinions in this sample serve to legitimize and broaden the scope of expert testimony on domestic violence within the institution of law.

They also operate to forge a judicial interpretation and construction of domestic violence issues to frame future legal actions. Having looked to the expert witnesses for guidance, the appeals courts craft their writings to convey their new knowledge of a field previously reserved for the small cadre of domestic violence advocates.

This chapter is, in large part, concerned with the significance of metaphoric structure. Metaphors are not simply literary devices, but are tools that influence how we form concepts and how we convey those concepts in words. They are not, however, always formal or even intentional. The seminal writers on metaphor, Lakoff and Johnson (1980), concede that:

> metaphor is a tool so ordinary that we use it unconsciously and automatically, with so little effort that we hardly notice it. It is omnipresent: metaphor suffuses our thoughts, no matter what we are thinking about. (p. xi)

Still, the linguistic choices made in judicial discourse are motivated in the sense that, whether consciously or not, they are reflective of the judges' view (Chng 2002). If domestic violence is outside the knowledge of the general population, then perhaps metaphors were deployed to bridge the gap, so to speak, in providing meanings and context to the issue.

I begin the body of this chapter with a discussion regarding the statute at issue, summarizing its history and purpose, and then analyzing its language. Then I introduce the concept of the ideal type as a Weberian model for conceptualizing the overall construction of domestic violence posed by expert testimony and constructed through judicial discourse. The main part of this chapter is an assessment of the more common themes of the expert testimony as expressed by the appellate courts in this sample. These

themes include the iteration of various metaphors concerning the battering relationship and battered women's syndrome ("BWS") as a psychological condition. I conclude the chapter by summarizing the collective experts' ideal type of the battering relationship, the offender, and the victim.

A: Evidence Code Section 1107

Prior to the 1990s, California trial courts issued inconsistent rulings on the admissibility of expert testimony about BWS in criminal trials (Baker 1994; Klis 1994). Domestic violence victim advocates approached the legislature with particular concerns that courts in the state often refused to permit battered women prosecuted for killing their male batterers to introduce BWS evidence to support their claims of self-defense (Baker 1994). A California Court of Appeals decision announced in *People v. Aris* (1989) was of particular concern to the advocates. In *Aris*, the battered woman appealed her conviction for the charge of second degree murder on the basis that the trial court excluded expert witness testimony to support her claim that BWS affected her mental condition at the time she killed her batterer. More particularly, the *Aris* defendant argued that syndrome evidence was necessary to explain her perceptions such that she reasonably believed shooting her long-term batterer while he slept was necessary to protect herself.

The California Court of Appeals strongly disagreed and averred that the evidence showed that no reasonable jury could believe that the danger was imminent, as required by the justification of self-defense, because the man was asleep at the time of her attack. The court indicated that "the criminal law will not even partly excuse a potential victim's

slaying of his attacker unless more than merely threats and a history of past assaults is involved" (*Aris*:174). Since the batterer was sleeping, the court ruled that there was no objective basis to perceive imminence of harm. The ruling went on to add that, without objective reasonableness, her perception of imminent danger was insufficient. In a telling aside, the *Aris* court further expounded upon the judges' view of the lawful options for women in abusive relationships:

> [T]he defendant should not be excused from the penalty for murder merely because walking away from the sleeping victim will not avoid a future confrontation. The law cannot allow her to shoot her husband instead of, as was the case here, inconveniencing her out-of-state aunt by moving in with her or leaving her husband and firmly refusing to take him back. The law of self-defense, whether perfect or imperfect,[8] does not provide an alternative means of resolving the battered woman's problem. For resolution of that problem, a battered woman must look to other means provided by her family, friends, and society in general such as restraining orders, shelters, and criminal prosecution of the batterer. While these means have proved tragically inadequate in some cases, the solution is to improve those means, not to lessen our standards of protection against the unjustified and unexcused taking of life. (*Aris*:174)

Armed with the *Aris* judgment, domestic violence advocates complained to the California legislature that the general public did not have a thorough understanding of domestic violence or how BWS can affect the reasonableness of self-defense as a protective device (Baker 1994). Advocates argued that most jurors lacked the experience or knowledge to fully appreciate the perceptions and self-defense tactics of battered

---

[8] Perfect and imperfect self-defense, as used here, are terms of art in the law. Perfect self-defense requires that the defender's actions be objectively reasonable and the defender's belief in the imminence of harm is subjectively honest. Imperfect self-defense requires only that the defender subjectively and honestly believed in the imminence of harm. The difference is important, as perfect self-defense will completely exonerate the person, while imperfect self-defense negates malice aforethought (i.e., evil intent), reducing the charge from murder to manslaughter but not exonerating the person.

women. The implication was that criminal trials against battered women defendants were unjust if the defendants could not somehow inform the jurors of this information.[9]

In part as a result of the advocates' efforts, the California legislature in 1991 enacted a new rule within the state's Evidence Code to address the issues posed. The new Evidence Code, numbered Section 1107, would apply to criminal charges occurring after January 1, 1992. The provision was then titled "Evidence Regarding Battered Woman Syndrome"[10] (Panel Discussion 1993). The legislature's primary concern was to permit evidence that might help the defense of battered women who seriously injured or killed their abusers (Baker 1994:110). However, the final statute did not limit the new section to those cases. The key provisions of the statute enacted in 1992 were as follows:

> (a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defense to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
>
> (b) The foundation shall be sufficient for admission of this expert testimony if the proponent of the evidence establishes its relevancy and the proper qualifications of the expert witness. Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven.

Despite the passage of this new evidentiary rule, there is some evidence that the legislature was not entirely convinced of its merits. The section is set to expire on

---

[9] California lawmakers were not exclusively targeted in this respect. Across the country efforts were underway during the 1990s for legal reform to expand the defense options for battered women being prosecuted for killing their batterers. The success of advocates in gaining legal changes varied dramatically across the states. A leading scholar on feminist lawmaking, Schneider (2000), concluded that, despite the reform efforts, there had been little change in attitude in the legal community, the media, or the public, where bids for defenses based on battered women's syndrome tend to be characterized as special treatment rather than equal treatment.

[10] See footnote 3.

January 1, 2010, unless the California legislature acts to delete the sunset provision or extend the date. Presumably, before the sunset date, the legislature will review the cases in which Section 1107 expert testimony was admitted to make a judgment as to the effects of the evidentiary code in criminal trials before deciding whether to continue the rule.

SELECTED ASPECTS OF SECTION 1107

There are a few items of interest in the 1992 version of the evidentiary provision that warrant mention. First, the language in sub-section (a) about admitting expert testimony was mandatory, rather than permissive. The vocabulary stated that expert testimony "is admissible," rather than using less absolute language that the legislature could have used, such as "may introduce" (Parrish 1995:100-101). Second, the term "battered women's syndrome" was explicitly employed in both the title and in the body of the law. As further demonstrated below, quarrels within the domestic violence advocacy community about the BWS terminology would later convince the legislature to remove the term from each place, although this necessitated two separate revisions of the law.

Another interesting aspect of the original evidentiary statute was that the language referring to the nature and effects of domestic violence appears to modify "battered women's syndrome," rather than standing on its own such that more general effects of battering would be admissible without being part of the syndrome. However, as I discuss later in this chapter, the courts have not limited testimony to what was consistent with Lenore Walker's version of battered women's syndrome. The courts generally have

interpreted the statute as permitting a broad range of expert testimony beyond what was explicitly tied to the syndrome.

The fourth item to highlight is that the exception listed in sub-section (a) meant that expert testimony could not be used to establish the facts of the case at trial. In other words, an expert introduced under this section of the Evidence Code cannot testify whether the alleged victim in the case being adjudicated suffered from BWS, whether the defendant in that case was a batterer, or whether the alleged abuser had engaged in behaviors typical of batterers. Indeed, it did not appear that any of the testifying experts had ever met with the batterer or victim in their cases or had any familiarity with the particular facts of their cases. Instead of allowing the expert to apply attributes of abuse to the particular parties in the case, the statute permitted the expert to discuss broad themes regarding battered women's syndrome as a general matter.[11] This is of particular consequence because these cases showed that expert testimony was permitted under this statute despite the absolute lack of any evidence, either from a layperson or expert, that the victim of the accused actually was diagnosed with battered women's syndrome. The jury in each case, thereby, was left to make that inference itself. In sum, the provision allowed the expert to testify about BWS, yet since no witness needed to testify to connect BWS to the victim of the alleged crime, the jury was free to make what might be considered a clinical assessment in assigning BWS to the victim.

---

[11] This does not mean that a party is absolutely precluded from offering an expert on domestic violence issues that had personally interviewed the victim or batterer. Such testimony could be admissible under other, standard evidentiary statutes. However, that testimony would not automatically enjoy the benefits of Section 1107, such as the presumption that battered women's syndrome is not a new scientific technique whose reliability is unproven. In other words, an expert's testimony on the syndrome that is not offered under Section 1107 is subject to attack on scientific validity grounds.

The next notable characteristic of the statute was that it specifically authorized expert testimony to support the abuse victim's state of mind. But, yet again, the expert could testify to support the victim's state of mind without the expert having met or become familiar with the victim's case. The statute did not, however, expressly state that expert testimony should be admissible regarding the state of mind or behaviors of the batterer. This deficiency could, presumably, have permitted the courts to refuse expert testimony about the batterer's intentions and actions. As further discussed below, the courts in this sample have generally declined to so limit the statute, with experts giving evidence about general attributes and tactics of male batterers.

The last aspect of significance for Section 1107 is that the rule expressly provided that there was no need to establish that BWS was a theory or a scientific fact that had been accepted in the scientific community. That declaration reflected the legislature's attempt to overcome a significant hurdle that litigators had faced when offering expert testimony on domestic violence as evidence. The law in California excluded from evidence any testimony about novel scientific techniques that had not gained general acceptance in the scientific community (*People v. Kelly* 1976). As of the introduction of Section 1107, indeed even as of this writing, general acceptance of BWS as a scientific theory is virtually nonexistent. Moreover, there was no requirement that any of the hypotheses underlying BWS be corroborated, or even tested. Thus, no scientific support was, pursuant to the statute, lawfully required to appraise the validity of such concepts as learned helplessness, the cycle of violence, or any of the generic "common myths" of domestic abuse (Faigman and Wright 1997). The acceptance by the legislature and the required certification by criminal judiciary underscored the philosophy that scientific

facts and findings are merely a product of social construction (Romkens 2000). Here, the legislature deemed BWS to be scientifically legitimate, at least from a legal perspective within the criminal justice system.

REVISIONS TO SECTION 1107

BWS grew as a controversial term as the 1990s progressed, and its inclusion in Section 1107 proved problematic. The courts' struggle with BWS is further addressed in the analysis below, but for now it is sufficient to briefly identify the legislative changes made to delete the term. In 2000, the California legislature changed the title from "Evidence Regarding Battered Woman Syndrome," to "Expert Witness Testimony on Battered Women's Experiences" (Adams 2004). Yet, the BWS terminology was not supplanted within the body of the law until late 2004. In a report to the legislature in early 2004 to explain the need for the modification, the legislative committee proposing the change explained that:

> 'battered women's syndrome' is a nationally-disfavored term amongst advocates. Since the mid-1990s, judges, academics, domestic violence experts, attorneys, and advocates have criticized this phase and instead urged adoption of 'battering and its effects' or 'battered women's experiences.' (Senate Committee on Public Safety 2004)

Months later, the legislature passed an amended section so that, effective as of January 1, 2005, the reading of Section 1107 substituted "battered women's syndrome" for "intimate partner battering and its effects" within the body of the statute. The new sub-section (f) explained:

> The changes in this section that become effective on January 1, 2005, are not intended to impact any existing decisional law regarding this section, and that decisional law should apply equally to this section as it refers to

> ‘intimate partner battering and its effects’ in place of ‘battered women's syndrome.’

Hence, the legislature made it clear that, despite the change in terminology, it did not want to disrupt the body of case law (represented in this sample) that had interpreted the statute. It is possible that the implication was that the legislature approved of the expansive application that the appellate courts had given the statute, even as previously written.

Notably, the statutory amendment to completely remove the BWS terminology from the body of Section 1107 became effective on a date subsequent to the issuance of all of the judicial opinions in this study. Thus, this body of case law contended with the statute when BWS was explicitly present within the provision. While the final deletion of all references to BWS does not have any great impact on the results of this study, the removal of BWS will serve to remedy a conflict the courts faced about BWS as a syndrome, which I discuss in more detail below. It is also possible that the judicial conflict served to influence the legislature in making these changes.

With the introduction of Evidence Code Section 1107, I now turn to an examination of the construction of the expert evidence on domestic violence by the judicial courts in this sample. I am interested in creating the ideal type from the body of cases. I also focus on analyzing the influence that the expert testimony appears to have on the structures of judicial knowledge concerning BWS and other issues surrounding domestic abuse between male and female partners.

B: Expert Credentials

Just four of the cases exemplify any issue on appeal protesting the sufficiency of the expert's credentials. In all four cases, the appellate panels hold the person qualified. The defense argument in three of the opinions was that the expert had insufficient formal training. The court in *Brown* (2001) quickly dispenses with the challenge, ruling that the individual, while not a licensed in clinical psychology, was a licensed marriage and family counselor who had direct contact with over 2,600 victims of domestic violence. Two other cases address attacks on the proffered expert's credentials for lack of formal training. In one case, the expert was qualified based on 10 years' experience as a victim advocate and having worked with over 2,400 victims (*Asprilla* 2001). The second opinion to clarify that formal degrees are not required was in *Vernon* (2004), in which the court states that the expert's 14 years managing a domestic violence shelter and counseling domestic violence victims was sufficient. The defense's further challenge that the *Vernon* expert's testimony based on informal conversations with victims was unreliable evidence also was dismissed as being relevant to the weight the jury might give the testimony, not the expert's qualifications. The fourth case handles the almost contrary argument regarding an expert with formal training, but no direct experience with victims. In *Williams* (2000), the expert was a forensic psychologist who had performed over 11,000 psychological evaluations, mostly on criminal defendants. The expert's little contact with abused victims, the court rules, went to the weight of the evidence, not the expert's credentials.

Despite the defendants, in many of the cases proffering a multitude of appellate issues, the legitimacy of those individuals who testified as experts was rarely challenged

on appeal. Perhaps as a result of having no direct issue on appeal, most of the opinions spend very little time, in most cases none at all, in describing the background of the expert. The several that do so provide simply an occupational title, without further details. Examples include identifying the expert as a psychologist, marriage and family therapist, director of a domestic violence agency, or a professional victim's advocate. The emphasis on the expert's testimony without further guidance as to the expert's specific skills, education, or experience, suggests that, once the trial court designates a person as an expert, the appellate courts accept the expert designation without any further question.

Moreover, there are no suggestions that the appellate courts rank one expert more highly than another or that it matters at all that the backgrounds of the experts varied. Hence, whether specific testimony about BWS came from a psychologist, a women's shelter director, or a victim's advocate, it appears to be irrelevant to the appellate panels. The lack of differentiation may help explain why, as this analysis will show, I could derive a single ideal type even among a group of experts from various professions, experiences, and educational levels.

C: Deriving the Ideal Type from Expert Testimony

An ideal type is a heuristic device that serves as a measuring tool to discover similarities as well as deviations in concrete cases and provides a sociologist with a basic method for comparative study. Max Weber (1903-1917/1949) describes the epistemology of the ideal type.

> An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more

> or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct. . . . In its conceptual purity, this mental construct . . . cannot be found empirically anywhere in reality. (p. 90)

Hence, Weber's intention was to overcome the assumption that there is any concrete reality, while at the same time understanding that there is much diversity in social life. The ideal type is not intended as a moral conception, nor is it about statistical averages. Rather, it is concerned with unique courses of action by individuals or institutions, with a view toward cultural phenomena.

Weber also emphasizes that ideal type concepts are not the ultimate goals of research. "The concepts are primarily analytical instruments for the intellectual *handling* of empirical facts . . . the concepts are not ends but are means to the end of understanding phenomena" (1949:106). The methodology furthers what Weber calls empathic imagination by understanding the actor's situation. This helps empiricism, based on Weber's philosophy, to become more objective. I use this structure to create the ideal type regarding battering from those typifications given by the expert witnesses (as constructed in the appellate opinions).

Since the sample is comprised only of cases in which it was clear that an expert testified under the Section 1107 evidentiary law, it is not surprising that the opinions contain at least some discussion about the specific testimony offered. Of the opinions, 85 percent provided some description of the expert's testimony. The remainder merely mentions the expert without further dialogue, usually because there was no issue in the appeal about the expert's statements.

D: Battered Women's Syndrome as Metaphor

Interestingly, only a small minority of cases actually contains any clear definition of "battered women's syndrome" as a scientific term of art. One might expect this syndrome to be clarified for the reader since it is one of several victimization syndromes, such as rape-trauma syndrome and hostage syndrome, which are included under the rubric of post-traumatic stress disorder ("PTSD"), a disorder officially recognized by the American Psychiatric Association (Downs 1996). The general failure to delineate the term BWS led me to a related investigation to determine the extent and nature of dialogue about the expert having described BWS in psychological or clinical terms by any means.

BWS AS A PSYCHOLOGICAL PRINCIPLE

The Dictionary of Psychology (Colman 2001) defines a syndrome as "a pattern of signs and symptoms that tend to co-occur and may indicate a common origin, course, familial pattern, or indicated treatment of a particular disorder." Thus, a syndrome is viewed as a collection of symptoms that comprise a psychological condition. Walker (1995) describes BWS as a clinical syndrome representing a collection of symptoms that, in psychology, is a subcategory of PTSD. She points to two groups of symptoms. The first group is the fight-or-flight response, which includes avoidance mechanisms such as denial, repression, disassociation, and minimization. The second group of symptoms includes changes in the woman's cognitive abilities, judgment, and memory, evidenced in part by what Walker refers to as memories of abuse that disappear and reappear at various times. In the same article, written in an issue of *Trial* magazine and thereby presumably directed toward an audience of trial lawyers, Walker states that the legal

system had "broadened" testimony on BWS to "include descriptions of the dynamics of abuse as well as the psychological impact it has on a victim" (p. 32). The inference, then, is that the dynamics of abuse were outside her conception of BWS.

A minority of cases attempts to give meaning to the term "battered women's syndrome." Of these, only a few opinions cites the expert's testimony as contributing to the definition, and of those, the courts give the definition of the syndrome short shrift, with little expansion or clarification beyond a sentence or two. The *Clark* (2003) decision indicates that the expert identified the syndrome as a "state of psychological denial," while experts in two others are cited as having described it as accommodating behavior by the women (*Hernandez* 2003; *Smith* 2002). The judgment in *Terra* (2003) conveys that the expert testimony described BWS not as a diagnosis, but as a list of characteristics common to women involved in long-term abusive relationships, such as PTSD, depression, helplessness, low self-esteem, and low self-worth. Similarly, the court in *Gomez* (1999) attributed to the expert the description of BWS as being a series of characteristics that appear in women who have been abused physically and psychologically over a long period of time. However, in the context of the entire opinion, this conclusion remains questionable.

The *Gomez* court devotes 15 entire paragraphs to describing the expert's testimony. Yet, nowhere in that lengthy summary is there any language that clearly indicates that the expert thought that BWS required a lengthy period of time. In fact, the expert is described as having testified that recanting or minimizing is even more likely to occur following the first incident of abuse. The *Gomez* opinion also details how the expert portrayed the techniques of how male batterers begin abusive relationships. Thus,

from the court's own extended writing on the expert evidence, it appears that the expert was very much focused on explaining domestic violence within the context of the early part of the relationship. Still, the appellate court constructs the testimony as BWS requiring repeated abuse.

The more common method for those courts that attempt any definition of BWS is to do so without reference to the expert witness or any other scientific authority. In a remarkable twist, only three of the 63 opinions have any reference to Lenore Walker or her work. While Downs (1996) "guestimated" that 80 to 90 percent of criminal case law on BWS refers to the work of Walker, this is not supported in this sample. Accordingly, it appears that Walker's work had little direct impact on the judicial construction of BWS and battering relationships.

Instead of invoking Walker or other scientific authority, the courts are far more likely to embrace a definition originating in legal precedent. Thirteen cases specifically denote BWS as a "series of characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." This definition can be traced to a 1984 case written by the Supreme Court of New Jersey (*State v. Kelly* 1984). A decade later, it was adopted by the California Supreme Court in *People v. Romero* 1994. The precedential value of this definition is now obvious with its repeated use by multiple courts as the prevailing viewpoint.

I then began investigating the source of the *Kelly* court's definition of BWS. Interestingly, the 1984 *Kelly* opinion by the New Jersey court stated this definition without expressly citing authority. After stating the definition, the New Jersey opinion

proceeded to discuss in more detail Lenore Walker's work, so it is possible that the court crafted the definition as a synthesis of its reading of Walker's work. Still, with its reiteration in further cases, without reference to Walker or any other authority other than prior legal opinions, the *Kelly* summarization has taken on a quality as the foremost legal definition in California of BWS.

Overall, then, the appellate courts in this sample do not appear to be overly concerned about providing a definition of BWS and, for those courts that did, little space was devoted to the definition. Further, the most common definition derives from a prior court opinion that provided no direct citation to any authority, either legal or scientific. The courts clearly prefer the value of legal precedent and generally do not appear to look to the expert testimony in the underlying cases for a definition. I find this remarkable, considering that BWS was formulated as a psychological condition and the underlying premise of Section 1107 was that BWS was not without the knowledge or experience of the ordinary juror. Instead of relying on the experts brought into testify about BWS as a scientific theory, the courts generally ignore the meaning given to BWS by the experts in the underlying cases. Moreover, in largely failing to expound upon a definition of BWS within their considered legal opinions, the courts imply that readers already understood the term. If the appellate judges feel that BWS is obvious enough not to require much explanation, then one can wonder why the expert testimony is needed in the first place.

Similarly, a scant number of opinions in this study allude to any expert testimony with references to psychological conditions or disorders. The court in *Clark* (2003) refers to expert testimony about BWS victims being in a "state of psychological denial," while the *Garduno* (2002) opinion discusses the expert having talked about domestic violence

as a psychological process. More specific psychological terminology is rare in this data set. Expert testimony on PTSD is referenced in only six cases, though in all instances PTSD is just briefly named and not further explained. Two cases (*Figueroa* 2002; *Vandersteen* 2003) contain allusions to traumatic bonding, while another points to victims experiencing traumatic memory. Finally, the *Cruz* (2004) expert reported on abuse victims often having been brainwashed.

Other opinions represent how the expert constructed the women as somehow responding to abuse unlike the average person. Still, these constructions are not couched in psychological terms. In one example, the appellate court reports the following exchange between the prosecutor and the expert, Darr:

> [Prosecutor]: Well, don't they know if they're being hit with a baseball bat that that's not normal; that that's not something that should be happening to them?
>
> [Darr]: Not necessarily. I think that that's an assumption that we make because we have different reference points for what is healthy and unhealthy. What seems logical to us because we have—we've been given a different set of values about what love is and about what a healthy relationship is oftentimes victims of domestic violence have never experienced relationships free of violence. So you have got nothing to compare it to. You go with what you know, not to be minimizing about it or be flip about it, but it's a relationship that if you have never had a violence-free relationship then you wouldn't know that that's normal."
>
> [Prosecutor]: But doesn't the level of abuse—I mean, three broken ribs, you're telling us it's not enough to convince the woman that something's wrong here, that this is an abusive relationship and they need to get some help, or being hit with a baseball bat?
>
> [Darr]: Oftentimes it's not. There are many times when victims believe because they—these are individuals who lack self-esteem; these are individuals who inherently don't like themselves because when you like yourself you don't let people beat you with a bat or a hand or anything else. So we're talking about people who need to be validated, and oftentimes victims of domestic violence seek out relationships because that lets them know that they're good people whereas you and I can know that we're good in spite of our flaws because obviously we all have flaws; we're good people. These people believe that they

> are their flaws. These are individuals who are not embarrassed by their actions; they're embarrassed by their very being, and they seek out others to validate, to let them know that they are good human beings. (*Basulto* 2003:13 n.3)

So, in this exchange, the expert distinguished the reactions of a victim as different from the norm, but not necessarily in deviant ways and not in psychological terms. The expert did characterize the women as being in repeated violent relationships. Nevertheless, yet again, the expert constructed abused women as entering serial abusive relationships, not because of some psychological malady, but as a result of a learned and habitual behavior. The expert conveyed the image of a woman who simply did not know that non-abusive relationships existed.

In sum, the analysis of the jurisprudence here reveals a strong disinterest in constructing BWS as a psychological condition or in clinical terms. The minority of cases that attempt to convey any meaning to BWS were more likely to use legal precedent than they were to cite either the testimony of the expert witnesses derived from the transcripts or other scientific support.[12] While many opinions discuss various aspects of victims, perpetrators, and abusive relationships, they tend not to expressly tie it to the syndrome or to any psychological condition. It appears, then, that the BWS terminology in Section 1107 was not an imperative in the construction of BWS as a scientific theory.

Still, there is one other issue to address concerning the impact of the BWS language on the judicial writings. A number of courts confront the argument that a

---

[12] I note that judicial knowledge can be created through various means. As related here, appellate courts are not limited to trial transcripts nor are they limited to the arguments posed by appellate counsel. Appellate courts may lawfully consider outside sources, particularly as related to scientific matters. However, few of the courts in this sample did so. A cogent example is the Supreme Court of California decision in *Brown* (2004) that cited external sources for information on domestic violence, including a number of law review articles and an American Psychological Association publication.

syndrome suggested a long-term experience. The next sub-section expounds on a disagreement among the opinions on whether Section 1107, with its core element of BWS, required more than one episode of battering as necessary for BWS as a syndrome to be relevant for the expert testimony to be admitted.

IS ONCE ENOUGH?

The cases in this study contain some lengthy critical review to determine how many times the man could abuse the woman, and over what length of time, for BWS expert testimony to be legally relevant under Section 1107. Walker believes that BWS would apply in situations involving ongoing, severe abuse. In this sample, many of the courts thereby considered the issue of whether one incident of violence was sufficient to trigger Evidence Code Section 1107's provision that required that relevancy of the expert testimony to the case. The courts were requested to make a legal decision about the application of BWS, which was created as a psychological condition. With two exceptions, the courts conclude that BWS expert testimony was appropriate even without evidence of any prior altercation to the battering that was the subject of the charges at trial.

By analyzing the cases and their progression, it becomes evident how the courts construct the issue of a "syndrome" that would normally be an issue for the psychiatric or psychological communities to resolve, but the courts were forced to tackle. The courts do so, but with a decidedly legalistic tone. The first court in this sample to consider the issue is the 1996 decision in *Dillard*. There, the court indicates that the argument that there was no evidence of continued abuse was unfounded since there had been evidence

admitted of prior battering incidents. Thus, the defendant made the argument, but the court dismisses it based on the factual evidence and thereby does not consider whether BWS required more than one incident.

The second sequential opinion to follow *Dillard* in this sample attempts to forge a benchmark on the issue. The 1999 appellate decision in *Gomez* rules that one episode of violence was insufficient to warrant BWS testimony under Section 1107. Where the court saw no evidence that the defendant "fit the profile of a batterer" or that the defendant and the victim were in a "battering relationship," BWS is presumed irrelevant. "Although a woman may minimize or deny a single instance of violence or abuse, her denial does not mean she suffers from battered woman's syndrome" (*Gomez*:22-23). Thus, the court here notes that, even if the victim acts consistent with some of the symptoms associated with BWS, it does not necessarily conjure the syndrome. Because *Gomez* represents a Court of Appeals judgment, it does not hold the stronger value of precedence that a determination from the Supreme Court of California does. Thus, trial courts and other appellate courts could, but are not altogether constrained to, follow the *Gomez* ruling on the matter. Future courts predominantly chose not to follow the *Gomez* rationale.

Since *Gomez*, 27 opinions contain arguments about whether BWS testimony was proper under Section 1107 because of the number of violent incidents or the length of the violent relationship. Of those 27 opinions, only one court affirmatively opines that more than one act of violence is necessary before BWS expert testimony is permitted (*Gadlin* 2000). Still, the court in *Gadlin* distinguishes *Gomez* on the grounds that the *Gadlin* trial transcript included evidence of prior acts of violence and permits the expert testimony.

However, the court still notes in dicta that it "agree[d]" with Lenore Walker, citing a quote from her 1979 text indicating that at least two incidents of violence are required for a victim to be defined as a battered woman.

Most of the opinions following *Gomez* decline to directly rule as to whether the proposition that Section 1107 implicitly required evidence of more than one episode of battering. Instead, many distinguished *Gomez* as not being applicable because, as in *Gadlin*, the appellate courts express that their underlying cases included evidence of prior abuse between the offender and the victim.

The watershed case, a direct refutation of *Gomez*, is promulgated by an appellate court in *Williams* (2000). There, the court writes that there was nothing in the BWS evidentiary statute:

> to suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator. (*Williams* 2000:1129)

This interpretation of the statute and of the proper use of BWS precipitated a trend. Sixteen decisions since then (in this sample) expressly agreed with the *Williams*' court reasoning and reiterated the popular new mantra that an abuser should not "get one free episode of domestic violence." Since *Williams* was decided, no California court decision (in this sample) has disagreed with the *Williams* court statements and no court other than *Gadlin* turned back to accepting the *Gomez* rationale. In fact, several case opinions expressly rule that Gomez was wrongly decided (as opposed to simply indicating the court was just siding with the *Williams* rationale). However, as further discussed below,

a Supreme Court of California decision in 2004 reopens the debate between the rulings in *Gomez* and *Williams*.

The judicial opinions that adjudge one episode of battering to be sufficient under Section 1107 find persuasive two particular aspects of the matter. First, they tend to read the statute verbatim, finding no mention or hint of any requirement that the prosecution must have established either a history of battering or that the alleged victim be a battered woman, at least as if that term implied any duration. By frequently quoting verbatim the *Williams* metaphor decrying "one free episode of domestic violence," the opinions seem to venerate the sound bite. Further, several of these convey that the appellate courts are influenced by the drift away from BWS and its potential constraints. The *Brown* (2003) court quotes the California Alliance against Domestic Violence as expressing that the preferred rendering had evolved to "expert testimony on battering and it effects" or "expert testimony on battered woman's experiences." The court goes on to state that BWS is criticized because:

> (1) it implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from some sort of sickness, (3) expert testimony on domestic violence refers to more than women's psychological reactions to violence, (4) it focuses attention on the battered women rather than on the batterer's coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.

Likewise, in a few decisions issued after the 2000 amendment of Section 1107, the appellate judges are likely to interpret the change in language in the title from "battered woman's syndrome" to "battered women's experiences" as evidence that the legislature intended to de-emphasize the syndrome as implying a long-term experience.

One opinion (*McClure* 2003) cites a legislative committee report aimed at overruling *Gomez*.

> An analysis of this legislation prepared by the Senate Rules Committee explains its purpose is 'to expand the use of expert testimony in domestic violence cases' by 'allowing testimony that goes beyond 'Battered Women's Syndrome' . . . [to include] testimony that describes the different types of experiences that victims face, including the nature and effect of physical, emotional, and mental abuse.' The committee analysis goes on to make clear this amendment is aimed at People v. Gomez. 'Furthermore,' the committee states, 'a recent state appeal panel has ruled that a single incident of domestic violence does not establish that a woman suffers from battered women's syndrome. However, expert testimony to describe why victims behave contrary to common expectations in the first instance of abuse is necessary. Without such testimony judges and juries may not fully understand a woman's experience.' (p. 12-13; footnotes omitted)

The *McClure* court goes on to explain how Walker's penchant for long-term abuse may no longer have been justified:

> It makes no sense for a court to say an expert witness's testimony designed to dispel myths and misconceptions is irrelevant unless it conforms to the court's own preconceived notions of what an abused woman would or would not do. Moreover, since Dr. Walker wrote in 1979 a great deal more has been learned about BWS. Dr. Walker did not testify as an expert in this case. The witness who did testify stated first-time victims frequently recant truthful testimony for the reasons discussed ante. (p 14; footnote omitted).

In another salient example of discomfort with the duration issue, the court in *Garduno* (2002) rejects certain expert testimony. The prosecution's expert testified that the legal process required at least two beatings to be identified as a battered woman, even though the expert said that his personal belief was that one was enough for BWS to apply. In *Garduno*, representing the only case in this sample in which experts are evident on both sides of the litigation, the defense expert stated that the term syndrome required that the "impairment must persist over time" and that one or two times is not sufficient

(p. 13). The appellate court repudiates proclamations from both experts. Instead, the court states:

> We hesitate to say as a matter of law that the two batterings coupled with a serious gunshot wound could be called a brief period of violence that does not qualify as more than a single violent incident as required by Gomez. (p. 27)

The second persuasive strategy used to justify following the *Williams* standard was indicated when the judges appear to be greatly influenced by the actual testimony given by the expert witnesses in the underlying trials. They retrospectively review the trials by pointing to one or more specific statements made by the expert during the trial to support the relevance of the expert testimony in those cases, often regardless of the existence of evidence of the syndrome. A particular focus is on the experts' discussions of the commonality of recanting after a first incidence of violence. Thereby, these judges explain, no prior history of abuse was needed. Other courts also find domestic violence testimony to be helpful in explaining why the woman would not wish to report a single incidence of violence to public officials and why she would reconcile with the alleged abuser. The *Brown* (2003) Court of Appeals points to the expert's testimony that "the victim returns because 'there's a hope that things are going to get better and . . . there's a tremendous amount invested in relationships." *Brown* indicates that the expert testified that a victim may suffer from BWS after only one incident of physical abuse. The same opinion finds relevant the testimony of the expert in the *Gomez* case, whereby the expert stated that "a behavior pattern characteristic of BWS—recanting and minimizing the event—is more pronounced after the first incident of domestic violence" (p. 9).

Similarly, the opinion in *Garduno* cites the prosecution expert's opinion that "one battering could cause battered women's syndrome," even though the expert admitted at

trial that he knew of no studies to support this and that he recognized that the legal definition required more than one episode of abuse. The *Garduno* appellate court prefers the approach that one time is enough.

The rulings that one episode is sufficient to trigger Section 1107 also exemplify the court opinions as engaging in a conflation of domestic violence with battered women's syndrome. The courts here are about as likely to describe the witness as being an expert on domestic violence as they are to describe the expert as testifying on BWS. The general impression from these opinions is that BWS applies to any female victim of domestic violence. This conclusion is supported by the fact that there were no expert witnesses in these cases that actually diagnosed the victims in those cases as suffering from BWS. The juries were permitted to infer it. One suggestion for the general failure to focus distinctly on BWS as a psychological condition affecting the victim is that the legal world simply picked up on BWS as a term bandied about and it became a symbolic shorthand for the wider panoply of issues regarding battering and its effects (Schneider 2000). The data provided by this sample would support such a conclusion.

The issue has been only partly resolved by a 2004 California Supreme Court (the highest ranking court in California) case in which the high court acknowledged the difficulty of the issue (*Brown* 2004).[13] The opinion confirms the split at the intermediate appellate level between *Gomez* and *Williams*. Citing external authority, including law review articles, the high court recognizes domestic violence as a social problem in the

[13] There are two appellate opinions on the same case for *Brown*. *Brown* (2003) represented the decision in the case at the Court of Appeal, while *Brown* (2004) was the opinion on appeal from the intermediate appellate court given by the Supreme Court of California.

United States. It differentiates domestic violence from other types of violence where abused women may refuse to testify or recant out of a sense of loyalty. Then the court refers to Walker's work on BWS and learned helplessness. Citing an early Walker book, The Battered Woman (1979), the court posits that:

> to fit under Dr. Walker's theory as a battered woman, the victim must go through the battering cycle at least twice, because under Walker's theory a woman who is beaten once and takes action against the batterer is not suffering from a pathological state of learned helplessness. (p. 12)

The court then immediately launches into a paragraph, with various citations to law reviews and appellate opinions, to explain how Walker's BWS had been rebuked for the lack of empirical support. It also highlights that critics argued that abuse victims often are not impaired by a pathological condition. In sum, the court notes the argument that expert evidence on domestic violence should not depend on proof that the victim suffered from Walker's formulation of a battered woman. From this primer, one might have expected the court to have agreed and ruled to admit expert testimony even without evidence of ongoing abuse.

But, in the end, the Supreme Court of California declines to rule upon whether Section 1107, with its BWS terminology, permitted expert testimony when there is evidence of only one incident of abuse. After the discussion of the critics' denunciation of Walker's view of BWS, the opinion moves right onto parsing the wording of the evidentiary code for Section 1107 and of 801, the latter being the traditional and overarching evidentiary rule regarding expert testimony in general. Instead of ruling whether the expert should have been admitted in that case under Section 1107, the court balks and decides the case under the more general Section 801. The court decides that

the expert testimony was admissible because the evidence was on a subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (*Brown* 2004:25).

The court's dodging of the Section 1107 issue is further evident where the prosecution at trial offered the expert under Section 1107, not Section 801. The state supreme court says the discrepancy did not matter because the court was ruling that the expert could lawfully have been introduced under Section 801, much like experts had been approved under Section 801 for rape trauma syndrome and child abuse accommodation syndrome. Despite the word "syndrome" in the latter cases, the court states, expert testimony was admissible even without evidence in the case of the presence of the syndrome. Experts could testify to the common reactions of rape or child molestation victims and other common misperceptions about sexual abuse. Analogizing to domestic violence, the opinion indicates that expert testimony could likewise inform the jury about the domestic violence victim's reactions and recantations. Overall, the court's analysis implies that the syndrome word in Section 1107 is problematic for the judges and they declined to entirely ignore its significance. At the same time, unlike many of the prior decisions in this sample, the Supreme Court of California appears to understand that domestic violence should not be conflated with BWS. The ruling, in sum, from the *Brown* high court was that expert testimony on domestic violence was admissible in the case without evidence of BWS, but, importantly, under an evidentiary statute other than Section 1107.

LEARNED HELPLESSNESS

It is also interesting to note one important metaphor that is generally not represented well in this body of law. BWS is often associated with learned helplessness, which Walker (1995) described as "the victim's inability to predict whether what she does will protect herself from further abuse." This theme of learned helplessness has attracted much criticism as mitigating women's agency and abilities. As the evidentiary statute specifically using the term "battered women's syndrome," much discussion about learned helplessness was expected. However, only four opinions cite helplessness as a common characteristic of abused women, and one of those specifically shows the court rejecting the condition. Just two refer to learned helplessness (*Brown* 2004; *Gonsalves* 2002), while another notes a sense of helplessness (*Terra* 2003), and the fourth refers to feelings of helplessness (*Cruz* 2004). One opinion in which the expert testified to learned helplessness describes it as a sense of dependency in which the woman placates the abuser and rationalizes the abuse (*Gonsalves* 2002).

One expert, however, criticized the idea. Learned helplessness was a myth, one expert is quoted as stating (*Vandersteen* 2003). This expert characterized the women as having more agency and will in strategically provoking an attack to get it over with. There is nothing in this corpus to link the original theory of learned helplessness as being imported from an experiment giving electric shocks to trapped dogs.

From this sample, then, the condition of helplessness, while often found connected to BWS in the literature, plays a minimal role in the expert knowledge conveyed by the judiciary in this study. The few cases that cite the term are in conflict as to the validity of helplessness in the ideal type of the battered women. I looked to see if

perhaps there was a time trend, whereby learned helplessness may have been more acceptable in the earlier years of the sample, but the evidence failed to support this suggestion. The five cases that mention helplessness appear during a two-year window, from 2002 to 2004. In sum, ideologies related to learned helplessness are rare in this sample and when they occurred, contrary to my expectation, did not occur just in the early years of the sample.

E: Recantation, Denial, and Minimization

A consistent premise within domestic violence advocacy is to convey how women may be victims of domestic violence even if they often recant allegations of abuse, deny they were abused, and/or minimize the offender's conduct. Walker (1995) describes these as unconscious psychological responses to avoid traumatic feelings.

Perhaps the most common theme across the cases was expert testimony about the frequency of recanting by domestic violence victims. Just over half of the sample refers to the expert testifying as to the incidence of recantation. Testimony on recantation often related to scenarios whereby the female victim, at some point, told one or more people that the defendant had been physically violent or threatening toward her, but the woman later denied that the abuse ever occurred.

The reason behind the expert testimony on recantation seemed obvious as, in almost all of these cases, the opinion indicates that the victim in the case had, at some point, recanted. The most frequent description is that experts testified that it was "common" for victims to recant, while two cases indicated that it was "very common," another described it as "typical," and yet another reported it to be "quite typical." Eleven

cases specifically cite the expert's statistics on the rate that domestic violence victims recant or become uncooperative with the prosecution. Overall, the percentages cited ranged from 50 to 85 percent. Some were very specific: 71 percent (*Terra* 2003), 76 percent (*McCart* 2003), and 80 percent (*Gomez* 1999, *Martinez* 2002). Two others provided a slight range: 80 to 85 percent (*Brown* 2003), and 75 to 80 percent (*Braddock* 2001).

Two individuals are specifically named in three opinions each. The cases indicate that Gail Pincus, Director of the Domestic Abuse Center, evidently gave relatively consistent statistics, reporting that the percent of domestic violence victims who recanted was 75 to 80 percent, 80 percent, and 80 percent, in three different opinions. However, the testimony by Linda Barnard, a marriage and family therapist, varied, with different percentages being reported, namely, 71 percent, 76 percent, and 77 percent, all in appellate cases reported in 2003. This gives a hint that the statistics given as scientifically valid by the same researchers do not necessarily have to be exact matches across cases.

These high percentages, along with the oft-repeated statements describing frequency, reflect an image of lying and deceit by abused women. The summary portrayal is that women lie regularly and repeatedly, although the dishonesty from the experts' construction was decidedly one-sided. If the woman said that she was abused, then she is truthful. But if the woman denied the abuse, the experts implied that she was most likely lying. Or if the woman recanted prior statements that abuse occurred, the experts insinuated that she was lying when she recanted, but not when she previously

reported the abuse. In one striking passage, the court recites certain testimony by the expert, named Darr, which it found important:

> [A]t one point during direct examination, the prosecutor queried, 'All right . . . We are turning to situational ethics. And basically does a victim understand that when she comes into court and takes an oath, swears to tell the truth, and then for lack of a better word lies about it that that's wrong; that that's not something that they should do?' Defense counsel's lack of foundation objection was overruled. Darr explained that domestic violence victims erroneously believe they can call the police but then choose not to prosecute the crime, and testify falsely in court because they fear the ramifications of the prosecution, including fear they their or their children's lives will be ruined. Darr stated, 'A recalcitrant victim is lying . . . is making a choice that you and I wouldn't make because they're vested differently than we would be.' When asked to further elaborate, Darr explained, 'This relationship continues to be the center of the universe. They use this relationship to validate their very worth. For those of us who don't do that, we understand right and wrong; we understand the appropriateness of truth telling versus lying, but [domestic violence victims'] entire universe is vested in this individual for however long a period of time they have been together, or whatever is going on in that victim's mind in terms of future behaviors and future relationships . . . ' Darr explained that a domestic violence victim worries 'if he goes to jail how am I going to feed the kids? What am I going to do, you know, with his family? How am I going to keep a roof over our head? Where am I going to go? What is going to happen to me? Who's going to love me?" (*Basulto* 2003:13-15)

So, this expert averred that the women knew they were telling falsehoods by recanting. But not all the expert evidence assumed that women would intentionally lie. The court in *Garduno* (2002) quotes the expert as having testified that the women do not know they are denying or minimizing, but rely on defense mechanisms to downplay the significance of the abuse to themselves.

Therefore, because denial and recantation were so prevalent in the facts of the cases and in the expert testimony, the overall picture I was left with was one of dishonest women. There is scant mention in these cases of the possibility that a woman could lie

about being abused. The two cases with any allusion to false reports of battering refer to the expert (the same witness in both cases) as having claimed that only about two percent of women falsely report abuse to the police, with a clear connotation that this was a rarity (*McCart* 2003; *Turner* 2003).

When women were portrayed as not exactly lying outright, the alternative image is one of almost fibbing by minimizing the abuse or harm. Seventeen opinions note the expert's testimony regarding the tendency of victims to minimize the abuse. The discourse of minimization from the expert testimony was not as central to the judges' written accounts, but still important as the judges' attempt to construct and explain gaps between the prosecution's version of the abuse and the less severe stories often attributed to the women's own accounts. None of the opinions provides any statistical evidence behind the expert's testimony about the frequency or extent of minimizing the batterers' actions by abused women.

Several opinions reiterate examples from the expert testimony as to the explanation women would give when they deny or minimize. *Brown*'s (2003) court quotes the expert as testifying about how "almost every victim will minimize [her] experience. They can have black eyes, severe bruising, broken bones, and say . . . he just . . . pushed me around. . . . " In *Braddock* (2001), the expert testified that "[m]ost commonly, women who recant claim they were the aggressor in the incident." Similarly, the expert in *Mijares* (2004) indicated the woman would tell the police that her injury was her own fault, although as a strategy to keep the family together because the man provides shelter and money for her and her children. In another case, the expert is quoted

as representing that the women commonly report that the injury was done by strangers or that she ran into a wall or door (*McClure* 2003).

A striking theme from these cases is that the opinions collectively work to pass off expert testimony regarding recantation and minimization as if it had scientific truth, but without questioning, much less citing, original source material. For example, many courts report the expert testifying about the commonality of recantation, denial, and minimization, without providing any research support for their characterizations. The opinions generally give no hint as to how the experts came to this knowledge.

The prevailing failure to question the expert's knowledge applied even for those few experts who gave specific numbers for the statistical prevalence of the broader community of abused women to engage in recantation or minimization. None of those opinions carries a specific citation to the reports from which the statistics were derived. Of the two opinions that give at least some description of the source of the expert's statistic, the information remained vague: one opinion indicated the expert's percentages were based on an unidentified city attorney's office study, while another obliquely referred to the results of an FBI study. No information is provided in any of the opinions about the details of the source material, such as the date any study was done, the research methodology used, the identity of the primary investigators, or any other information that could convey information about bias or overgeneralization. Indeed, one of the cases accepts as scientifically valid the expert's testimony that 50 percent of female victims of domestic abuse recant, although the expert admitted that the statistic was loosely based on the expert's own experience (*Salinas* 2003). Here, then, the witness's own observation is accepted as scientific evidence, regardless of empirical support. Further,

the statistic remains unchallenged by the appellate court, even though it is significantly lower than the percentages reported in prior opinions.

The statutory wording may have much to do with the disregard for empirical backup for the expert's testimony because Evidence Code Section 1107 specifically assumed BWS to be scientifically valid, at least within the criminal courtroom. But, whatever the reason, the appellate courts embrace the expert evidence as scientifically correct and, then, legally sanctioned as truth. Indeed, three case opinions specifically cited, with evident endorsement, the statistics provided in prior legal opinions on the incidence of recantation by battered women. For instance, the *Gomez* opinion quotes the expert as saying that 80 percent of women recant after the first assault. Then two later opinions (*Salinas* 2003 and *Williams* 2000) specifically quote the *Gomez* statistic as if it were unquestionable proof. The opinions deprive the reader, however, of any ability to verify the validity or reliability behind the testimony. Of course, it is possible that, at trial, the experts were challenged to specifically cite scientifically conducted studies to support their testimony. The data used here, which do not include full trial transcripts that would have been available to the appellate judges, do not allow a determination of whether that occurred. However, whether or not the experts provided specific resources, the appellate courts did not seem to care. Even when the specific numbers given for recantation by the same expert in three different cases varied, the judicial opinions made no comment about the seeming discrepancy.

Certainly, the failure to critically analyze the empiricism of the expert's testimony may reflect that the judges simply lack the tools or knowledge to do so. Neither social theory nor statistical concepts have been typically required courses within law schools.

Few law students may have had any experience with sociological methodology or scientific empiricism. Thus, the judiciary's lack of focus on the validity of the experts' reports on research may not be a conscious choice, but rather be due the judiciary's lack of skills to question the experts' testimony in terms of scientific support.

F: Metaphors for Battering Relationships

This body of judicial opinions conveys the significance that certain metaphors had in the construction of judicial knowledge. The adoption of the phraseology "not one free episode of domestic violence" among multiple courts was discussed earlier in this chapter. Now, I evaluate the other most frequent metaphors in the sample: (a) power and control, (b) cycle of violence, (c) honeymoon period, and (d) window of opportunity. The first three of these generally are discussed in terms of the expert testimony regarding the common tactics of male batterers, while the latter involves the women's small chance to tell others about the abuse.

While a number of professionals in the domestic violence arena stress that no single description of behaviors and feelings can apply to all domestic violence victims, these cases tend to portray a singular picture relevant to all male batterers. For example, the experts in *Gomez* (1999) and *Sosa* (2002) are cited as describing the "typical" battering man. The *Gomez* court's construction of the expert's testimony is interesting in light of its description of the expert as having testified that not every relationship experiences the tactics described and that every batterer has his own favorite tactic. Thus, the *Gomez* court reconstructs the testimony as being a profile of what the court describes as the "typical battering male" in the "typical battering relationship."

A majority of cases describe the experts as having testified at trial about the various tactics of male batterers. Seventeen cases refer to batterers' use of abusive tactics to gain "power and control" over their victims. Several of these indicate that batterers use abusive behavior as a tactic to reassert control when the relationship hierarchy is threatened by the women's actions. An ideology of masculinities arises in several other cases. Three cases refer to male privilege, including *Singleton* (2002), where the court paraphrases a portion of the expert's testimony as follows:

> [T]here are a number of factors involved in why [battered women] don't see themselves as victims of sexual assault . . . such as beliefs [held by the male] that once in a partnership . . . there is a certain male privilege [including] entitlement to sexual favors . . . [and] cultural beliefs, religious beliefs [held by the victim] that women should succumb to males as a male's woman, religious beliefs that women should also be extremely subserving. (p.33, n. 9)

Dillard's (1996) expert talked about abusive behaviors as serving the man's need to feel like the "king of the castle." Similarly, the *Dean* (2002) court indicates that experts testified that a man's masculinity is based on the extent of power and control over his female partner, whom he sees as his property. Nearly all the opinions that address power and control related it to the cycle of violence perpetuated by the male in an abusive relationship. These two metaphors, then, are pretty consistently used together.

Half of the sample refers to the cycle of violence. The most commonly reported order of the phases in the cycle was tension-building, then acute violence, followed by the honeymoon, which is consistent with Walker's design. A few cases, however, do not follow this exact sequential structure. One case conveys the expert's testimony on the cycle as starting with the battering, followed by the honeymoon and then tension-building (*Gonsalves* 2002). In another case, the cycle is represented as being a violent incident,

followed by reconciliation, followed by another violent incident, with no mention of tension-building (*Watts* 2002). Still, all these opinions about the stages of the cycle of violence support the ideology of repeating phases, whereby a violent episode is followed by relative calm, followed by tension rebuilding toward another violent episode. Some cases indicate that the experts testified that the intervals between the cycle stages decreased over time.

The honeymoon period of the cycle of violence is the most common phrase used to describe when the man apologizes, the woman accepts, and the couple is generally compatible for a time until the next violence incident. Several cases, however, use an alternative term, "hooking back," to describe the man's apologetic attempt at reconciliation. The term honeymoon evokes an image of an idyllic time for a couple who are in love and devoted to each other. Indeed, one expert characterized it as the phase whereby the woman was "swept off [her] feet," presumably by her man. The majority of cases that discuss expert testimony on the cycle indicated that the abuser is apologetic during the honeymoon phase, although a few also mentioned that the man also may blame the victim for his violence. The most common purposes for discussing the cycle in general, and the honeymoon phase in particular, is to explain why battered women minimize, recant, or stay in abusive relationships.

These metaphors also serve to challenge any notion of violence as unremitting and the batterer as consistently cruel. The respites offered by the honeymoon period appeared to make staying in a relationship that is sometimes abusive to be more reasonable or at least more understandable. The judicial decisions in general signal that visions provided by the cycle and the honeymoon period particularly resonated with the

judges. The thoughtful judicial writings utilize these particular phrases and often expounded upon them to explain the dynamics of abusive relationships and, more particularly, to account for the women's behaviors. Further, the great weight placed on these metaphors implied that this information was not assumed as common knowledge. Of course, the argument in this paper is that, as the discussion of abusive relationships and the cycle of violence recurs in judicial opinions, as is exemplified here, this knowledge will spread, at least within legal circles.

The symbolism of the window is generally used as a reference to an opportunity to escape abuse. This metaphor is not as ubiquitous as the others, but is still presented in several opinions. It was variously described as a "trauma window," "window of time," or more commonly the "window of opportunity." Most of the cases involving the window metaphor do not limit how the victim navigated escaping the violent partner. However, four of the cases, albeit all with the same expert witness having testified, affirmatively indicate that the expert was clear that the window provides the chance for the victim to escape through the assistance of outside help. *Bell*'s (2003) expert is described as saying that the trauma window closes when the victim realizes she needs the financial support of the batterer or hears his voice. "At that point, the victim goes back under the control of the batterer . . . " (p. 10).

For one expert witness, whose testimony appears in four separate cases, the window is all about notifying other people. This expert stated in one trial that "the cycle of violence is broken only when society holds the perpetrator accountable for her actions, and the batterer is arrested, prosecuted, and held to probationary terms" (*Martinez* 2002:9). The same expert is quoted in other cases as proclaiming that people other than

the victim, even society in general, were obligated to save her (*Gomez* 1999). The strong implication from this expert was that the victim was not capable of doing so herself.

The impact of BWS testimony over the years seems evident in some decisions. The *Ilyin* (2001) court states that "this case did not involve the common circumstance in which the witness recants her accusations. . . . " The *Ilyin* case involves BWS testimony to explain why the victim there did not recant, but always denied the incident. Then two cases recognize that there were common stereotypes associated with battered women. The appeals court in *Hernandez* (2003) states that "there is no requirement that a woman must evidence every stereotypical aspect of" BWS for expert witness testimony to be admissible (p. 23-24). Hence, these courts recognize that stereotypes about battered women exist and that not every abused female would exemplify all of them.

It is also clear, from the progression of the opinions over time, that, as BWS expert testimony became more imbedded in California's justice system as useful to the prosecution in domestic violence cases, the courts shifted attention from elaborating on BWS as a concept to expanding it to encompass new circumstances, such as the tactics and perceptions of male batterers and the behaviors of battered women that are inconsistent with BWS. In determining that a battering relationship can exist without more than one act of violence, the courts de-emphasize the need to prove that either the victim or the offender fit any battering profile. Several courts explicitly stated that the statute does not require proof that the victim was a battered woman. Instead, the courts stressed the applicability of BWS testimony to explain recanting, reuniting with the offender, or not wanting to prosecute.

G: Discussion and Conclusion

The judicial discourse expounded in this chapter evinced the predominant cultural scripts shaped by experts on issues related to domestic violence. A notable finding in this research was the relatively consistent view from the appellate panels refusing to limit Section 1107 to BWS or to any psychologically-driven condition. With the imprecise wording of the evidentiary rule, the courts could have ruled in a far more constraining manner, limiting the expert to addressing a clinical syndrome and only in the presence of evidence that the victim suffered from the syndrome. Instead, the opinions generally sought to broaden the scope of the expert testimony elicited under Section 1107 to themes more wide-ranging than BWS as it was originally conceived. I observed that experts, with judicial approval, testified to BWS as a psychological syndrome, but far more often to the perceptions and behaviors of victims, the perceptions and behaviors of batterers, and the characteristics of battering relationships. BWS became seen as merely an unfortunate term in the statute that symbolized the panoply of issues in relationships of domestic violence. BWS was de-psychologized and was practically used synonymously with domestic abuse.

The ideal type of the battering relationship that emerges represented a batterer bent on using various types of violence and intimidation to control his partner. Contrary to what was expected, the female in the relationship generally was not described as suffering any psychological deficits or helplessness. However, she predominantly denies, minimizes, or recants. She is lying. She blames her injuries on herself or some source other than her partner, and these excuses are fabrications. As conveyed in these judicial opinions, the relationship is almost entirely constitutive of violence and control tactics.

Relationship themes such as love, children, and economic survival are not evident, except to the extent the batterer uses them to perpetuate his control.

The prodigious use of metaphors served to fashion the imagery accorded to batterers and their victims. The repetitive use of the more common ones underscores their utility in succinctly conveying a whole range of knowledge. Metaphorical structures such as power and control and the cycle of violence elicited allusions of perpetuation and struggle. They invited the reader to view domestic violence outside the limited realm of an individual incidence of battering. The metaphor of "not one free episode of domestic violence" was particularly attractive to build upon the idea to prodigiously permit expert testimony even without evidence of a history of abuse. A paradox emerged here. On the one hand, an expert can testify about general issues of domestic violence even in the case of a single incident of abuse. On the other hand, the expert can testify in that same case about power and control and the cycle of violence, both of which denote long-term abuse and multiple battering episodes. The result seems to permit the jury to infer, in the face of the court permitting such expert testimony, that frequent abuse occurred, regardless of the evidence of such.

CHAPTER 6: CONCLUSION

The purpose of this research was to investigate judicial construction of issues regarding domestic violence. Using a critical discourse analytic frame, I sought to investigate this body of judicial knowledge for signs of how appellate courts considered evidence of partner abuse and how they conveyed this information in case opinions. Feminist and social constructivist philosophies offered guidance on how to judge the judicial writings, not as facts in themselves, but as created artifacts.

The data set was comprised of 63 appellate opinions from California in which expert witness testimony informed the court about common patterns in domestic violence. A 1992 statute enacted in that state specifically permitted expert evidence on domestic violence in criminal cases. All of the cases in the sample involved male batterers and their female victims. An important aspect to this research was to explore the impact of the expert evidence on judicial decisions and knowledge.

In Chapters 4 and 5, I related two broad categories of discourses from the sample: the discourses of resistance and the discourse of expert testimony. The discourses of resistance embodied three categories: a discourse of resisting the physical assault, of attempts to end the relationship, and of resisting reuniting with the abuser. Here, the courts constructed the "facts" of the underlying stories, giving hints along the way as to how the appellate judges perceived and appraised the actions and reactions of alleged victims of male battering. I noted gendered expectations portraying male violence as exercising masculinities, while female vulnerability tended to be required for women.

The judicial writings, however, had to tread carefully here. It did not seem to surprise the judges when women failed to aggressively protect themselves or fight back. Where facts entered into evidence in the trial suggested otherwise, the opinions tend to minimize the aggression, usually by suggesting that the man's violence was more severe. I noted, however, that this reaction by the judges may be related to wanting a legitimate victim to be deserving of protection.

While the overall picture was of female victims as being relatively non-aggressive at the time of the batterer's assault, they were supposed to be more in control in regard to the relationship. Thus, there was much stress on the judges conceiving of and then writing about why female victims stay in abusive relationships. Consequently, the opinions often addressed the question of why the victim did not just leave, with the implication that such action was easy and safe. To build the story around an ongoing relationship of battering, the judges were likely to find as many factors as possible that may have prevented the woman from ending the relationship. Often, the answers were found in the actions of the man in controlling his partner in multiple ways, such as through intimidation, economic control, and isolation tactics.

Then there was the discourse of staying away from the abusive relationship. Once a woman does leave, then the common thought is that she would reasonably stay away permanently. This data set included several cases in which the woman had successfully ended the relationship, but then returned at a later date. The appellate opinions showed the difficulty the judges had with this unexpected behavior.

The discourses of resistance provided an interesting foray into how the judiciary navigates around difficult issues. The appellate judges here were largely restrained by

the legal assumptions that jury verdicts of guilt be upheld without compelling reason otherwise. Thus, the appellate panels were faced with fact scenarios of batterers and victims not acting in ways that "normal" people are expected to act. Yet, because of the presumption to uphold the guilty verdicts, the courts were obviously constrained in their analysis. Thus, it appeared they tried hard to construct violent relationships that were difficult for them to understand, while still supporting the predominant decision in this corpus to deny the batterer's appeal, thereby upholding the conviction.

The discourse on expert testimony showed a strong impact of the expert on judicial decision-making and on the creation of judicial knowledge on domestic abuse. The decisions often referred to the expert evidence and were likely to use it to help explain the difficult issues confronted in the discourses of resistance, as well as to understand the common tactics of male batterers. However, the use of BWS terminology was an impediment. The courts carefully navigated the statute's use of BWS, with criticisms of the term as well as fact scenarios that did not fit the BWS profile of either a long-term relationship of abuse or a woman who was passive or suffered a psychological condition. While a couple of courts were strict in applying BWS, the majority generally did not allow the BWS term to limit the application of the statute for experts to testify. Moreover, there was a clear desire to interpret the statute broadly to permit the expert to testify about a wide variety of issues, including, quite importantly, tactics, behaviors, and perceptions of male batterers.

The judiciary, at least as can be observed from this data set, did not challenge the scientific evidence proffered by expert witnesses. The judicial knowledge conveyed by these opinions conveys the commonality of behaviors, such as abused women denying or

recanting, or abusive men using tactics to gain male power. Even statistics from the experts were not given supporting data regarding from where the numbers were derived. In the normal professional education for the practice of law, statistical and empirical methods are not taught. Thus, I suggested that judges lack the knowledge or skill to even question, much less challenge, the source of the empirical data cited by the experts.

Despite the influence of the expert testimony on these judges, the opinions were apt to accept and reinforce knowledge about domestic violence from judicial precedent. This occurred on several occasions, whereby an expert's testimony in one case could then be recited as truth in later cases. In other words, an expert's scientific opinion could live on through regurgitation in future cases. But this was also true about statements made in judicial opinions that were not uniquely referenced to an expert or other scientific evidence. For instance, I noticed that the definition of BWS was judicially created and reinforced through other opinions, mostly without reference to an expert or other science. This underscored the value of judicial precedent even in a matter of science.

I was able to derive an ideal type of domestic abuse from the portrayal of expert testimony. The female victim often denies, minimizes, or recants. I discussed the sweeping portrayal of abused women as habitual liars, except when they report being abused by their male partners. The female victim faces many hurdles in protecting herself or permanently terminating an abusive relationship. The male batterer's tactics attempt to control and intimidate her into staying. I found it interesting that, despite the BWS term, the experts generally did not psychologize the female victim. Instead, she was discussed in terms of behaviors and perceptions and not in terms of suffering from any psychological condition.

The male batterer's ideal type is a metaphorical one. He uses power and control tactics to stress a distinct hierarchy within the household. His violent methods are various: physical, emotional, and economic. The rationale underscores masculinities and a patriarchal ideology.

Then the relationship ideal type is also explained in metaphors. The couple experiences the cycle of violence. The male batterer's tactics are focused on perpetuating the unequal pecking order, while receding from the brink of overload when she might leave. The beginning of the relationship sees him as kind, loving, and devoted. Once the relationship is assured, the tension builds to a climax of violence. This would seem to be a death knell, but the honeymoon period of re-invoking love and devotion works as a tactic for the male to have the relationship continue, while explaining the decision of the woman to stay.

This study has its limitations. One is that the data set is from a single state, thus making generalization difficult. However, I intended to choose an outlier to discover how far expert testimony can push judicial knowledge on issues of domestic violence.

I hope that future studies will investigate judicial decisions in a social constructivist framework. Judicial decisions do not necessarily convey facts. They construct, mold, and make judgments on information that they convey as facts. In addition, this research underscores the significance that expert witnesses can have in judicial decision-making. Here, expert testimony regarding domestic violence had a strong impact on the judicial construction of battered women, battering men, and their relationships.

Appendix A: Table of Cases in Sample

People v. Archuleta, 2002 Cal. App. Unpub. LEXIS 631 (Cal. Ct. App. 2002).

People v. Asprilla, 2001 Cal. App. Unpub. LEXIS 1449 (Cal. Ct. App. 2001).

People v. Basulto, 2003 Cal. App. Unpub. LEXIS 10257 (Cal. Ct. App. 2003).

People v. Bell, 2003 Cal. App. Unpub. LEXIS 7794 (Cal. Ct. App. 2003).

People v. Boyd, 2001 Cal. App. Unpub. LEXIS 882 (Cal. Ct. App. 2001).

People v. Braddock, 2001 Cal. App. Unpub. LEXIS 931 (Cal. Ct. App. 2001).

People v. Brown, 96 Cal. App. 4th Supp. 1 (Cal. Ct. App. 2001).

People v. Brown, 2003 Cal. App. Unpub. LEXIS 944 (Cal. Ct. App. 2003).

People v. Brown, 33 Cal. 4th 892 (Cal. 2004).

People v. Campos, 2002 Cal. App. Unpub. LEXIS 459 (Cal. Ct. App. 2002).

People v. Clark, 2003 Cal. App. Unpub. LEXIS 577 (Cal. Ct. App. 2003).

People v. Colabine, 2004 Cal. App. Unpub. LEXIS 6773 (Cal. Ct. App. 2004).

People v. Cook, 2004 Cal. App. Unpub. LEXIS 7163 (Cal. Ct. App. 2004).

People v. Corin, 2002 Cal. App. Unpub. LEXIS 11703 (Cal. Ct. App. 2002).

People v. Cruz, 2004 Cal. App. Unpub. LEXIS 8142 (Cal. Ct. App. 2004).

People v. Dean, 2002 Cal. App. Unpub. LEXIS 1953 (Cal. Ct. App. 2002).

People v. Dillard, 45 Cal. App. 4th 1417 (Cal. Ct. App. 1996).

People v. Ellis, 2003 Cal. App. Unpub. LEXIS 11439 (Cal. Ct. App. 2003).

People v. Figueroa, 2002 Cal. App. Unpub. LEXIS 10889 (Cal. Ct. App. 2002).

People v. Fitzgerald, 2003 Cal. App. Unpub. LEXIS 1559 (Cal. Ct. App. 2003).

People v. Gadlin, 78 Cal. App. 4th 587 (Cal. Ct. App. 2000).

People v. Garcia, 2004 Cal. App. Unpub. LEXIS 4092 (Cal. Ct. App. 2004).

People v. Garduno, 2002 Cal. App. Unpub. LEXIS 1990 (Cal. Ct. App. 2002).

People v. Gomez, 72 Cal. App. 4th 405 (Cal. Ct. App. 1999).

People v. Gonsalves, 2002 Cal. App. Unpub. LEXIS (Cal. Ct. App. 2002).

People v. Goshen, 2003 Cal. App. Unpub. LEXIS 5326 (Cal. Ct. App. 2003).

People v. Graham, 2002 Cal. App. Unpub. LEXIS 11464 (Cal. Ct. App. 2002).

People v. Guerra, 2003 Cal. App. Unpub. LEXIS 4530 (Cal. Ct. App. 2003).

People v. Gunn, 2004 Cal. App. Unpub. LEXIS 7708 (Cal. Ct. App. 2004).

People v. Hernandez, 2003 Cal. App. Unpub. LEXIS 424 (Cal. Ct. App. 2003).
People v. Hobley, 2003 Cal. App. Unpub. LEXIS 6513 (Cal. Ct. App. 2003).
People v. Ilyin, 2001 Cal. App. Unpub. LEXIS 1549 (Cal. Ct. App. 2001).
People v. Johnson, 2003 Cal. App. Unpub. LEXIS 8223 (Cal. Ct. App. 2003).
People v. McCart, 2003 Cal. App. Unpub. LEXIS 2882 (Cal. Ct. App. 2003).
People v. McClure, 2003 Cal. App. Unpub. LEXIS 4855 (Cal. Ct. App. 2003).
People v. McDowell, 2004 Cal. App. Unpub. LEXIS 1082 (Cal. Ct. App. 2004).
People v. McGowan, 2003 Cal. App. Unpub. LEXIS 3399 (Cal. Ct. App. 2003).
People v. Martinez, 2002 Cal. App. Unpub. LEXIS 174 (Cal. Ct. App. 2002).
People v. Mijares, 2004 Cal. App. Unpub. LEXIS 3247 (Cal. Ct. App. 2004).
People v. Morgan, 58 Cal. App. 4th 1210 (Cal. Ct. App. 1997).
People v. Namowicz, 2003 Cal. App. Unpub. LEXIS 1806 (Cal. Ct. App. 2003).
People v. O'Brien, 2003 Cal. App. Unpub. LEXIS 3529 (Cal. Ct. App. 2003).
People v. Phat, 2003 Cal. App. Unpub. LEXIS 1828 (Cal. Ct. App. 2003).
People v. Piper, 2003 Cal. App. Unpub. LEXIS 610 (Cal. Ct. App. 2003).
People v. Rush, 2001 Cal. App. Unpub. LEXIS 2176 (Cal. Ct. App. 2001).
People v. Salinas, 106 Cal. App. 4th 993 (Cal. Ct. App. 2003).
People v. Simpson, 2002 Cal. App. Unpub. LEXIS 10690 (Cal. Ct. App. 2002).
People v. Singleton, 2002 Cal. App. Unpub. LEXIS 8503 (Cal. Ct. App. 2002).
People v. Smith, 2002 Cal. App. Unpub. LEXIS 3526 (Cal. Ct. App. 2002).
People v. Sosa, 2002 Cal. App. Unpub. LEXIS 3968 (Cal. Ct. App. 2002).
People v. Terra, 2003 Cal. App. Unpub. LEXIS 1229 (Cal. Ct. App. 2003).
People v. Terry, 2004 Cal. App. Unpub. LEXIS 6316 (Cal. Ct. App. 2004).
People v. Torres, 2003 Cal. App. Unpub. LEXIS 7043 (Cal. Ct. App. 2003).
People v. Turner, 2003 Cal. App. Unpub. LEXIS 7117 (Cal. Ct. App. 2003).
People v. Vandersteen, 2003 Cal. App. Unpub. LEXIS 2252 (Cal. Ct. App. 2003).
People v. Vernon, 2003 Cal. App. Unpub. LEXIS 11496 (Cal. Ct. App. 2003).
People v. Virabutsady, 2002 Cal. App. Unpub. LEXIS 10624 (Cal. Ct. App. 2002).
People v. Watts, 2002 Cal. App. Unpub. LEXIS 5956 (Cal. Ct. App. 2002).
People v. Williams, 78 Cal. App. 4th 1118 (Cal. Ct. App. 2000).
People v. Williams, 2002 Cal. App. Unpub. LEXIS 1333 (Cal. Ct. App. 2002).

People v. Wright, 2001 Cal. App. Unpub. LEXIS 2553 (Cal. Ct. App. 2001).
People v. Wu, 2003 Cal. App. Unpub. LEXIS 508 (Cal. Ct. App. 2003).
People v. Zarazua, 2004 Cal. App. Unpub. LEXIS 3831 (Cal. Ct. App. 2004).

Appendix B: Case Outcomes

This table summarizes the cases in this sample, the counts on which the jury convicted, and the sentence. The last column indicates whether the sentence as a result of an enhancement under California law, such as an increased penalty under mandatory minimum sentencing or the state's three-strikes law. A question mark indicates that the information was not known.

Case	**Guilty Counts**				**Sentence**	**Enh.**
Archuleta	corporal injury - spouse	terrorist threat	cruelty to a child	violation - domestic relations order	?	?
Asprilla	corporal injury - cohabitant	battery resulting in serious injury	witness intimidation	false imprisonment	4 years	Y
Basulto	corporal injury – cohabitant (2 counts)	assault with a deadly weapon (3 counts)	assault	criminal threat	5 years, 8 months; fine	N
Bell	assault with a deadly weapon				45 years to life	Y
Boyd	corporal injury –spouse (2 counts)	robbery			16 years, 4 months	Y
Braddock	corporal injury - spouse	assault	battery		4 years	N
Brown	terrorist threat	false imprisonment	battery on domestic partner		10 years, 8 months	Y
Brown 2	vandalism				6 months; fine	N
Brown 3	terrorist threat	false imprisonment	battery on domestic partner		10 years, 8 months	Y
Campos	corporal injury - spouse	terrorist threat[14]	dissuading a witness	battery	7 years, 4 months	Y

[14] Reversed on appeal.

Case	Guilty Counts				Sentence	Enh.
Clark	assault with a firearm	terrorist threat			7 years	Y
Colabine	assault with great bodily injury (2 counts)	child abuse	criminal threats	severing a telephone line	9 years, 4 months	Y
Cook	forcible oral copulation	corporal injury – cohabitant (3 counts)			?	Y
Corin	corporal injury - cohabitant				2 years; fine	Y
Cruz	false imprisonment	criminal threats	exhibiting a dangerous weapon	child endangerment	36 years to life	Y
Dean	corporal injury -spouse	assault with a deadly weapon			?	Y
Dillard	corporal injury - cohabitant				25 years to life	Y
Ellis	attempted voluntary manslaughter	felon in possession of firearm and ammunition	aggravated assault (2 counts)	criminal threats	50 years to life	Y
Figueroa	false imprisonment				225 days, then 3 years probation	N
Fitzgerald	child endangerment	terrorist threat	assault with great bodily injury		6 years	N
Gadlin	assault with a deadly weapon				35 years to life	Y
Garcia	assault with a deadly weapon	corporal injury - spouse				Y
Garduno	attempted murder	assault with a firearm	corporal injury – spouse (2 counts)		33 years to life	Y
Gomez[15]	assault with a deadly weapon	battery on a cohabitant	assault		25 years to life	Y

[15] All charges reversed on appeal.

Case	Guilty Counts				Sentence	Enh.
Gonsalves	corporal injury on his child's mother (3 counts)	Residential burglary; vehicle theft	stalking	assault	12 years, 4 months	Y
Goshen	battery on a cohabitant	assault	false imprisonment	dissuading a witness	16 months; fine	Y
Graham	?				?	?
Guerra	corporal injury - cohabitant				8 years	Y
Gunn	corporal injury - spouse				?	?
Hernandez	corporal injury - spouse				4 years (suspended after 1 year); then probation	Y
Hobley	assault with a deadly weapon (2 counts)	assault	Criminal threats		36 years to life	Y
Ilyin	injury to a cohabitant	false imprisonment	possession of a deadly weapon		4 years	?
Johnson	kidnapping	false imprisonment	bodily injury on child's mother (2 counts)	battery	6 years	N
Martinez	assault	terrorist threat			9 years	Y
McCart	aggravated mayhem	assault (2 counts)	criminal threat		life plus 4 years, 8 months	?
McClure	corporal injury - cohabitant				?	?
McDowell	battery	threat	false imprisonment	child endangerment	25 years to life	Y
McGowan	stalking	battery			3 years, 4 months	?
Mijares	rape (4 counts)	assault with a deadly weapon	criminal threats	dissuading a witness	25 years to life[16]	N

[16] Remanded for resentencing.

Case	Guilty Counts				Sentence	Enh.
Morgan	assault (2 counts)	battery on a date (2 counts)	false imprisonment		?	?
Namowicz	corporal injury to mother of his child	false imprisonment	criminal threat		35 years to life	Y
O'Brien	felony injury to spouse	criminal threat	assault (2 counts)	making annoying phone calls	43 years to life	Y
Phat	assault with a deadly weapon	false imprisonment			4 years	Y
Piper	aggravated assault (2 counts)	terrorist threat	stalking		40 years to life	N
Rush	corporal injury – spouse (2 counts)	dissuading a witness	assault (2 counts)		13 years	Y
Salinas	corporal injury - spouse				2 years; fine	N
Simpson	kidnapping (2 counts)	assault with great bodily harm (2 counts)			17 years, 8 months	Y
Singleton	torture	rape	sodomy	felon in possession of a firearm	?	Y
Smith	corporal injury - cohabitant (3 counts)				29 years to life	Y
Sosa	2nd degree murder				15 years to life	N
Terra	spousal battery				25 years to life	Y
Terry	kidnapping	corporal injury - cohabitant	stalking	criminal threats	28 years	Y
Torres	rape (2 counts)	forcible oral copulation	criminal threat (2 counts)	corporal injury on mother of child	?	Y
Turner	assault – likely to cause great bodily injury	resisting arrest			9 years, 4 months	Y

Case	Guilty Counts				Sentence	Enh.
Vandersteen	battery w/ serious bodily injury				12 months, then probation	N
Vernon	corporal injury to spouse	assault			5 years	Y
Virabutsady	corporal injury - cohabitant				6 months, then probation	N
Watts	corporal injury - cohabitant	assault – likely to cause great bodily injury			9 years	Y
Williams 2002	criminal threats (4 counts)	dissuading a witness (5 counts)	cruelty to a child (4 counts)		25 years to life	Y
Williams 2000[17]	corporal injury - spouse	assault with a deadly weapon			1 year, then probation	Y
Wright	rape (2 counts)	oral copulation (3 counts)	sodomy (2 counts)	dissuading a witness (2 counts)	18 years	?
Wu	rape (3 counts)	corporal injury – spouse	dissuading a witness	false imprisonment	15 years	?
Zarazua[18]	assault – likely to cause great bodily injury	Corporal injury			3 years	N

[17] Reversed on appeal.
[18] Reversed on appeal.

Bibliography

Adams, Jill E. 2004. "Unlocking Liberty: Is California's Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?" *Berkeley Women's Law Journal* 19:217-245.

Allen, Hillary. 1987. *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions*. Open University Press: Milton Keynes.

Anderson, Kristin L. 1997. "Gender, Status, and Domestic Violence: An Integration of Feminist and Family Violence Approaches." *Journal of Marriage and Family* 59:655-669.

Anderson, Kristin L. and Debra Umberson. 2001. "Gendering Violence: Masculinity and Power in Men's Accounts of Domestic Violence." *Gender & Society* 15:358-380.

Aramburu, Beatriz and Barbara C. Leigh. 1991. "For Better or Worse: Attributions about Drunken Aggression toward Male and Female Victims." *Violence and Victims* 6:31-41.

Arrigo, Bruce A. 1996. *The Contours of Psychiatric Justice: A Postmodern Critique of Mental Illness, Criminal Insanity, and the Law*. New York: Garland.

Association, Harvard Law Review. 1993. "Developments in the Law—Legal Responses to Domestic Violence: Battered Women who Kill their Abusers." *Harvard Law Review* 106:1574-1597.

Ayyildiz, Elisabeth. 1995. "When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante." *The American University Journal of Gender & the Law* 4:141-166.

Baker, Scott Gregory. 1994. "Deaf Justice? Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107." *Golden Gate University Law Review* 24:99-130.

Baker, Phyllis L. 1997. "And I Went Back: Battered Women's Negotiation of Choice." *Journal of Contemporary Ethnography* 26:55-74.

Barnett, Ola W. 2000. "Why Battered Women Do Not Leave, Part 1." *Trauma, Violence, & Abuse* 1:343-372.

Barnett, Ola W. and Cheok Y. Lee. 1997. "Gender Differences in Attributions of Self-Defense and Control in Interpartner Aggression." *Violence Against Women* 3:462-481.

Bartlett, Katharine T. 1990. "Feminist Legal Methods." *Harvard Law Review* 103:829-888.

Becker, Howard S. (1964). "Problems in the Publication of Field Studies." Pp. 267-284 in *Reflections on Community Studies*, edited by A.J. Vidich, J. Bensman and M.R. Stein. New York: Wiley.

Bem, Sandra Lipsitz (1993). *Lenses of Gender: Transforming the Debate on Sexual Inequality*. New Haven, CT: Yale University Press.

Benton, Ted and Ian Craib. 2001. *Philosophy of Social Science: The Philosophical Foundations of Social Thought*. New York: Palgrave.

Berger, Peter L. and Thomas Luckmann. 1966. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. New York: Anchor Books.

Bourdieu, Pierre. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38:805-853. Translated by R. Terdiman.

Bowker, Archibald Edgar. 1961. *A Lifetime with the Law*. London: A.H. Allen.

Brookman, Fiona. 1999. "Accessing and Analysing Police Murder Files." Pp. 46-61 in *Qualitative Research in Criminology*, edited by E. Wincup. Brookfield, VT: Ashgate.

Browne, Angela. 1987. *When Battered Women Kill*. New York: The Free Press.

Buel, Sarah M. 1999. "Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay." *The Colorado Lawyer*, 28:19-28.

Bumiller, Kristin. 1998. "Fallen Angels: The Representation of Violence Against Women in Legal Culture." Pp. 37-53 in *Criminology at the Crossroads: Feminist Readings in Crime and Justice*, edited by L. Maher. New York: Oxford University Press.

Burns, Thomas Jerome. 1999. "Rhetoric as a Framework for Analyzing Cultural Constraint and Change." *Current Perspectives in Social Theory* 19:165-185.

Buzawa, Eve S. and Carl G. Buzawa. 1996. *Domestic Violence: The Criminal Justice Response*. Thousand Oaks, CA: Sage.

Cardozo, Benjamin N. 1921. *The Judicial Process*. New Haven, CT: Yale University Press.

Carney, Thomas F. 1979. *Content Analysis: A Technique for Systematic Inference for Communications*. Winnepeg, Canada: University of Manitoba Press.

Carrington, Kerry. 1994. "Postmodern and Feminist Criminologies: Disconnecting Discourses?" *International Journal of the Sociology of Law* 22: 261-277.

Chilton, Paul A. and Christina Schäffner. 1997. "Discourse and Politics." Pp. 206-230 in *Discourse as Social Interaction*, edited by T. van Dijk. London: Sage.

Chng, Huang Hoon. 2002. *Separate and Unequal: Judicial Rhetoric and Women's Rights*. John Benjamins: Philadelphia.

Chodorow, Nancy. 1978. *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*. Berkeley, CA: University of California Press.

Coates, Linda J. 1996. "Discourse Analysis of Sexual Assault Trial Judgments: Causal Attributions and Sentencing." Ph.D. dissertation, Department of Psychology, University of Victoria.

Coates, Linda J., Janet Beavin Bavelas and James Gibson. 1994. "Anomalous Language in Sexual Assault Trial Judgement." *Discourse and Society* 5:189-206.

Colman, Andrew M. (2001). *The Dictionary of Psychology*. Oxford: Oxford University Press.

Crocker, Diane H. 2002. "Regulating Intimacy: Judicial Decision-Making in Cases of Wife Assault." Ph.D. dissertation, Department of Psychology, York University, Toronto, Canada.

Daly, Kathleen and Lisa Maher. 1998. "Crossroads and Intersections: Building from Feminist Critiques." Pp. 1-17 in *Criminology at the Crossroads: Feminist Readings in Crime and Justice*, edited by K. Daly and L. Maher. New York: Oxford University Press.

Daniels, Cynthia. 1997. "The Paradoxes of State Power." Pp. 1-4 in *Feminists Negotiate the State: The Politics of Domestic Violence*, edited by C. Daniels. New York: University Press of America.

Danforth, Gay and Bobbie L. Welling. 1996. "Achieving Equal Justice for Women and Men in the Courts: Final Report of the Judicial Council Advisory Committee on Gender Bias in the Courts." San Francisco: Judicial Council of California

DeBrovner, Caroline Joy. 2000. "Stigma, Sex and Law: The Conflation of Sex, Gender, and Sexual Orientation in Legal Discourse." Ph.D. dissertation, Department of Sociology, New York University.

Denzin, Norman K. and Yvonna S. Lincoln. 1998. "Introduction: Entering the Field of Qualitative Research." Pp. 1-34 in *Collecting and Interpreting Qualitative Materials*, edited by Y. S. Lincoln. Thousand Oaks, CA: Sage.

Diamond, Gregory A. 2002. “To Have but Not to Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers?” *Columbia Law Review* 102:729-773.

Dobash, R. Emmerson and Russell P. Dobash. 1979. *Violence Against Wives*. New York: Free Press.

Downs, Donald Alexander. 1996. *More than Victims: Battered Women, the Syndrome Society, and the Law*. Chicago: The University of Chicago Press.

Dubin, Danielle R. 1995. “A Woman's Cry for Help: Why the United States Should Apply Germany’s Model of Self-Defense for the Battered Woman.” *ILSA Journal of International & Comparative Law* 2:235-265.

Edwards, Susan S.M. 1981. *Female Sexuality and the Law: A Study of Constructs of Female Sexuality as they Inform Statute and Legal Procedure*, edited by P. Wiles. Oxford: Martin Robertson.

_____. 1994. “From Victim to Defendant: The Life Sentence of British Women.” *Case Western Reserve Journal of International Law* 26:261-293.

Einstadter, Werner and Stuart Henry. 1995. *Criminological Theory: An Analysis of its Underlying Assumptions*. New York: Harcourt Brace College Publishers.

Eisikovits, Zvi. 1999. “Talking Control Metaphors Used by Battered Women.” *Violence Against Women* 5:845-868.

Epstein, Lee and Gary King. 2002. “The Rules of Inference.” *The University of Chicago Law Review* 69: 1-133.

Ewing, Charles Patrick. 1987. *Battered Women who Kill: Psychological Self-Defense as Legal Justification*. Lexington, MA: Lexington Books.

Faigman, David L. & Wright, Amy J. 1997. “The Battered Woman Syndrome in the Age of Science.” *Arizona Law Review* 39:67-115.

Fairclough, N. 1992. *Discourse and Social Change*. Cambridge: Polity Press.

_____. 2000. *Language and Power*. 2d ed. New York: Longman.

Feld, Scott L. and Murray A. Straus. 1989. “Escalation and Desistance of Wife Assault in Marriage.” *Criminology* 27:141-161.

Felter, Elizabeth. 1997. “A History of the State's Response to Domestic Violence.” Pp. 5-19 in *Feminists Negotiate the State: The Politics of Domestic Violence*, edited by C. Daniels. New York: University Press of America.

Finkel, Norman J. 1995. *Commonsense Justice: Jurors' Notions of the Law*. Cambridge, MA: Harvard University Press.

Flax, Jane. 1997. "Postmodernism and Gender Relations in Feminist Theory." Pp. 170-178 in *Feminisms*, edited by S. Kemp and J. Squires. New York: Oxford University Press.

Foster, Lynne A., Veale Christine Mann, and Catherine Ingram Fogel. 1989. "Factors Present when Battered Women Kill." *Issues in Mental Health Nursing* 10:273-284.

Foucault, Michel. 1972. *The Archaeology of Knowledge*. Translated by A.M. Sheridan Smith. New York: Pantheon Books.

Foucault, Michel. 1984. *The History of Sexuality*. New York: Vintage Books.

Frankel, Lois J. 1979. "Sex Discrimination in Criminal Law." Pp. 287-305 in *The Criminology of Deviant Women*, edited by R. Simon. Boston: Houghton Mifflin.

Gee, James Paul. 1999. *An Introduction to Discourse Analysis: Theory and Method*. New York: Taylor and Francis.

Gelles, Richard. 1993. "Through a Sociological Lens: Social Structure and Family Violence." Pp. 31-46 in *Current Controversies in Family Violence*, edited by Richard Gelles and D.R. Loseke. Newbury Park: Sage.

Gewirtz, Paul. 1996. "Narrative and Rhetoric in the Law." *Law's Stories: Narrative and Rhetoric in the Law*, edited by P. Brooks and P. Gewirtz, New Haven: Yale University Press.

Gibbons, John. 1994. "Introduction: Language Constructing Law." Pp. 3-10 in *Language and the Law*, edited by J. Gibbons. London: Longman.

Gillespie, Cynthia K. 1989. *Justifiable Homicide: Battered Women, Self-Defense and the Law*. Columbus: Ohio State University Press.

Glaser, Barney G. and Anslem L. Strauss. 1967. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Chicago: Aldine.

Goodrich, Peter. 1987. *Legal Discourse*. London: MacMillan.

Grana, Sheryl J. 2002. *Women and (In)Justice: The Criminal and Civil Effects of the Common Law on Women's Lives*. Boston: Allyn and Bacon.

Habermas, Jurgen. 1977. *Erkenntnis und Interesse*. Frankfurt: Suhrkamp.

Harding, Sandra. 1997. "Is There a Feminist Method?" Pp. 160-170 in *Feminisms*, edited by S. Kemp and J. Squires. New York: Oxford University Press.

Harrell, Adele and Barbara E. Smith. 1996. "Effects of Restraining Orders on Domestic Violence Victims." Pp. 214-242 in *Do Arrests and Restraining Orders Work?* edited by C. G. Buzawa. Thousand Oaks, CA: Sage.

Hart, Barbara. 1996. "Battered Women and the Criminal Justice System." Pp. 98-114 in *Do Arrests and Restraining Orders Work?* edited by C. G. Buzawa. Thousand Oaks, CA: Sage.

Henley, Nancy, Michelle Miller, and Jo Anne Beazley. 1993. "Syntax, Semantics, and Violence in the Print Media." Presented at the Society of Experimental Social Psychology Meetings, October, Santa Barbara, CA.

Higgins, Tracey E. 1995. "By Reason of their Sex: Feminist Theory, Postmodernism, and Justice." *Cornell Law Review* 80:1536-1594.

Hollander, Jocelyn A. 2002. "Resisting Vulnerability: The Social Reconstruction of Gender in Interaction." *Social Problems* 49:474-496.

Honkatukia, Paivi. 2001. "Rough Sex? Understandings of Rape in Finnish Police Reports." *Journal of Scandinavian Studies in Criminology and Crime Prevention* 2:15-30

Howarth, David. 2000. *Discourse*. Buckingham, England: Open University Press.

Howe, Adrian. 1987. "Social Injury Revisited: Towards a Feminist Theory of Social Justice." *International Journal of Sociology and Law* 15:432.

Hoyle, Carolyn. 1998. *Negotiating Domestic Violence: Police, Criminal Justice and Victims*. New York: Oxford University Press.

Jäger, Siegfried. 2001. "Discourse and Knowledge: Theoretical and Methodological Aspects of a Critical Discourse and Dispositive Analysis." Pp. 32-62 in *Methods of Critical Discourse Analysis*, edited by R. Wodak and M. Meyer. Thousand Oaks, CA: Sage.

Keitner, Chimene I. 2002. "Victim or Vamp? Images of Violent Women in the Criminal Justice System." *Columbia Journal of Gender and Law* 11:38-87.

King, Roy D. and Emma Wincup. 2000. *Doing Research on Crime and Justice*. New York: Oxford University Press.

Klein, Andrew R. 1996. :Re-Abuse in a Population of Court-Restrained Male Batterers: Why Restraining Orders don't Work." Pp. 192-213 in *Do Arrests and Restraining Orders Work?* edited by C. G. Buzawa. Thousand Oaks, CA: Sage.

Klis, Deborrah Ann. 1994. “Reforms to Criminal Defense Instructions: New Patterned Jury Instructions which Account for the Experience of the Battered Woman who Kills her Battering Mate.” *Golden Gate University Law Review* 24: 131-168.

Kvale, Steiner. 2002. “The Social Construction of Validity.” Pp. [] in *The Qualitative Inquiry Reader*, edited by Y. S. Lincoln. Thousand Oaks, CA: Sage.

LaFree, Gary. 1989. *Rape and Criminal Justice: The Social Construction of Sexual Assault*. Belmont, CA: Wadsworth.

Lakoff, George & Johnson, Mark. 1980. *Metaphors We Live By*. Chicago: University of Chicago Press.

Lamb, Sharon. 1991. “Acts without Agents: An Analysis of Linguistic Avoidance in Journal Articles on Men who Batter Women.” *American Journal of Orthopsychiatry* 61:250–257.

_____. 1996. *The Trouble with Blame: Victims, Perpetrators, and Responsibility*. Cambridge, MA: Harvard University Press.

Leigh, Barbara C, and Beatriz Aramburu. 1994. “Responsibility Attributions for Drunken Behaviour: The Role of Expectancy Violation.” *Journal of Applied Social Psychology* 24:115-135.

Leonard, Elizabeth Dermody. 2001. “Convicted Survivors: Comparing and Describing California's Battered Women Inmates.” *Prison Journal* 81:73-86.

Leubsdorf, John. 2001. “The Structure of Judicial Opinions.” *Minnesota Law Review* 86:447-496.

Lincoln, Yvonna S. 2002. “Emerging Criteria for Quality in Qualitative and Interpretive Research.” Pp. 327-345 in *The Qualitative Inquiry Reader*, edited by Y. S. Lincoln. Thousand Oaks, CA: Sage.

Lincoln, Yvonna S. and E.G. Guba. 1985. *Naturalistic Inquiry*. Beverly Hills, CA: Sage.

Litosseliti, Lia. 2002. “’Head to Head’: Gendered Repertoires in Newspaper Arguments.” Pp.129-148, in *Gender Identity and Discourse Analysis*, edited by L. Litosseliti and J. Sunderland. Philadelphia: John Benjamins.

Loseke, Donileen R. and Spencer E. Cahill. 1984. “The Social Construction of Deviance: Experts on Battered Women.” S*ocial Problems* 31:296-310.

Lowman, John, and Brian D. MacLean. 1992. *Realist criminology: Crime Control and Policing in the 1990s*. Buffalo: University of Toronto Press.

MacMartin, Clare. 2002. "(Un)reasonable Doubt? The Invocation of Children's Consent in Sexual Abuse Trial Judgements." *Discourse and Society* 13:9-40.

Maley, Yon. 1994. "The Language of the Law." Pp. 11-50 in *Language and the Law*, edited by J. Gibbons. New York: Longman.

Marshall, Catherine and Gretchen B. Rossman. 1999. *Designing Qualitative Research*. Thousand Oaks, CA: Sage Publications.

Marvasti, Amir B. 2004. *Qualitative Research in Sociology: An Introduction*. Thousand Oaks, CA: Sage.

Matoesian, Gregory M. 1993. *Reproducing Rape: Domination through Talk in the Courtroom*. Chicago: The University of Chicago Press.

Maxfield, Michael G. and Earl Babbie. 1998. *Research Methods for Criminal Justice and Criminology*. Belmont, CA: West/Wadsworth.

Maxwell, Joseph A. 1996. *Qualitative Research Design: An Interactive Approach*, vol. 41, edited by D. J. Rog. Thousand Oaks, CA: Sage.

Mercer, Kathryn L. 1998. "A Content Analysis of Judicial Decision-Making: How Judges use the Primary Caretaker Standard to Make a Custody Decision." *William & Mary Journal of Women & the Law* 5:1-149.

Mertz, Elizabeth. 1996. "Consensus and Dissent in United States Legal Opinions: Narrative Structure and Social Voices." Pp. 135-157 in *Disorderly Discourse: Narrative, Conflict, and Inequality*, edited by C. L. Briggs. New York: Oxford University Press.

Messerschmidt, James. 1993. *Masculinities and Crime: Critique and Reconceptualization of Theory*. Totowa, N.J. Rowman and Littlefield.

Miller, Binny. 1994. "Give them Back their Lives: Recognizing Client Narrative in Case Theory." *Michigan Law Review* 94:485-576.

Miller, Michelle Hughes. 1997. *The Criminalization of Motherhood: The Intersection of Gendered Policy and Familial Ideology*. Ph.D. dissertation, Department of Sociology, University of Nebraska: Lincoln, NE.

Mills, C. Wright. 1959. *The Sociological Imagination*. New York: Oxford University Press.

Naranch, Laurie. 1997. "Naming and Framing the Issues: Demanding Full Citizenship for Women." Pp. 21-34 in *Feminists Negotiate the State: The Politics of Domestic Violence*, edited by C. Daniels. New York: University Press of America.

Nourse, Victoria F. 2001. "Self-Defense and Subjectivity." *University of Chicago Law Review* 68:1235-1307.

O'Barr, William M. 1982. *Linguistic Evidence: Language, Power, and Strategy in the Courtroom*. New York: Academic Press.

Ogle, Robbin S. and Susan Jacobs. 2002. *Self-Defense and Battered Women who Kill: A New Framework*. Westport, CT: Praeger.

Orr, Douglas A. 2000. "Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar." *Florida Bar Journal* 2:14-15.

Panel Discussion. 1993. "Courtroom, Code and Clemency: Reform in Self-Defense Jurisprudence for Battered Women." *Golden Gate University Law Review* 23:829-863.

Parrish, Janet. 1995. *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*. National Clearinghouse for the Defense of Battered Women, Retrieved December 8, 2003 (http://www.ojp.usdoj.gov/ocpa/94Guides/Trials/Trend/).

Phillips, Nelson and Cynthia Hardy. 2002. *Discourse Analysis: Investing Processes of Social Construction*. Thousand Oaks, CA: Sage.

Phillips, Scott and Ryken Grattet. 2000. "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." *Law & Society Review* 34:567-602.

Polkinghorne, Donald . 1991. "Two Conflicting Calls for Methodological Reform." *Counseling Psychologist* 19:103-114.

Powers, Penny. 2001. *The Methodology of Discourse Analysis*. Sudbury, MA: Jones and Bartlett.

Ptacek, James. 1999. *Battered Women in the Courtroom: The Power of Judicial Responses*. Boston: Northeastern University Press.

Purvis, Trevor and Alan Hunt. 1993. "Discourse, ideology, Discourse, Ideology, Discourse, Ideology . . . " *British Journal of Sociology* 93:473-499.

Rafter, Nicole Hahn. 1990. "The Social Construction of Crime and Crime Control." *Journal of Research in Crime and Delinquency* 27:376-389.

Richardson, D., and J.L. Campbell. 1980. "Alcohol and Wife Abuse: The Effect of Alcohol on Attributions of Blame for Wife Abuse." *Personality and Social Psychology Bulletin* 6:51-56.

Richman, Kimberly Dawn. 2003. "Judicial Narratives in Custody Cases Involving Gay and Lesbian Parents: 1952-1999: A Study of Indeterminacy and Meaning Making in Legal Rationales and Outcomes." Ph.D. dissertation, Department of Sociology, University of California, Irvine, CA.

Rollins, Joe. 2002. "AIDS, Law, and the Rhetoric of Sexuality." *Law and Society Review* 36:161-191.

Romkens, Renee. 2000. "Ambiguous Responsibilities: Law and Conflicting Expert Testimony on the Abused Woman Who Shot Her Sleeping Husband." *Law and Social Inquiry* 25:355-391.

Rosen, Richard A. 1993. "On Self-Defense, Immanence, and Women who Kill Their Batterers." *North Carolina Law Review* 71:371-411.

Rothenberg, Bess. 2002. "The Success of the Battered Woman Syndrome: An Analysis of How Cultural Arguments Succeed." *Sociological Forum* 17:81-103.

Ryan, Roxann M. 1998. "Prosecution Strategies in Domestic Violence Felonies: An Exploratory Study." Ph.D. dissertation, Department of Criminal Justice, University of Nebraska, Omaha, NE.

Schneider, Elizabeth M. 2000. *Battered Women and Feminist Lawmaking*. New Haven, CT: Yale University Press.

Seligman, Martin. 1975. *Learned Helplessness: Depression, Development, and Death*. New York: W.H. Freeman.

Senate Committee on Public Safety. 2004. *Battering and Its Effects (SB 1385)*. Last retrieved December 6, 2005: http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1351-1400/sb_1385_cfa_20040326_145239_sen_comm.html

Shotter, John. 1993. "Becoming Someone: Identity and Belonging." Pp. 5-27 in *Discourse and Lifespan Identity*, edited by N. Coupland and J. Nussbaum. Newbury Park: Sage.

Simon, Dan. 1998. "A Psychological Model of Judicial Decision-making." *Rutger's Law Journal* 30:1-142.

Simpson, Sally S. 1989. "Feminist Theory, Crime, and Justice." *Criminology* 27:605-631.

Skinazi, Heather R. 1997. "Not Just a 'Conjured Afterthought': Using Duress as a Defense for Battered Women Who 'Fail to Protect'." *California Law Review* 85:993-1042.

Sleutel, Martha R. 1998. "Women's Experiences of Abuse: A Review of Qualitative Research." *Issues in Mental Health Nursing* 19:525-539.

Smart, Carol. 1995. *Law, Crime and Sexuality: Essays in Feminism*. Thousand Oaks, CA: Sage.

Smart, Carol. 1998. "The Woman of Legal Discourse." Pp. 21-36 in *Criminology at the Crossroads: Feminist Readings in Crime and Justice*, edited by K. Daly and L. Maher. New York: Oxford University Press.

Smith, Carole. 2000. "The Sovereign State v Foucault: Law and Disciplinary Power." *The Sociological Review* 48:283-306.

Smith, Paige Hall, Kathryn E. Moracco, and John D. Butts. 1998. "Partner Homicide in Context." *Homicide Studies* 2:400-421.

Stanton, Elizabeth Cady, Susan B. Anthony, and Matilda Josyln Gage. 1881. *History of Woman Suffrage*, 3 volumes. New York: Fowler and Wells.

Stibbe, Arran. 2001. "Language, Power and the Social Construction of Animals." *Society and Animals* 9:145-161.

Strauss, Anselm and Juliet Corbin. 1994. "Grounded Theory Methodology; an Overview." Pp. 273-285 in *Handbook of Qualitative Research*, edited by N.K Denzin and Y.S. Lincoln. London. Sage.

Stygall, Gail. 1994. *Trial Language: Differential Discourse Processing and Discursive Formation*. Philadelphia: John Benjamins.

Sunderland, Jane and Lia Litosseliti. 2002. "Gender Identity and Discourse Analysis: Theoretical and Empirical Considerations". Pp. 1-39 in *Gender Identity and Discourse Analysis,* edited by L. Litosseliti and J. Sunderland. Philadelphia: John Benjamins.

Taslitz, Andrew E. 1999. *Rape and the Culture of the Courtroom*. New York: New York University Press.

Taylor, Stephanie. 2001. "Locating and Conducting Discourse Analytic Research." Pp. 5-48 in *Discourse as Data: A Guide for Analysis*, edited by M. Wetherell, S. Taylor, and S.J. Yates. Thousand Oaks, CA: Sage.

Taylor, Verta. 1998. "Feminist Methodology in Social Movements Research." *Qualitative Sociology* 21:357-379.

Taylor, Wendy K. 2001. "The Lived Experience of Battered Women." *Violence Against Women* 7:563-583.

van Dijk, Teun A. 2001. Critical Discourse Analysis. Pp. 352-371 in *The Handbook of Discourse Analysis*, edited by D. Schiffrin, D. Tannen, and H. Hamilton. Malden, Mass: Blackwell.

van Dijk, Teun A. 1997. “Discourse as Interaction in Society.” Pp. 1-37 in *Discourse as Social Interaction*, edited by T. van Dijk. London: Sage.

_____. 1993. “Principles of Critical Discourse Analysis.” *Discourse and Society* 4:249-283.

Van Hoecke, Mark. 2002. *Law as Communication*. Portland: Hart.

Walker, Jeffery T. and John A. Boyeskie. 2001. “The Discourse of Criminality: From Beccaria to Postmodernism.” *Critical Criminology* 10:107-122.

Walker, Lenore E. 1979. *The Battered Woman*. New York: Harper Colophon.

Walker, Lenore E.A. 1984. *The Battered Woman Syndrome*. New York: Springer Publishing Company.

------- 1989. *Terrifying Love*. New York: Harper & Row.

------- 1995. “Understanding Battered Woman Syndrome.” *Trial* 31:30-37.

Walker, Lenore E. and Angela Browne. 1985. “Gender and Victimization by Intimates.” *Journal of Personality* 53:179-195.

Weber, Max. [1903-1917]. 1949. *The Methodology of the Social Sciences.* Edited by E. Shils and H. Finch. New York: Free Press.

Websdale, Neil. 1999. *Understanding Domestic Violence*. Boston: Northeastern University Press.

Wincup, Emma. 1999. “Researching Women Awaiting Trial: Dilemmas of Feminist Ethnography.” Pp. 112-129 in *Qualitative Research in Criminology,* edited by E. Wincup. Brookfield, VT: Ashgate.

Wood, Linda A. and Rolf O. Kroger. 2000. *Doing Discourse Analysis: Methods for Studying Action in Talk and Text*. Thousand Oaks, CA: Sage.

Yllo, Kersti. 1988. “Political and Methodological Debates in Wife Abuse Research.” Pp. 28-50 in *Feminist Perspectives on Wife Abuse*, edited by K. Yllo and M. Bograd. Newbury Park, CA: Sage.

Cases:

People v. Aris, 264 Cal. Rptr. 167 (Ca. Ct. App. 1989).

People v. Humphrey, 13 Cal. 4th 1073 (1996).

People v. Kelly, 17 Cal. 3d 24 (1976).

People v. Romero, 8 Cal.4th 728 (1994).

State v. Kelly, 478 A.2d 364, 371 (N.J. 1984).

State v. Oliver, 70 N.C. 60 (1874).

Vita

Melissa Hamilton started her criminal justice career in Florida assuming the positions of corrections officer at a county jail and a police officer of a mid-size coastal city. Thereafter, at The University of Texas at Austin School of Law, she was Associate Editor of the Texas Law Review and graduated Order of the Coif. Ms. Hamilton then served for a year as a law clerk for Judge Sam Johnson on the U.S. Court of Appeals for the Fifth Circuit. After completing her clerkship, she began a 12-year posting as an Assistant General Counsel for a publicly traded software firm where she managed intellectual property, securities and corporate functions. Addressing a strong desire to return to her roots in the criminal justice arena, she entered the doctorate program in sociology at The University of Texas at Austin in 2001. Her dissertation research is focused on domestic violence and expert testimony in criminal trials.

Permanent Address: 5921 Maury's Trail, Austin, TX 78730

This dissertation was typed by the author.