TEXAS UNDERGRADUATE LAW REVIEW JOURNAL

AT THE UNIVERSITY OF TEXAS AT AUSTIN

2012

Texas Undergraduate Law Review Journal at The University of Texas at Austin

Submission Guidelines

All articles must be electronically submitted to Pedro A. Villalobos. Name, telephone number, email address and UT EID must be written on submission. The submission must contain all of the following:

- Electronic Copy of the Manuscript
- Cover Letter
- Student Release Form (Available at www.texasulr.org website)

Inquiries should be addressed to:

wiseman.philip@utexas.edu
(512) 592-9503

Volume I, Issue I. Fall 2012

ISSN: 978-1479300556
ISSN: 1479300551

Printed in the United States of America.

TEXAS UNDERGRADUATE LAW REVIEW
AT THE UNIVERSITY OF TEXAS AT AUSTIN

Volume I, Issue I. Fall 2012

Visit us online at
www.texasulr.org

The editors of this journal wish to thank The Honorable Sarah Weddington for her generous support and guidance.

They also thank The University of Texas at Austin Senate of College Councils for their generous support.

TABLE OF CONTENTS

TEXAS UNDERGRADUATE LAW REVIEW JOURNAL

Law: The Wind Beneath My Wings
One Woman's Journey to Effectuate Change As an Attorney
(Revised and Edited)[1]

Lecture[2] by The Honorable Sarah Weddington, J.D.[3]

Thank you for the opportunity to share some of my thoughts and experiences as an attorney. I am delighted to be here. I consider it a special privilege to share the work that I've been involved in and the ways in which the skills of a lawyer have enriched my life. I believe that law is a very important aspect of our society, and I believe that your mastery of the competencies of a lawyer will give you expanded options.

No one looking at a group of students like you can pick out the ones who will have a lasting impact on legal principles or on society. Nor can you see your own futures. I believe each of you is capable of impact. I am reminded of this when I think about my own law school colleagues. In 1965, I entered The University of Texas School of Law in Austin, Texas. If someone had looked at the group of entering students that I was part of and had tried to guess which of us would try a United States Supreme Court case, nobody would have guessed that it would be me. Nor would I have guessed that it would be me. A primary reason was that I was female, and it was a time when women in the legal field were so few as to be curiosities. For example, there were only five women in my entering class. Now, most law schools have approximately percent women students. In spite of the skeptics of 1965, women are being integrated into the profession.

The legal skills that you are acquiring will greatly expand your personal and professional options. I am so glad that I became a lawyer, my knowledge of law has allowed me to be involved in a variety of positions and issues.

---

[1] A revised an updated version of a lecture by Dr. Weddington delivered and published originally in the *Law Review of the Thomas M. Cooley Law School Volume 20, Number 1*.

[2] The content of this lecture has been edited for publication.

[3] Attorney Sarah Weddington is nationally known for her legal work, government service, and leadership expertise. A 1967 graduate of The University of Texas School of Law, she was the winning attorney in the United States Supreme Court case of *Roe v. Wade*, which was decided on January 22, 1973. In 1972, she became the first woman elected from Austin/Travis County to serve as a member of the Texas House of Representatives. She served three terms before resigning to become the first woman to serve as General Counsel for the U.S. Department of Agriculture, a Presidential appointment requiring U.S. Senate confirmation. In 1978, she transferred to the White House and served as Assistant to the President for President Jimmy Carter. From 1983 to 1985, she represented the State of Texas in Washington, D.C. as the first woman director of the Texas Office of State-Federal Relations. She has received numerous awards and serves in a number of volunteer positions, including that of a board member for The Foundation for Women's Resources that created The Women's Museum: An Institute for the Future. Currently she is revising and updating her book "*A Question of Choice*" for the fortieth anniversary of *Roe v. Wade*. She was an adjunct professor at The University of Texas, Austin for over 25 years.

While visiting with students here before this presentation, it became obvious that students were curious about my career path and particularly about various aspects of *Roe v. Wade*.[4] Therefore, I want to mold my remarks to respond to the indicated interests. First, I will direct my remarks to my career path and why I call law "the wind beneath my wings." Second, I will answer questions students asked about the case for which I'm probably known best, *Roe v. Wade*. And third, I want to encourage you to be of good cheer when you have doubts about whether the rigors of law school are worth the struggle and when the road ahead seems long and steep.

My career path was never one that I planned or predicted, yet it is one that has been enormously satisfying. Recently, I was introduced as being "historic." I don't think of myself that way, but I can understand why this word was used. *TIME Magazine* published a special issue called "*80 Days That Changed the World*"[5] that features me and the *Roe v. Wade* decision. *AOL* and *PBS* recently did a special computer compilation of women "who make America" called "*Makers*"[6]. I am included with many other outstanding women. January 22, 1973 is the date the decision in *Roe v. Wade* was announced. However, my career has also included a number of other venues and aspects. I was particularly conscious of these other aspects as I was constructing my personal website.[7] Looking back at my law school years, I could never have guessed the paths that the law would open for me. For me, truly the law has been "the wind beneath my wings." It has opened numerous avenues and options that started by simply helping a professor of mine.

By way of background, I am the daughter of a Methodist minister and his homemaker and teacher wife. I grew up in small, rural, Texas towns. Years ago I heard the following saying: "To be a leader, you must be comfortable feeling different." Like other children of preachers I've talked to, I always felt different. That made it easier for me to strike out in directions that were unusual for a woman. I've wondered why I've always had such a passionate interest in justice and how things "ought to be." I think it was in part because of my father's emphasis on what he called "Christian social responsibility" and his emphasis on working to improve the world for others.

I started college at a time when the "common wisdom" was that the only appropriate careers for a woman were essentially teacher, nurse, or secretary. My initial decision was to become a teacher. I have my English and speech secondary education degree. I tried extremely hard as a practice teacher to make eighth graders love the English classics such as Beowulf, but generally found the students were more interested in other subjects. I

[4] 410 U.S. 113 (1973).
[5] See Sarah Weddington, Jan. 22, 1973, *Getting the Right to Choose*, in *Eighty Days that Changed the World*, TIME Magazine., Mar. 21, 2003, at A54.
[6] For more information, see the Makers series featuring Sarah Weddington at www.makers.com/sarah-weddington-0.
[7] For more information, see The Weddington Center, The Center for Leadership, at www.weddingtoncenter.com.

have the greatest respect for eighth grade teachers but I decided to go to graduate school. I was uncertain about what I could do with a Doctorate in English. I didn't have enough chemistry to go to medical school. Law school was open to students who had very good grades regardless of their particular degree. So I focused on law school.

During my senior year of college I talked to people in my rural Texas town about possible options. I discovered that no one knew a woman attorney. I knew only one male attorney, a man in my father's church. Seeking information and guidance, I made an appointment to talk to the Dean of the small, Methodist-affiliated college in Abilene, Texas, where I was a student. I explained that I was thinking of going to law school. His response was, "You can't." I asked, "Why not? I have very good grades." He told me that no woman from the college has ever gone to law school and that it would be too tough for me. As you might guess, that was the very moment I decided I *was* going to law school.

To the extent that it is possible for anyone to "love" law school, I did. The other students were more varied and intellectual than my undergraduate colleagues. The subjects were interesting and challenging. As graduation approached, I started applying for jobs. During my law school years, when people asked what I planned to do, my response was that I wanted to be a general practitioner in some small Texas town. As I discovered the difficulty of securing a job offer, I expanded the type of jobs that I would consider.

Women in my law class commiserated about our lack of job offers. Additionally, we took umbrage at the fact that firms were paying for male students to fly to various cities for interviews, but they did not offer the same courtesy to female students. Eventually, Mettie L. Brown, the head of the University of Texas School of Law placement office, essentially told the law firms that the Dean would no longer let them use the law school facilities to interview students unless they provided transportation for both the men and the women invited to a firm for follow-up interviews after initial interviews at the school. She and our Dean, W. Page Keeton, are due the credit for opening new opportunities for women. I continue to be grateful to each of them.

As I remember a conversation several years ago with Ms. Brown, I was a “break-through.” I was the first woman from my law school to have her way paid to an out-of-town interview. A firm paid my travel expenses from Austin to Dallas. The distance wasn't far, but the change in law firm policies was tremendous. However, I did not get an offer from that or any other firm. In fact, at that Dallas firm, the senior partner in charge of the interview made comments like, "Lawyers often have to work late but women have to be home to cook dinner. How could you do both," and, "To train a young lawyer we have to be able to cuss him out, but we couldn't cuss you - you're a woman. How would we ever train you?" Eventually, the firm explained that other candidates were better suited to their needs.

The job offer I finally secured was one working for my evidence professor, John Sutton, Jr., a man who later served as Dean of the University of Texas School of Law. Professor Sutton was the Reporter for an American Bar Foundation committee, which was rewriting the Canons of Ethics. Its work product was the Code of Professional Responsibility which was later adopted by the American Bar Association and many state bar associations. I was hired to be Professor Sutton's assistant on that project. My duties included extensive research and drafting; the opportunities included traveling to many key American cities and working with some of the most outstanding lawyers of the time. Obviously, my legal training was key to my securing that opportunity.

I worked on *Roe v. Wade* around this time, and will speak more about the case in a few minutes. While working on *Roe*, I obviously did not know whether the case would be won or lost. In 1971, a group of women in Austin felt strongly that several pieces of legislation favorable to women needed to be passed by the Texas legislature. But our results during the 1971 legislative session were nonexistent. We decided that the only way for women's issues to be treated seriously was for women to be members of the Texas Legislature, and that the only way to achieve that was for women to learn how to run campaigns for other women and to be the candidates.

A particular scandal in Texas politics provided an opening for new people to run and hopefully win. This group of women decided that I should be the candidate and they would organize the campaign. If I won, I would be the first woman from Austin/Travis County to serve in the state legislature, and we could try to pass several legislative measures.

Victory was ours on election night, November 1972. I was not required to have a law degree in order to run, but law had been a traditional route for male elected officials. I believe the fact that I had a law degree was significant in giving my candidacy credibility, especially so early in political efforts by women. Also, the skills of a lawyer were immensely useful in being an effective legislator.

The 1973 session of the Texas legislature contained more women than ever before. In the House there were five women among the 150 members. Nonetheless, those five, with support from various male members, passed a number of significant reforms regarding women's issues. An equal credit bill was passed. Another successful bill prevented the firing of public school teachers because of pregnancy. A rape reform measure was passed. Prior to its passage, for example, a woman had to prove that she had resisted to the maximum extent possible despite the fact that experts recommended against fervent resistance, fearing that if a woman were attacked, she was likely to be hurt to a greater extent if she resisted than if she did not. In Texas rape trials, the woman's character and past sexual conduct was often more on trial than whether intercourse without consent had occurred. We changed that. I was reelected in 1974 and 1976.

In 1977, if you had asked me what I planned to do next, I would have said, “I'm staying right here in the Texas legislature.” However, I got a call from Washington, D.C., asking if I would be interested in becoming General Counsel for the U.S. Department of Agriculture (USDA). The caller presented it as an opportunity to work with the Administration of President Jimmy Carter, and summarized the important work of the Department. The caller also pointed out that I would be the first woman General Counsel for the USDA and insisted that it was an opportunity that I couldn't pass up. I declined but the caller urged that I talk to friends and political colleagues about the decision. I did and they said, “Sarah, Washington is a place with no country and western music, no barbecue, and no Mexican food; it is not civilized.” Despite that, I ended up saying "yes.” I was confirmed by the U.S. Senate and moved to Washington. I would not have been eligible for that position had I not had my law degree.

Being general counsel was a challenging and satisfying experience. One of my clients was the U.S. Forest Service, and one of my most memorable experiences was an eight-day trip via horseback into the Bob Marshall Wilderness Areas of Montana, managed by the Forest Service. We were planning for implementation of legislation that Congress had passed to create a system of wild and scenic rivers. The position of general counsel gave me an opportunity to begin the process of changing the face of the General Counsel's office of the USDA and hiring a diverse contingent of young lawyers.

My tenure, however, was shorter than I had planned. I got a call from the White House a year later that led to a job offer to work directly for President Carter in the West Wing. He and his wife Rosalynn Carter are people I greatly admire. (A friend recently commented that President Carter is the only President who used the Presidency as a steppingstone to doing more important things.) Working in his administration was a fabulous opportunity to be involved at the heart of governmental issues and events. I worked in an office just above the Oval Office, spent occasional weekends at Camp David, flew aboard Air Force One, attended state dinners, and participated in some of the most memorable events of the Carter years. Legal skills were not a prerequisite for the position, but I was much more effective because I had them. They were invaluable in working on administrative regulations and Congressional issues, in recommending candidates for federal appointments, in helping with the confirmation process (including judicial confirmations), and in preparing and presiding at a number of briefings and White House ceremonies.

As each of you know, the Carter team lost the election in November of 1980. Although we were incredibly tired and dejected the morning after the defeat, we came into work despite being incrediby tired and dejected. Each of us, including me, had just lost employment and - even more important - the chance to utilize the resources and prestige of the White House to impact change. Previously as we entered the White House, we were greeted by a display of pictures from the previous week's important events. The day

after the election, there were no pictures. Instead, an article was posted that was entitled "*Fifty Things You Can Make for Christmas for Under Five Dollars*."

Each departing administration has from election day to Inauguration Day for the transition to a new administration. Those who have worked in the White House essentially have two and a half months to clear out their offices. All files and paper must be packed and sent to the location where the new presidential library will be. The final thank-you parties and events before departure must be organized. And on Inauguration Day, the outgoing President gets a last trip home on Air Force One.

For me that day began other adventures. Over the next several years, I held a number of positions. One was working for Jim Wolfensohn in managing his family foundation. It was a wonderful introduction to the world of international philanthropy. Mr. Wolfensohn later was head of the World Bank for 10 years. Another was becoming the first endowed professor at the University of New Mexico School of Law. The laid-back atmosphere of Albuquerque was a welcome change from the energy- charged atmosphere of D.C.. In addition to teaching ethics, I had an opportunity to learn from others some of the aspects of law regarding Indian tribes. Obviously, legal training was necessary to teach law; it was also a help in learning the issues of philanthropy.

To quickly summarize more recent years, I became the first woman to head the Texas Office of State-Federal Relations. I left that to return to a traditional law practice and pick up the work I had done to support myself while a member of the Texas Legislature (a position that paid $400 monthly), and again became a Professor. I also write and speak extensively.

I am certain that new adventures are still ahead. I am so grateful that I went to law school and gained the skills of a lawyer. Those skills truly have been "the wind beneath my wings" and have let me soar in ways I could never have previously imagined for myself. I believe that the skills you are acquiring will likewise be the wind beneath your wings, and that those skills will give you entree to places and opportunities that you don't today visualize for yourself. I believe that on some future day you will say, just as I do, "I'm so glad that I am a lawyer."

Let us return to the discussion of *Roe v. Wade*. The questions that I was asked include: "How did you get involved in the case?" "What was it like to try a case before the United States Supreme Court?" "What is likely to happen regarding the case doctrine in the future?"

When I look back at *Roe v. Wade* and its humble beginning, it is very difficult to realize that January 22, 2013, will be the fortieth anniversary of the decision. If, on the date of the decision in 1973, I had been told that we would still be talking about *Roe* as a

pressing controversy forty years later, I would never have believed it. Yet it is very much a part of every election, a part of public debate, and a part of evolving legal issues. Although *Roe* in some aspects is a matter of history, it is also a matter of current-day concern.

During the time I was working for Professor Sutton, a group of women, who were primarily graduate students at the University of Texas at Austin, approached me and asked for legal help. The students were part of a volunteer counseling effort to provide information about how to prevent pregnancy. But, they explained, some of the women who came to them were already pregnant and wanted information about abortion. Texas law made abortion illegal except to save the life of a woman. The students had gathered information about legal places for abortion in states such as California and New York, and they had gathered information about the best and the worst places for illegal abortion in places like Texas and Mexico. Their query essentially was, "May we tell women the good places to go, or will we be prosecuted as accomplice to abortion? What would happen if we told reporters for the campus radio or newspaper about the information we've collected?"

If those women who approached me in 1969 about whether they could tell others about the availability of legal and of illegal abortion procedures had instead asked whether I would be willing to argue a U.S. Supreme Court case, I probably would have replied, "No way!" At that point, I had handled uncontested divorces, wills for people with no money, and one adoption for my uncle. That was my entire case experience.

The women were asking whether giving out information about where to get safe abortions could subject them to charges as accomplices to abortion; I did not know the answer to their question. Abortion was not something I had studied in law school; there had never been a Supreme Court case on the subject. *Griswold v. Connecticut*,[8] a Supreme Court case involving a statute that made the use of a contraceptive device a criminal offense, was decided in 1965 while I was attending law school. It established a right of privacy within a marriage, but I don't remember studying that case in law school. I told the women I would go to the law school library and try to find the answer to their question.

Later in writing about the *Roe* case, I interviewed some of those women. I asked, "Why did you come to me for help? Why didn't you seek out someone with litigation experience?" Their answer essentially was that they wanted a woman lawyer, and I was the only woman lawyer they knew of. And they were looking for someone willing to do the legal work for free; they hoped I would be willing. I was.

[8] 381 U.S. 479 (1965).

As research progressed, I asked Linda Coffee, another woman from my law school class, for help. Coffee was working for a bankruptcy firm in Dallas after a clerkship with a federal judge. She also began to volunteer time to work on the abortion issue. Each of us was discussing with other lawyers the possibility of a suit to challenge the constitutionality of the Texas anti-abortion statute, the type of plaintiff or plaintiffs that would be suitable, and other aspects of the potential litigation. During that process, a male lawyer in Dallas who was a friend of Coffee's explained that an unmarried pregnant woman had come to him wanting an abortion. He had told her that abortion was illegal, but that he would help her with an adoption. He also told her about Coffee's interest in challenging the Texas statute, and Linda soon met with her. We called that woman "Jane Roe" in what became a class action on behalf of “all women who were or might become pregnant in the future and want the option of abortion.” The defendant was Henry Wade, the District Attorney of Dallas, and the person responsible for enforcing the statute in question.

The suit was filed in federal court in Dallas. It asked first that the Texas anti-abortion law be declared unconstitutional and second that an injunction be granted against continuing enforcement of the statute. The case was assigned to a three-judge panel. There were three key issues in the case: Is there a fundamental interest at issue, or, worded differently, is pregnancy fundamental? Is there a Constitutional issue involved? And, does the state have a compelling reason to regulate? After hearing the case, the three-judge panel held that the Texas anti-abortion statute was unconstitutional.[9] However, the court refused to grant the requested injunction; the judges said they presumed that a state law-enforcement official - like a district attorney - would abide by the judgment of a federal court.

The next day, however, defendant Wade announced publicly that he would continue to prosecute under the statute. I do not believe that he meant to help us, but in fact he did, perhaps inadvertently. At that time, federal procedure allowed a direct appeal to the U.S. Supreme Court when a state law has been declared unconstitutional but state officials were continuing to enforce it. Based on Wade's announcement, we filed an appeal directly to the Supreme Court and filed a protective appeal to the Fifth Circuit. We asked the Fifth Circuit to hold the door open for the *Roe* case if the Supreme Court denied *certiorari*.

You can imagine how surprised I was when I received notice from the Supreme Court that it had granted *certiorari* and would hear *Roe v. Wade*. The case quickly became the focus of national attention. Pro-choice lawyers from all over the country provided suggestions about various avenues of research and what grounds to argue. Our task was twofold: to prepare the principal plaintiffs' brief and to prepare for oral argument.

[9] See *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

Other attorneys began the process of preparing and filing *amicus curiae* (or "friend of the court") briefs. Many *amicus* briefs were filed in our favor. One was filed by religious organizations, such as the Board of Christian Social Concerns of the United Methodist Church, a large segment of Presbyterians and also of Episcopalians, the Unitarian Universalist Alliance, and several Jewish groups, among others. Another *amicus* brief was filed by a welfare-rights organization. It discussed the effects of a pregnancy on teenagers and on women with few assets., focusing on the hurdles they face trying to support themselves and their families.

There was another *amicus* brief known as the "doctors' brief." Doctors played a very important role in the case. For example, one of the little-known facts about *Roe* is that the four affidavits filed with the petition, in addition to Jane Roe's, were from doctors. Three of the physicians were in charge of departments of obstetrics and gynecology at our largest Texas medical schools in Dallas, San Antonio, and Galveston. These physicians, along with their residents and interns, were responsible for treating women who came to the public hospitals affiliated with the medical schools, hospitals which had large emergency room facilities and were the source of care for many Texas indigents and its poorer citizens. Many of the women they treated were suffering from the consequences of self-induced or illegal abortions. The affidavits generally stated that something had to be done about this situation. The costs in terms of the health and lives of women were too great. The fourth affidavit from a doctor was one submitted by the Director of the University of Texas Student Health Center. My memory is that the Center had a policy that birth control would not be given to a female student unless she certified that she was within six weeks of marriage. The policy was based on the presumption that a woman needed to start the pill six weeks before marriage to be protected on her wedding night. The Director talked about the large number of students seen at the health center who were experiencing an interruption of menses and his concern for the medical perils of what those female students might do. The *amicus* brief that we called the "doctors' brief" was one that included the American College of Obstetricians and Gynecologists.

Other amicus briefs in our favor included one submitted by a large group of law school deans and constitutional law professors, one submitted by a great number of women's organizations, such as the National Organization for Women, the National Women's Political Caucus, and others.

Conversely, as you would expect, there were *amicus* briefs filed against our position. The Catholic Diocesan Attorney's Association and Citizens for the Unborn are some examples. There were also briefs from some law professors and physicians who were opposed. In sum, the briefs filed with the Supreme Court in *Roe* stacked up to be over a foot high.

The most directly relevant U.S. Supreme Court case was the 1965 case of *Griswold v. Connecticut*.[10] Connecticut, and some other Eastern states had criminal laws prohibiting the use of contraception, a prohibition that extended to married couples. Estelle Griswold, the Director of the New Haven Planned Parenthood, along with physician Dr. Lee Buxton, gave a woman a contraceptive device. Griswold and Dr. Buxton were arrested, prosecuted, and convicted of being accomplices to the use of a contraceptive device. The Supreme Court's opinion held that there is a right to privacy, which includes the right to decide whether to bear or beget a child. I argued in Roe that the right of privacy should also include the decision of whether to continue or terminate a pregnancy.

The Supreme Court allows thirty minutes per side for oral argument, or one hour total per case. In theory the Justices have read the briefs and their clerks have briefed them. Counsel are there to answer the questions of the Justices.

Informal moot courts were one of the primary ways that I prepared for oral argument. Law students, people interested in the cause, and even some of my law professors helped me prepare by firing questions at me. Frankly, I never knew if the law professors truly wanted me to win or whether they just loved pretending that they were Supreme Court Justices.

The Supreme Court finally scheduled oral argument for December 13, 1971. After arriving in Washington the day before oral argument, I went to the Supreme Court building to see the courtroom and to learn where I should stand for oral argument. I took notice of the three lights on the podium for counsel: green for "begin," yellow for "time is about up," and red for "stop." I located the lawyer's lounge, a room near the courtroom set aside for lawyers to be able to sit quietly and review their notes just before they go to the courtroom.

The night before oral argument, sleep eluded me. I would think of a question the Court might ask, get up to check my notes, and go back to bed. That scenario was played out again and then again. The morning of oral argument before the Supreme Court, I was incredibly nervous. I've said that I felt the weight of the world on my shoulders that morning. I had done everything possible to prepare, but I was intensely conscious of the importance of the Court's decision and wanted so much for the case to be decided in favor of a woman's right of privacy regarding decisions about pregnancy.

Arriving at the Court building, I went up the marble steps to a landing with columns that seemed to reach into the sky, then through the doors of the Supreme Court building (that was before the security screening that a visitor would go through today.) Between the

[10] 381 U.S. 479 (1965).

entry doors and the courtroom is a marble corridor; I remember the sound of my steps as I walked.

After reviewing my notes in the lawyer's lounge across from the Marshall's office, I was preparing to go to the courtroom a little before 10:00 a.m. when argument begins. I decided I should visit the women's room. In the lawyer's lounge I only found a door marked "Men." It turned out that women had to go down a long corridor, down a staircase and to a women's room in the basement. As an aside, each time after that when I've returned to Washington to hear a case argued, I have checked on whether the lawyer's lounge yet had a women's room. After Sandra Day O'Connor and Justice Ruth Bader Ginsburg became Justices, their efforts resulted in the addition of a women's room to the lawyer's lounge. So there is now an appropriate facility for each of you should you be preparing to argue a case before the Supreme Court. Times change slowly, but they have changed in that regard at the U.S. Supreme Court.

People entering the courtroom go through very heavy red-velvet curtains. As one passes the curtains, three sections of what look like church pews with fancy padding are visible. The section on the left is called the three-minute section. It is for tourists; one group leaves and another group enters every three minutes during oral argument. The heavy curtains are to help muffle the resulting noise. Another section is for those who want to hear an entire case and is available on a first-come, first-seated basis. For all of the sections, there are strict rules that prohibit putting one's arm on the back of the pew, whispering, chewing gum, or taking notes. Personnel of the Court enforce strict decorum. A gold railing separates lawyers admitted to Supreme Court practice from those without that credential. Beyond the gold railing there is a section of individual chairs inside the railing for lawyers so admitted.

Past the chairs are two large tables on each side of a center aisle. As one approaches the Supreme Court bench, those representing the plaintiff sit on the left; those representing the defendant on the right. As I took my seat in the courtroom, I looked to the left and saw the section for the press, which has about seventy-five seats and was absolutely packed. To my right was first the table for defendant's counsel and past that the section for family, friends, and invited guests of the Justices; it, too, was absolutely packed. To present oral argument, counsel stands at a podium not far from the Justices. Of course, the Chief Justice is in the middle, and the other Justices sit in alternating order of seniority down to the ends of the bench. Above the seat of the Chief Justice is a huge clock so counsel can watch the minutes of oral argument ticking by. Each side is allocated thirty minutes, or one hour per case.

The court setting is very formal. For example, when it is time for the Court to convene, the Marshall comes out in striped pants and a tail-coat and says, essentially, "Oyez Oyez. Oyez. All ye please rise and face the Court." There is a hush. Everyone stands; the

curtains behind the bench part; the Justices enter in their black robes. When the Justices were settled, Chief Justice Warren Burger said, “Ms. Weddington, if you're ready, you may begin.” My time commenced. I had barely said, "Mr. Chief Justice and may it please the Court. This is the case about...” when Justices began to pop questions. That continued for the entire period. If you'd like, you can hear most of the oral argument as part of a tape series called *May It Please the Court*.[11] I think you would find it interesting.

When the case presentations ended, I had no idea if I'd won or lost. A few months later, I learned that the Court wanted the case reargued, which is most unusual. Even more unusual was that the Court did not direct counsel to address any specific aspect of the case. It essentially just said “come back and do it again.” The case was reargued on October 11, 1972. Once again, I left the Court not knowing whether I had won or lost.

A custom of the Court that I'm told dates back to the time of Thomas Jefferson is having a goose-quill pen at the place of each counsel. The pen is a souvenir for having presented before the U.S. Supreme Court; few attorneys ever get to do that. Since I argued the case twice, I have two of the pens. (One has always been in my office; the other was at the Women’s Museum in Dallas until it closed.)

As Monday, January 22, 1973 began, a few dozen people knew that what seemed like an ordinary day would not end that way. It was near freezing that morning in Washington, D.C., as personnel of the United States Supreme Court rushed to work. The nine Justices, their clerks, and a handful of others at the Court know that the opinion in *Roe v. Wade* would be released when the Court convened at ten that morning.

Secrecy is the Court's standard. Until an opinion is actually announced, no one within the Court is to tell anyone outside the Court what is happening, but rumors do sometimes emerge. *TIME Magazine*, on October 30, 1972, said "court-watchers are convinced that the Justices will eventually declare abortion bans unconstitutional.”

On Friday, January 19, 1973, at the regular Justices' conference, the cases to be handed down the next week had been determined. There were five of them, and *Roe* was placed on the list. Justice Harry Blackmun, the author of the Court's opinion, was convinced that Chief Justice Burger had delayed the release of the opinion to allow the United States President, Richard Nixon, who was opposed to abortion, to have the spotlight for his Inauguration Day. The inauguration took place on Saturday, January 20, 1973 -- just two days before *Roe* was handed down.

---

[11] See *Sarah Weddington, May It Please the Court*, at http://oyez.org/cases/1970-1979/1971/1971_70_18 (to hear the audio); see also *May it Please The Court : The Most Significant Oral Argument Made Before the Supreme Court Since 1955* (Peter H. Irons & Stephanie Guitton eds., New Press 1994).

Once the list of cases to be announced was certain, an order went to the Court's printers to have copies of the opinions ready Monday morning for release and distribution. On Monday morning, those copies were stacked in the Court's Office of Public Information, face down so that no one could see the name of the case or its content until it was announced from the bench in the courtroom.

For some connected with the Court, there was an excited air of anticipation. Justice Blackmun's wife and daughter Sally, a lawyer, were sitting in the family and friend section in the courtroom as time for the court session approached. Justice Blackmun was once again reviewing an extended explanation of the opinion and the basis for it, which he planned to read when the Court session began. He was assigned the task of researching and drafting the Court's opinion in the fall of 1971 and had been working on it ever since. Before becoming a Justice, he had been an attorney for the Mayo Clinic in Rochester, Minnesota and was the member of the Court with the most extensive medical background. At 10:00 a.m., the Court's session began. The Marshall of the Court, in striped pants and cutaway tails, intoned in a deep authoritative voice, “Oyez, Oyez.” The Justices in their black robes entered the courtroom through deep red velvet curtains and took their seats with the Chief Justice in the middle and the other Justices first to his right, then to his left in order of seniority.

Chief Justice Berger announced the opinions being released; the second one was *Roe v. Wade*. The Court Clerk called the Court's Office of Public Information to authorize release of the printed copies of the opinion. As Justice Blackmun read the explanation that he had prepared, some members of the press listened; others began a stampede to the Office of Public Information to grab opinions and begin a Herculean effort to be the first to report the story. Members of the press hurriedly scanned the opinion and began to organize coverage: lists of people and organizations to be called for comment were compiled, and the calls started. The Clerk authorized a telegram to be sent to me.

In Austin, January 22, 1973, began as a wet, wintry, unpleasant day. I had momentarily thought how nice it would be to stay in bed, but that was an impossible luxury. Days earlier, at twenty-seven, I had been sworn in as the first woman elected from Austin/ Travis County to be a member of the Texas Legislature. A session was to begin at 11:00 a.m., and I had work to do before that.

A little after 9:00 a.m. central time, the phones began ringing in my Austin law office and in my Capitol office. A reporter asked my assistant, "Does Ms. Weddington have a comment today about *Roe v. Wade*?" My staff assistant queried, "Should she?" The reporter told her that it had been decided that morning. I can still hear my assistant saying, "How was it decided?" The reporter told my assistant that I had won the case by a vote of seven to two. She immediately told me. What an exciting moment that was!

Abortion had become legal. The abortion laws of most states were instantly unenforceable. The news flashed across the country via radio and television. Jubilation and confusion prevailed in my office. People were coming by to offer congratulations; people involved in the case were calling; we were trying to call people who had helped with the case; flowers were being delivered. Many people who are sixty-five or over still remember exactly where they were when they heard about the *Roe* decision.

However, we wanted to know exactly what the Court's decision said. Soon a telegram arrived from the Supreme Court. The telegram was very short and said that a copy of the opinion was being air-mailed. The telegram was collect. I cannot remember what the cost of receiving the telegram was, but I was certainly happy to pay.

I released a statement that read as follows: "I am pleased because of the impact this decision will have on the lives of many women who in the past have suffered because of the current Texas law. I am especially pleased that the decision is a solid seven-to-two decision and that it was based on the right of privacy. I feel very humble to be able to represent the class of women affected by this decision and hope their lives will be better for it."

The news traveled like wildfire, and some people could not believe what they were hearing. One group of students in Texas had a fund of $500 available as a loan should one of them need to leave the state for an abortion; they checked the accuracy of the news and then divided up the money. The women in Austin who had originally asked me to file suit were dancing and celebrating. Also, a doctor, who had been indicted for performing an abortion on a patient who was inflicted with measles, was driving to Florida, heard the news on the radio, and stopped in a torrential rain to call home for more details. She knew then that her medical license, which had been in jeopardy, was now safe.

The week before the decision, women were often being treated in hospital emergency rooms for the consequences of illegal and self-induced abortion. After *Roe*, that virtually disappeared.

Women no longer had to leave their home states to get abortion services. For example, one woman in Austin was scheduled to be on a plane at three that afternoon going to California for a legal abortion. She called her doctor and asked if he could help. He could, and he did at five that afternoon.

At the same time, statements were being released by groups opposed to the decision.

The news about *Roe* was soon preempted by other news from Austin: former United States President Lyndon B. Johnson had died. He suffered a heart attack while at his ranch outside of Austin. His body would soon lie in state first in Austin, then in

Washington, D.C. The headlines the next day would be about former President Johnson. The story about *Roe v. Wade* was the primary story on the second half of the front page of most newspapers.

That night, my husband and I had a moment alone to talk about the day's events. We talked about how the abortion issue could be checked off, and we could begin to work on other issues. We thought a seven-to-two Supreme Court opinion was the equivalent of one written in concrete.

Forty years later, *Roe* is one of a handful of Supreme Court cases recognized by most Americans by name and by subject. It is also known internationally. Today the controversy about abortion continues. There have been many dramatic legislative and cultural changes since *Roe*, and they remind me of the fact that relatively few people today remember what it was like before the decision.

As I said earlier, if anyone on January 22, 1973 had told me that the abortion issue and the *Roe* case would be a matter of intense debate in 2012, I would never would have believed it. I would have been wrong.

Roe involved three key issues. The first was whether pregnancy was a fundamental right. In arguing *Roe v. Wade*, I thought it was very important to put this in the context of the larger picture of women's lives. To me, women's lives are like a huge wheel. The spokes are varied aspects of life. At the time I was arguing *Roe*, public school teachers who became pregnant were often fired if they didn't resign first. The Texas legislature had not yet passed the equal credit laws; state rape reform had yet to be passed. In *Roe*, we argued all sorts of broader issues concerning women's roles in society, but to me the hub of women's lives is the issue of who controls reproductive decisions. If a woman cannot make key reproductive decisions for herself, then effectively she is prevented from deciding other important aspects of her life.

One issue, as I said, was whether pregnancy is “fundamental.” We argued that it was a fundamental right because of all the effects that pregnancy has on a woman. That was especially true for young women. For example, if a high school student became pregnant, she was usually forced to quit school. At that time schools didn't have special classes to accommodate pregnant students, as they sometimes do now.

The second issue was whether there is a constitutional right involved. I am certain that in your constitutional law classes a great deal of time is spent talking about this very issue. It's true that the word “abortion” is not mentioned in the Constitution, but certainly a central focus is on limiting the ability of government to interfere with the right of citizens. I was primarily urging the Court to consider the Fourteenth Amendment.

However, I also made alternative pleas under the First, the Fourth, the Fifth, the Eighth, and other Amendments.

The third issue was whether the State had a compelling reason to regulate abortion. The Texas Attorney General's office was arguing that the fetus was a person; therefore, there was a compelling reason to regulate. Our rebuttal argument on this issue was that the fetus had never been treated as a person under Texas or federal law.

For example, the Constitution states that "all persons born or naturalized in the United States... are citizens of the United States...,"[12] Consider income tax deductions. A taxpayer who is pregnant for eight and a half months of 2012 but who does not deliver until 2013, cannot take an applicable income tax deduction until 2013. Similarly, pregnant women who travel outside the country do not get two passports; they get one. In Texas, the right of inheritance is contingent on being born alive. There are many additional examples. We were arguing that the law has never treated the fetus as a person and that birth was the critical moment to obtain legal rights.

The majority opinion was written by Justice Harry Blackmun. I'm sure you have or will read the opinion. Justice Blackmun was joined by Chief Justice Warren Burger, Justice William Douglas, Justice William Brennan, Justice Potter Stewart, Justice Thurgood Marshall and Justice Lewis Powell. The dissenting Justices were Justice Byron White and Justice William Rehnquist, who later became Chief Justice.

Not only is the *Roe* opinion and the issue of abortion a matter of fervent debate today, but it seems to me that the conflict around the issue is even more intense now than it was in 1973. That conflict is being played out in three separate arenas: cases and judicial consideration, state and federal legislation, and efforts by each side to sway public opinion. Of course, politics is a major factor in each of those arenas.

I had assumed that as years passed and people got used to abortion being a legal option, people would be increasingly adamant that reproductive decisions should belong to women, not government.[13] Polls do continue to show that a majority of the American population believe exactly that. However, I failed to accurately factor in how adamant those opposed to abortion would be and how effectively they would organize. In my opinion, it is harder today to motivate people to work for pro-choice issues and causes than it was prior to 1973. Perhaps that is because only those sixty-five or older remember what it was like before *Roe* and the tragic stories of that time. Younger people have not had the experience of living at a time when contraception was unavailable and abortion

[12] U.S. CONST. amend. XIV, §1.
[13] See Poll asks: Who decides on abortion?, UPI.com, Aug. 27, 2012, http://www.upi.com/Health_News/2012/08/27/Poll-asks-Who-decides-on-abortion/WEN-3191346101842.

was illegal; instead, they have only the experience of being able to make their own decisions at a time when they or their friends can effectuate those decisions safely and legally. As memories of the period before *Roe* dim, it is harder to motivate people to act to retain *Roe* and the right of choice.

Today the spotlight in this regard is on the individuals who serve as Justices on the United States Supreme Court and on those who appoint and confirm them. There have been too many Supreme Court opinions regarding abortion to summarize each of them in this short presentation. One of the most important, however, was *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[14] I think of *Roe* and *Casey* as being the most significant opinions. Justice Sandra Day O'Connor wrote the *Casey* opinion. The Pennsylvania statute involved did not make abortion illegal, but it restricted access in a number of ways. O'Connor's opinion dramatically expanded the number of state abortion restrictions deemed constitutional, restrictions that had been declared unconstitutional in prior cases. The opinion was also important because it shifted the burden of proof.

Until *Casey*, the burden of proof was generally on the state to prove that it had "a compelling reason to regulate." Under that burden of proof, the state generally lost and regulations were overturned. After *Casey*, the burden of proof was essentially on those challenging regulations to demonstrate that the regulations were "an undue burden." As a consequence, the Court has been approving far more extensive regulations than before *Casey*.

The only regulation at issue in *Casey* that was overturned was a provision that no married woman could obtain an abortion without first certifying that she had notified her husband of her pregnancy. However, there were exceptions for circumstances where he had not been involved in creating the pregnancy, if he could not be found, or if domestic abuse might result. I learned for the first time, reading the documents filed with the Court and being in the courtroom for Supreme Court arguments that rates of domestic violence tend to increase when a woman is pregnant, rather than decrease as I had expected.

Ten years ago I thought of the Justices as being 3-3-3 on the issue. Three of the Justices joined opinions suggesting that *Roe* should be overturned. Those are then Chief Justice William Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas. Three joined opinions suggesting that *Roe* should be left alone. Those were Justice John Paul Stevens, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. And three joined opinions that have been unwilling to overturn Roe but which said it should be modified. Those were Justice Sandra Day O'Connor Justice Daivd Souter, and Justice Anthony Kennedy.

[14] 505 U.S. 833 (1992).

Others analyze the Court as a 5-4 split because in the *Gonzalez v. Carhart*[15] case, Justice Kennedy voted with Chief Justice Roberts, Justice Alito, Justice Thomas, and Justice Scalia to uphold Congressional restriction on forms of medical abortion that could be used.

That narrow margin on the Supreme Court focused attention on changes that might occur in its make-up. Changes in fact have occurred. When *Roe* was tried, there were nine men on the Court. Today the Court includes three women.

Today, those on the Court are (by age after Chief Justice Roberts):[16]

Name	Current Age	Appointed By	First Day of Service
John Roberts	57	George W. Bush	Sept. 29, 2005
Ruth Bader Ginsburg	79	Bill Clinton	Aug. 10, 1993
Antonin Scalia	76	Ronald Reagan	Sept. 26, 1986
Anthony Kennedy	76	Ronald Reagan	Feb. 18, 1988
Stephen Breyer	74	Bill Clinton	Aug. 3, 1994
Clarence Thomas	64	George H.W. Bush	Oct. 23, 1991
Samuel Alito	62	George W. Bush	Jan. 31, 2006
Sonia Sotomayor	58	Barack Obama	Aug. 8, 2009
Elena Kagan	52	Barack Obama	Aug. 7, 2010

Right now, the Democrats control the U.S. Senate by six votes.[17] However, the coming election on November 6, 2012 could alter that. If the Republicans take control of the Senate, the head of the Senate Judiciary Committee is likely to switch from the current Chair, Democratic Senator Patrick Leahy of Vermont, who supports *Roe*, to a Republican Senator opposed to *Roe*. The Senate Judiciary Committee considers Presidential appointments to the Supreme Court. If one or more vacancies occur on the Supreme Court in the next four years, the issue of abortion will certainly be front and center during the confirmation process.

[15] 550 U.S. 124 (2007).
[16] See Biographies of Current Justices on the Supreme Court, Supreme Court of the United States, http://www.supremecourt.gov/about/biographies.aspx.
[17] At print, the Democratic Party controlled fifty-one seats in the Senate, with two Independents caucusing with the Democratic Party. The Republican Party controlled forty-seven seats.

That the abortion issue will be central to any confirmation process to fill a vacancy on the U.S. Supreme Court is made even more critical by the divergent views of the current candidates to be U.S. President.

President Barack Obama is pro-choice. On the thirty-ninth anniversary of *Roe*, January 22, 2012, Obama stated, "I remain committed to protecting a woman's right to choose and this fundamental constitutional right."[18] The 2008 Democratic National Platform[19] states, "The Democratic Party strongly and unequivocally supports *Roe v. Wade* and a woman's right to choose a safe and legal abortion, regardless of ability to pay, and we oppose any and all efforts to weaken or undermine that right."[20]

The Republican candidate, Mitt Romney, has held a series of positions over recent years, but he currently refers to himself as solidly "pro-life."[21] There are reports that he supports abortions in situations of rape, incest, or to save the life of a woman.[22] If those reports are true, this is in contrast to the 2012 Republican Party Platform, which states, "We assert the sanctity of human life and affirm that the unborn child has a fundamental individual right to life which cannot be infringed."[23] The platform makes no mention of exceptions for rape, incest, or to save the life of the woman.

The election battles being fought for congressional seats and state elected positions are made even more important by the recent anti-abortion legislation being passed in Congress and in state legislatures. Although those measures have not made procedural abortions illegal, they have certainly succeeded in making the procedure less available and more expensive.

It is certain that abortion - and recent as well whether contraception will be covered by employer-provided insurance and whether it will be made available to low-income women - will continue to be on the front pages of newspapers throughout the nation. For example, a Republican member of the U.S. House running to be the next U.S. Senator from Missouri, Todd Akin, focused even more attention on the abortion issue when he was asked about abortion being legal in the case of rape and he responded that he had

---

[18] To view President Barack Obama's quote, please visit http://www.barackobama.com/news/entry/on-the-39th-anniversary-of-roe-v-wade/.
[19] At print, the 2012 Democratic Party Platform had not been approved by the Democratic Convention.
[20] See "Renewing America's Promise", the 2008 Democratic National Platform, at http://www.democrats.org/about/party_platform.
[21] Mitt Romney's position on abortion can be seen at http://www.mittromney.com/issues/values.
[22] While in Tampa for the Republican National Convention, Mitt Romney commented on his support for abortion in situations of rape, incest, or to save the life of the woman during an interview with CBS News. To view the article please visit http://www.huffingtonpost.com/2012/08/27/mitt-romney-abortion_n_1834888.html.
[23] See "We the People: A Restoration of Constitutional Government", the 2012 Republican National Platform, at http://www.gop.com/2012-republican-platform_We/#Item14.

been told by doctors that in the situation of "legitimate" rape the woman's body had a way of shutting down and preventing pregnancy.

Each side of the issue will be striving for public relations victories as the time approaches for consideration of candidates, of new Justices, and of pending legislation. What will happen to *Roe* and related issues is in doubt. Obviously, I hope that reproductive decisions will remain personal decisions and not government decisions.

I have every confidence that you will find many ways to use the legal skills that you are developing or will be developing at law school. I remember in law school wondering if all the effort and investment of time and money would turn out to be worth it. There were moments when I wondered if I should be doing something else. You may have had those same questions and doubts. I am here to tell you that law will give you many options and one of these days I believe that you will, as I am, be grateful that you continued this path. I am envious of your intellect and skills. You are better at using the computer than I am. You speak more languages. You have so many assets.

Recently, I was introduced at a luncheon by a young woman lawyer who said, “I am proud to introduce Sarah Weddington. I had never met her until today, but I am her daughter-in law.” It was a wonderful introduction because it reminded me of how the legal field has expanded from my school days to yours. It reminded me of the satisfaction of having changed a variety of laws to allow women more options and opportunities. Today, there are more and more women attorneys, and also more men who are very supportive of women and of women's issues.

When I look back, I am so glad that I had the opportunity to go to law school and gain the skills of a lawyer: to write, to argue and to present various points of view. I am glad that I was able to argue *Roe v. Wade*. I have delighted in the other opportunities that my degree and skills have created.

There are many issues that need your time and creativity. I hope that law will hold for you as much satisfaction as it has for me.

Thank you.
August 29, 2012

The Red Scare, Perjury, and the Rhetoric of the Julius and Ethel Rosenberg Trial

Rebecca R. Reilly
Advisor: Douglas M. Coulson

Abstract

In 2001, almost fifty years after the espionage trial in which Julius and Ethel Rosenberg were tried and convicted of "conspiracy to commit espionage to aid a foreign country" during the Red Scare of the 1950s[1], New York Times reporter Sam Roberts revealed that Ethel Rosenberg's brother David Greenglass admitted in interviews that he committed perjury about Ethel's involvement in espionage in order to save his own wife from imprisonment. Because the prosecution's case against Ethel Rosenberg rested entirely on Greenglass's testimony, this admission reveals that the prosecution's case against her was false. In his recent interviews with Roberts, Greenglass claims that the prosecution "encouraged him to testify that he saw Ethel type up the notes"[2] of atom bomb experiments from Los Alamos which formed the basis of the prosecution's espionage charges. Indeed, the prosecution was well aware of the necessity of this testimony, even admitting after the trial that without the typing testimony, "they could never have convinced the jury that Ethel was anything more than the wife of a spy."[3]

I. Introduction

The Rosenberg trial has often been characterized as one of the classic examples of a "political trial" in American history, and its political character has been much debated in the years since the Rosenbergs were convicted. The Rosenbergs' crime itself, espionage against the United States government, was certainly political—indeed, in Otto Kirchheimer's book *Political Justice: The Use of Legal Procedure for Political Ends*, he calls the Rosenberg case a "deeply politically tinged case."[4] In political theorist Michal Belknap's book *American Political Trials*, Belknap defines one form of political trial as that which "has its outcome determined by political controversy,"[5] and this definition may best describe one of the central questions about the Rosenberg trial—whether the anti-Communist hysteria of the Red Scare rendered the conviction of the Rosenbergs certain in advance. The revelation that the pivotal testimony used to convict Ethel Rosenberg was perjured testimony invites a reexamination of this question, and this

[1] Douglas O. Linder, "Testimony of Julius Rosenberg, Witness for the Defense" *The Rosenberg Trial* (UMKC School of Law, 2012).
[2] Rebecca Leung, "The Traitor" *60 Minutes* (CBSNews, 11 Feb. 2009).
[3] *Id*.
[4] Otto Kircheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton UP, 1961) 344.
[5] Belknap, Michal R. *American Political Trials* (Westport, CT: Greenwood, 1981) xvi.

article will reconsider the Rosenberg trial to consider whether its outcome was determined or the trial itself and the arguments and evidence introduced by the attorneys in the case may be understood to have influenced its outcome. The article will also assess the rhetorical strategies used by the attorneys in light of the politics of the Red Scare during the early 1950s and the impact of such a political climate on the rhetoric in an espionage case.

II. The Rosenbergs' Communist Party Ties and Their Trial for Espionage

Julius Rosenberg was sixteen when he joined New York City College's Young Communist League in 1934. He met his wife Ethel there, and they remained avid members of the Young Communist League until 1943 when according to Greenglass, Rosenberg began to talk to him "in abstract terms about espionage." These conversations coincided with the Rosenbergs "dropping out of the open Communist Party activities that had been a large part of their lives."[6] The Rosenbergs' explanation for suddenly dropping out of Party activities was that they wanted to spend more time with their son who had been born earlier that year, but during the trial it was suggested that they only discontinued their open affiliation with the Party so that they could conduct covert espionage activities.[7] Although the prosecution denied that the Rosenbergs were on trial for being Communists, the significance of this fact in the claims of the Red Scare was obvious to many.

On March 6, 1951, Julius and Ethel Rosenberg's trial for espionage against the United States government began. David Greenglass was also arrested in connection with the conspiracy, but in exchange for a lesser sentence Greenglass became the prosecution's star witness, providing crucial testimony that would ultimately result in Ethel Rosenberg's execution. During the trial, Greenglass testified that Julius Rosenberg gave him $200 in exchange for descriptions of atom bomb experiments from Los Alamos where Greenglass had been stationed for several years. According to Greenglass's testimony, he had "about twelve pages or so" of information regarding the experiments and the people involved.[8] In what we now know to be partially perjured testimony, Greenglass testified that he and his wife Ruth "drove to the Rosenberg's home and gave [Julius] the written material in the presence of Ethel. In [Greenglass's] presence, she typed the secret information on a portable typewriter while he and Julius clarified ambiguous and ungrammatical language in Greenglass's draft."[9] Greenglass's testimony

---

[6] Douglas O. Linder, "Trial Of The Rosenbergs: An Account" *The Rosenberg Trial* (UMKC School of Law, 2012).
[7] *Id*.
[8] Douglas O. Linder, "David Greenglass, Witness for the Prosecution" *The Rosenberg Trial* (UMKC School of Law, 2012).
[9] *Id*.

incriminated both Julius and Ethel, a fact that was crucial for the prosecution because when Julius was first arrested he refused to cooperate and the police arrested Ethel in an attempt to coerce Julius to talk.[10] As noted above, without Greenglass's eyewitness account the defense would have had little to no evidence against Ethel. His testimony was crucial to the prosecution and he effectively sent his sister and brother-in-law to the electric chair.

III. Defense Attorney Emmanuel Bloch's Weak Rhetorical Strategies

Defense attorney Emmanuel Bloch's closing arguments in the Rosenberg case relied heavily on indirect arguments, inference, and a weak rhetoric of fear that appears to have held little possibility of convincing the jury off the Rosenbergs' innocence. He began his closing argument by attempting to identify himself with the jurors as New Yorkers by remarking, "We are a pretty sophisticated people. People can't put things over on us very easily. We are fairly wise in the ways of the world and the ways of people."[11] Although Bloch is saying here that as New Yorkers the jurors can't be fooled, thus implying that the prosecution is attempting to fool the jury, this indirect approach may have been quite weak. It would have been far more persuasive if Bloch had confidently argued that the prosecution was misleading the jury rather than timidly suggesting that the jury might draw such a conclusion. Similarly, rather than directly confront the fear the jury likely felt of the Rosenbergs' ties to the Communist Party, Bloch merely told the jury that the Rosenbergs were not on trial for being Communist and that the jury needed to be aware of this distinction.

Similarly, even when Bloch directly attacked Greenglass's motives and character as the prosecution's key witness in the case, he failed to fully develop the implications of his argument but left it to the jury to draw the conclusion he wanted. When Bloch attacked what we now know to have been Greenglass's perjured testimony, for example, he said,

[A]ny man who will testify against his own blood and flesh, his own sister, is repulsive, is revolting, who violates every code that any civilization has ever lived by. He is the lowest of the lowest animals that I have ever seen, and if you are honest with yourself, you will admit that he is lowest than the lowest animal that you have ever seen.[12]

While Bloch was correct that Greenglass's actions were abhorrent, he did a poor job of showing that Greenglass was a bigger threat to America than the Rosenbergs were

---

[10] Douglas O. Linder, "Trial Of The Rosenbergs: An Account" *The Rosenberg Trial* (UMKC School of Law, 2012).
[11] Douglas O. Linder, "Summation of Emanuel Bloch for the Defense" *The Rosenberg Trial* (UMKC School of Law, 2012).
[12] *Id*.

perceived to be. Bloch talked about Greenglass violating a code of civilization, but never discussed what the implications were of this violation, assuming the jury would know. Then, by calling Greenglass an animal, Bloch only takes away his human agency, potentially diminishing the threat he claimed Greenglass posed, or at least Greenglass's responsibility for his actions. Finally, by the indirect phrase "if you are honest with yourself," Bloch seemed to imply that the jury might not be honest with themselves but without directly confronting this reality. Bloch's assessment of Greenglass's character was not only weak, but also did little to make Greenglass a bigger threat than Soviet espionage, and the jury had no reason to be compelled by this portion of Bloch's closing. Although Bloch also showed that Ruth Greenglass had never been arrested or indicted despite her own admissions that she participated in the espionage and argued that Ruth was getting away clean because David was testifying against his own family, because he never directly addressed the fear of Communism nor did he effectively show that the Rosenbergs were the real victims, his rhetorical strategies were unsuccessful.

This weak rhetorical strategy is also evident when Bloch calls the Greenglass's loyalty and patriotism into question to convince the jury that the real criminals were the Greenglasses and not the Rosenbergs. Bloch referenced the fact that Ruth Greenglass was never indicted despite her own testimony that she was involved with the passing of information to the Soviets and pointed out that the Greenglass' testimonies were almost identical and that they must have "rehearsed" their whole story. He explained to the jury that Greenglass took an oath when he entered the United States Army to protect his country and that he could not even remember that oath, suggesting to the jury that being a loyal American meant little to Greenglass. Because Greenglass, unlike the Rosenbergs, actually did fight for America in the war, however, Bloch's approach only solidified Greenglass's standing as a veteran and Bloch's strategy appeared weak. When Julius Rosenberg took the stand, Bloch asked him, "Do you owe allegiance to any other country?" After he answered, "No, I do not," Bloch asked, "Have you any divided allegiance?" When Rosenberg responded, "I do not," Bloch finally asked, "Would you fight for this country?," to which Julius answered, "Yes, I will."[13] Bloch's use of the weak subjunctive case in his final question only emphasized that Rosenberg did not actually fight for his country as Greenglass had, however.

IV. Irving Saypol's Rhetoric of Fear

Because most Americans were frightened by anyone associated with the Communist Party at the time of the Rosenberg trial, the prosecutor Irving Saypol had almost everyone on his side. Many people believed the Rosenbergs were guilty because of the Rosenbergs' Communist ties alone, and David Greenglass's testimony validated those

[13] Douglas O. Linder, "Testimony of Julius Rosenberg, Witness for the Defense" *The Rosenberg Trial* (UMKC School of Law, 2012).

beliefs. In contrast to Emmanuel Bloch's weak effort to demonize David Greenglass, Saypol effectively portrayed the Greenglasses as victims of the Rosenbergs. At one point of his closing argument, he told the jury, "Greenglass's relations toward his older sister, Ethel, and her husband, Julius, were such that he was willing prey to their Communistic propaganda. He committed this crime because they persuaded him to do it."[14] Saypol emphasized the passive agency of the Greenglasses, calling them "willing prey" and saying that the Rosenbergs "persuaded" the Greenglasses. He went on to say, "The Rosenbergs told [the Greenglasses] to go and commit espionage in the interests of communism in the Soviet Union […]. It was the Rosenbergs who took […] David Greenglass and set him to betraying his country."[15] With this language, Saypol suggested to the jury that the Greenglasses were not acting of their own volition.

Further, Saypol identified the Greenglasses with all Americans so that the jury felt they were all victims of the Rosenbergs' espionage, while in Bloch's argument only the Rosenbergs were victims of Greenglass. Saypol's emphasis on this identification with fear is a powerful rhetorical strategy. The Red Scare of the early 1950s did create a bias against Communists like the Rosenbergs, so their chances of winning their trial were slim, and Saypol's rhetorical strategies that capitalized on everyone as victims of the Rosenbergs' disclosure of military secrets intensified this effect.

Politically driven judge Irving Kaufman, who presided over the Rosenberg trial, also knew that because of the Red Scare and Americans' fear of Communism the only viable verdict was a guilty one, and Kaufman and Saypol worked together and used the rhetoric of fear to suggest to the jury that they personally along with all Americans were victims of the Rosenbergs. Judge Kaufman frequently intervened during the trial and asked his own questions to reinforce Saypol's case during the questioning of every witness except one and interceded heavily during both Rosenbergs' testimonies. Although at the end of his closing argument Saypol told the jury that the Rosenbergs are not on trial for being Communist, he used the word "Communist" and its variations fourteen times throughout his statement in contrast to Bloch's use of the word only six times. Saypol clearly did not want the jury to forget that the Rosenbergs had ties to the Communist Party and were therefore unpatriotic Americans.

V. The Rhetoric of Political Trials

It is difficult to accept that the Rosenbergs' Communist ties during the Red Scare of the early 1950s would not have gripped the jury with the fear of Communism that pervaded the era. Political theorist Ron Christenson writes in his book *Political Trials: Gordian*

[14] Douglas O. Linder, "Summation of Irving Saypol for the Prosecution" *The Rosenberg Trial* (UMKC School of Law, 2012).
[15] *Id*.

Knots in the Law, "With the perspective of time, the postwar trials of … the Rosenbergs can be seen as products of hysteria: … anti-Communist."[16] It could be argued that nothing that Emmanuel Bloch said in defense of the Rosenbergs or that Irving Saypol said in support of the prosecution could have changed the jury's mind about the Rosenbergs' guilt. The jury decided in favor of the prosecution and the Rosenbergs were sentenced to execution by the electric chair on April 5, 1951, and though Bloch fought tirelessly for a stay of execution, he could only delay their deaths for so long. The couple was electrocuted, their children were adopted, and the Greenglasses changed their name and went into hiding.

In Sam Roberts's book about Greenglass, Roberts writes that Greenglass "had no sense of morality, no sense of cause and effect."[17] Greenglass did not care that his sister and brother-in-law were going to die because of his words. He was able to convince the jury that he was telling the truth, despite the fact that his and his wife's testimonies were practically identical. He knew the jury was already suspicious of Communist activity, so he pretended to be sorry for his involvement with Julius. During an interview with Roberts, Greenglass admitted that he had little memory of the night to which he testified. He said he knew he and Julius had created and edited notes about the atom bomb and the people involved, but he did not remember who typed them.[18] Ethel Rosenberg was arrested as leverage against her husband and died only because her own brother's testimony convicted her, and it appears now that in contrast to Irving Saypol's claim that the Rosenbergs were not on trial for being Communists, the prosecution was more interested in condemning people who might have been Communist than discovering the truth and coerced Greenglass into helping them. Unfortunately, it seems that because both Rosenbergs were tried together, they both had to be convicted together.

Because of the Rosenbergs' Communist activity during the Red Scare, there is a great possibility that the rhetoric in the Rosenberg trial did not matter and that the guilty verdict was predetermined by politics. These two characteristics are evidence of a political trial. However, there is also reason to believe that the rhetoric may have actually strongly affected the outcome of the Rosenberg trial. The defense, Emanuel Bloch, made a poor case for the Rosenbergs, saying that they were victims of David Greenglass, and both the Rosenbergs testified but then pleaded the Fifth Amendment and refused to answer on the ground that it might incriminate them when asked about their own or others' Communist ties.[19] Their invocation of the Fifth Amendment did not help their case, as it appeared to the jury that they had something to hide. Moreover, the Rosenbergs were tried with a friend of theirs, Morton Sobell. Sobell did not testify and he received

[16] Ron Christenson, *Political Trials: Gordian Knots in the Law* (New Brunswick, NJ: Transaction, 1986) 5.
[17] Robert Siegel, "A Brother's Betrayal" *NPR's All Things Considered* (NPR, 9 Oct. 2001).
[18] Rebecca Leung, "The Traitor" *60 Minutes* (CBSNews, 11 Feb. 2009).
[19] Douglas O. Linder, "Trial Of The Rosenbergs: An Account" *The Rosenberg Trial* (UMKC School of Law, 2012).

only a thirty-year prison sentence. His punishment implies that because he did not testify, he did not warrant the death penalty. Had the Rosenbergs not taken the stand, their verdict might have been less harsh and similar to Sobell's. The Rosenbergs' rhetoric may have contributed to their own deaths.

Robert Detweiler, professor of history at California Polytechnic State University, compared the Rosenberg trial to Edgar Doctorow's book *The Book of Daniel*. Doctorow's book is loosely based on the Rosenbergs' children's lives, in which Daniel researches his parents' trial and execution.[20] Detweiler writes, "It is not a matter of determining guilt or innocence. With 'Judge Hirsch and Prosecutor working together like a team' (213), as did Judge Kaufman and … Saypol at the Rosenberg trial, 'guilt' has been decided in advance."[21] Yet Irving Saypol, who probably knew that the outcome of the trial was predetermined, still argued his case well and intensified the anti-Communist feelings attributed to the jury. Although Saypol may have known that the Rosenbergs' fate was already sealed, he voiced the American identity of fear that characterized the Red Scare of the era. People were looking to him to communicate how they felt about America and Communism. If he had not represented America fairly or effectively, the verdict might have been in jeopardy and he might have lost the confidence of both his colleagues and the nation. Political theorist Otto Kirchheimer says it best when he writes, "Just because the case as built up by the prosecution was logically consistent … the absence of a more powerfully presented defense was felt all the more."[22] Saypol's prosecution, his rhetoric of the American identity, was still crucial to the Rosenberg case as well as to his reputation.

The argument could be made that if Bloch had made a more effective defense and if Saypol had not had such a compelling prosecution, the Rosenbergs might have had a fighting chance. The Rosenberg Trial was certainly a political one, but the rhetoric of both the defense and the prosecution contributed to the guilty verdict. Bloch's weak defense that the Greenglasses were the real criminals for testifying against family appears insignificant to Saypol's powerful prosecution that the Rosenbergs victimized all of America. The jury never forgot that the Rosenbergs were Communist, but Saypol's convincing rhetoric and Bloch's lack thereof may have strongly influenced their decision.

---

[20] Barbara L. Estrin, "Surviving McCarthyism: E. L. Doctorow's 'The Book of Daniel'" (*The Massachusetts Review* 16.3, 1975: 577-87) 578.
[21] Detweiler, Robert. "Carnival of Shame: Doctorow and the Rosenbergs" (*Religion and American Culture* 6.1, 1996: 63-85) 72.
[22] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton UP, 1961) 345.

Batter's Down: The Advances and Hindrances of the Civil and Legal Systems in Regard to Battered Women

Ashley Kuempel

Abstract

Although there has been significant advances in the civil and legal systems in regard to women subject to domestic abuse, the journey to improving the situations of battered women is far from complete. Legal remedies in particular have failed to take into account the psychological consequences of women affected by battered women's syndrome and the dangers of utilizing remedies such as no-drop policies in certain situations. In order to emphasize this, the paper starts with the traditional attitudes and legal treatment of women prior to the battered woman's movement of the 1960's. Then, it examines and considers both the positive and negative effects of civil and legal solutions on women affected by domestic violence in detail. In addition, the paper explores the psychological effects battered women's syndrome imposes on women subject to domestic abuse. The paper then provides options such as community-based programs and shelters as alternate solutions for women to utilize in order to escape abusive situations and subsequently provides my personal opinion on solutions, such as prioritizing domestic abuse higher on the national agenda, that would improve the situations of battered women. In conclusion, I offer my personal interest in the issue of domestic violence and what I learned from examining the issues at hand.

I. Introduction

As author Mark Caine once eloquently stated, "The first step toward success is taken when you refuse to be captive of the environment in which you first find yourself."[1] However, for most women subject to domestic abuse, psychological, social, and legal obstacles have considerably hindered this route to freedom and success. Although households in America have been plagued by domestic violence throughout history, the legal system has ameliorated the situation considerably since the late 1960s. Both civil and legal institutions have significantly remedied the situation for battered women through implementing solutions such as civil protection orders and mandatory arrest laws. Despite these advances, domestic violence still affects an alarming amount of women in America partially due to the fact that the advances of the legal system have sometimes hurt, rather than helped, battered women nationwide. Despite improvements in the legal system, studies have shown that "an estimated four million American women

[1] "The Last Straw: Support, Motivation, Tips and Warning Signs of Domestic Violence," WordPress.com, accessed November 18, 2011, http://thelaststraw.wordpress.com/quotes/.

are battered each year by their husbands or partners"[2]and "three out of four American women will be victims of violent crimes sometime during their life."[3] Along with the psychological trauma inflicted on those affected with battered women's syndrome, the dangers of utilizing the legal system discourage many domestically abused women from relying on the law for protection. For example, battered women are often hesitant to report the abuse to the authorities for fear that their batterers will find out and punish them violently. For this reason, other alternatives such as community intervention programs have been created to protect women affected by domestic violence without relying on the law. Therefore, though each of these remedies has significantly increased the options available for battered women, many victims have yet to escape the captivity of domestic abuse.

II. Traditional Attitudes Towards Domestic Abuse

Though domestic violence has become a key public issue in society today, it was often kept behind closed doors and viewed as a private matter in the past. Traditionally, "domestic violence was considered a matter between a man and his wife, an area where law enforcement had no jurisdiction."[4] In the *Commentaries of the Law of England (1765-1769)*, Blackstone states that under the laws of coverture, "the husband and wife are one person in law" and "the very being or legal existence of the woman is suspended during the marriage."[5] After marriage, a woman automatically lost her legal identity under the law and her husband was therefore responsible for most of her actions. For example, when a woman committed adultery, her husband was often beaten as a punishment for her grievances.[6] As a result, a husband "might give his wife moderate correction" and could be entrusted "with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices and children."[7] These corrections were restricted only by the "rule of thumb," which limited the husband from using anything larger than a thumb to beat his wife.[8]Therefore, a husband had complete dominion over his wife in the past, and domestic abuse was viewed as a private matter meant to be settled by the couple themselves.

Although early feminists "advocated against wife-beating in New England as early as the 17th century,"[9] they were not appealing from the actual predicaments of individual battered women. Instead, they focused on broader issues and mainly "wanted to encourage

---

[2] Herma Hill Kay et al., Sex-Based Discrimination Text, Cases and Materials (6th Ed. 2006). p. 1112.
[3] Kay, p. 1111.
[4] Leigh Goodmark,*The Legal Response to Domestic Violence: Problems and* Possibilities: Law is the Answer? Do We Know That For Sure?: Questioning The Efficiency of Legal Interventions For Battered Women, 23 St. Louis U. Pub. L. Rev. 7 (2004).
[5] Kay, p. 224.
[6] Weddington Lecture, 9/26.
[7] Kay, p. 225.
[8] Weddington Lecture, 9/26.
[9] Jane C. Murphy, *Symposium: Engaging With the State: The Growing Reliance on* Lawyers and Judges to Protect Battered Women, 11 Am. U.J. Gender Soc. Pol'y & L. 499 (2003).

temperance, protect children, and improve the status of white women by affording them the right to divorce, hold property, and vote."[10] Until the true battered woman's movement materialized in the 1960's, "the response to a battered woman's cry for help was often silence."[11] Traditionally, "most people viewed woman abuse as a private matter not to be interfered with by outsiders."[12] Even after domestic violence became illegal, the legal system still found it better to "draw the curtain, shut out the public gaze, and leave the parties to forgive and forget."[13] Law enforcement officials viewed domestic assaults as private affairs and treated them differently than other public assault cases. For instance, in response to domestic abuse complaints, "police officers frequently told abusive spouses to take a walk around the block and cool down" while attempting to "mediate between abusers and their victims."[14] Due to this lack of legal intervention, the initial "grassroots" battered woman's movement rejected the input of the state due to the perception that it was "maintaining, enforcing, and legitimizing male violence against women."[15] However, despite this initial rejection of the legal system, "'engaging with the state' emerged as a principal strategy"[16] of the movement in the 1980's and remains so today. The movement's strategy "shifted from establishing shelters, safe houses, and hotlines to drafting legislation, lobbying elected officials, and litigating cases to create and expand legal protections for battered women."[17] Although the input of the state has undeniably increased the options available to victims of domestic abuse since the 1980s, the situations of battered women are still dismal today due to the fact that "finality in the legal system is not finality in the real world."[18] Almost all legal innovations have been "premised on the notion that battered women want to end their relationships, invoke the power of the legal system to keep their batterers away, and ultimately sever all ties with their abusers."[19] However, in many cases of domestic violence, this is not the case due to fact that the ramifications of battered women's syndrome affect the decisions of abused women. Therefore, it is essential to review the civil and legal advances in regard to domestic violence in dialogue with the individual mentalities of battered women nationwide.

III. Advances in the Civil System

Civil remedies have contributed significantly in the struggle against domestic violence throughout the years. The civil protection order, known as "the grandmother of domestic

---

[10] *Id.*
[11] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[12] Kay, p. 1111.
[13] Kay, p. 1103.
[14] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[15] Jane C. Murphy, *Symposium: Engaging With the State.*
[16] *Id.*
[17] *Id.*
[18] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[19] *Id.*

law," includes "injunctive orders" regarding issues such as child support and alimony and prohibits "abusers from continuing to assault, threaten, or physically abuse victims."[20] Although a violation of a civil protection order is only classified as a misdemeanor offense, it is more efficient and easier to obtain than a criminal system protection. In addition, it has been adopted in every state, and is thus one of the most beneficial remedies granted to domestically abused women. In most states, "police may now make warrant-less arrests for misdemeanor crimes of domestic violence."[21] Congress' 1994 Violence Against Women Act (VAWA), further substantiated the power of protection orders by requiring "states to grant full faith and credit to civil protection orders issues in other states" and discouraging "mutual protection orders where the batterer cross-claims against the victim of battering."[22] Therefore, the accessibility and benefits of the civil protection order exemplify its representation of "the intersection of traditional community-based and justice system approaches: victim empowerment coupled with deterrence."[23] Civil protection orders increase a woman's sense of empowerment without stripping her of all decision-making ability. However, despite the success of protection orders in eliminating domestic abuse, "only about 20% of the approximately two million victims of domestic violence in the United States each year seek such orders."[24] The physical and emotional effects of battering often hinder women from seeking the help they need to escape their situation.

Civil remedies have improved custody implications in domestic violence cases as well. Traditionally, judges did not factor domestic abuse into custody decisions. On the contrary, studies showed that "batterers were more likely to seek custody of their children and more likely to receive custody than other men."[25] However, battered women supporters began working to get domestic abuse considered in court decisions. Then, in 1990, "the United States Congress adopted a resolution expressing the sense of Congress that batterers should not be awarded custody of their children."[26] Although this policy statement surprised judges and attorneys, Congress had numerous justifications for it, including the fact that "batterers directly and indirectly interfere with their victims' parenting and use children as weapons post-separation."[27] Therefore, Congress attempted to alleviate the chance of battered women losing their children as a result of escaping their abusive relationships. Though these advances in civil policy have improved the situation of battered women to some extent, legal remedies were also essential to ameliorate the state of affairs of battered women in respect to the law.

---

[20] *Id.*
[21] Kay, p. 1111.
[22] Kay, p. 1112-1113.
[23] Jane C. Murphy, *Symposium: Engaging With the State.*
[24] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[25] *Id.*
[26] *Id.*
[27] *Id.*

IV. Advances in the Legal System

Although the legal system traditionally viewed domestic abuse as a private matter not to be meddled with, efforts to increase the receptiveness of the criminal system have reformed this attitude to a certain extent. For example, criminalizing the violation of restraining orders has provided battered women with considerably more protection from their abusers than before. Furthermore, in 2004, twenty states and the District of Columbia adopted mandatory arrest laws that "require that a police officer make an arrest if he has probable cause to believe that a crime of domestic violence has been committed."[28] Mandatory arrest laws have dramatically increased the arrest rates of domestic violence disputes. For instance, in the District of Columbia, "the arrest rate in domestic violence cases went from 5% in 1990 to 41% in 1996 after the inception of the mandatory arrest law."[29] However, after the arrests, many abusers get released because their victims recant their story or refuse to testify in court. For this reason, some states have implemented "no-drop policies" that "prevent prosecutors from dismissing charges at the victim's request" and allow prosecution to proceed if enough evidence is available[30]There are two types of no-drop policies: hard no-drop policies and soft nodrop policies. Hard no-drop jurisdictions "push cases forward regardless of the victim's wishes," and thus can "subpoena victims so they have to testify."[31] Soft no-drop policies take the wishes of battered women into account to some extent and provide that "victims are not forced to testify in criminal matters but are provided with services designed to increase comfort with the criminal system and are encouraged to cooperate."[32] Through these policies, the government, rather than the victim, would make the decision to pursue domestic violence cases.

However, although these mandatory policies send "a powerful message to batterers and society as a whole about the criminal nature of domestic violence,"[33] they fail to take into account the individual wishes of each battered woman. In addition, the mandatory arrests and no-drop policies demonstrate the state's support of women subject to domestic abuse yet are premised on the assumption that "battered women want -or should want- to separate from their abusers."[34] Despite this common notion, many women do not see their situation in such black and white terms. The implications of battered women's syndrome often blur or obstruct the ability of battered women to escape their situation.

Although these legal remedies benefit battered women as a whole, they also deprive individual women of agency and the capacity to "best know how to keep [themselves]

---

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Jane C. Murphy, *Symposium: Engaging With the State.*
[34] Leigh Goodmark, *The Legal Response to Domestic Violence*.

safe."[35] For many women coming out of authoritative environments, the last thing they need is to be controlled by the legal system as well. No-drop policies in particular hold battered women legally captive by demanding that they testify against their abusers in court and deplete their ability "to make crucial, potentially life and death, decisions, by and for themselves."[36] Instead of empowering domestically abused women, legal remedies often strip them of all decision-making ability and confidence. Therefore, the legal system has in many ways taken women's safety into its own hands while disregarding their loss of agency. In order to understand why many women do not automatically want to escape their situation, it is essential to review the consequences of battered women's syndrome and other factors that restrict their ability to leave.

V. Battered Women's Syndrome

In working to improve the situations of battered women nationwide, the legal system often works under the assumption that "women who remain in battering relationships are free to leave their abusers at any time."[37] However, in analyzing the effect of battered women's syndrome, which is a sequence of common traits that appear in women "who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives,"[38] women are often not free to leave at all. Instead, the abusive chains of their batterer often psychologically bind them and trap them in their destructive environments. In most cases, domestic abuse occurs in three repetitive cycles of violent behavior. During the first "'tension building phase,'" the batterer "engages in minor battering incidents and verbal abuse" and the victim is "as placating and passive as possible" in order to avoid a more formidable form of abuse.[39] The second "'acute battering incident'" phase is characterized by increased violence often brought on by a "triggering event" when the "tension between the battered woman and the batterer becomes intolerable and more serious violence inevitable."[40] However, the third phase sharply contrasts with the escalation of abuse in the first two stages. This segment of the cycle is characterized by "extreme contrition and loving behavior by the abuser" and is often filled with empty promises by the batterer such as "promises to seek professional help [and] to stop drinking."[41] Many battered women see this period of peace as a chance for reform and a light at the end of the tunnel of their abuse. Thus, countless domestically abused women do not leave their husbands due to the hope that their marriage can be reconcilable. However, the batterers' apparent remorse is usually just a calm before the storm of violence commences once more. In order to be classified as a battered woman,

---

[35] *Id.*
[36] *Id.*
[37] Kay, p. 1113.
[38] Kay, p. 1114.
[39] Kay, p. 1114
[40] *Id.*
[41] *Id.*

"the couple must go through the battering cycle at least twice."[42] Therefore, the cyclical trauma inflicted on battered women often leaves the woman psychologically damaged and trapped in an unstable environment of abuse.

In addition to the cyclical nature of the battering cycle, other factors contribute to battered women's lack of proactive resistance to their situation. For example, women who were raised in a violent environment often think that abuse is customary. In addition, many battered women refuse to come to terms with the grim circumstances of their situation and often respond to reality with "withdrawal, silence, and denial."[43] In many cases, women subject to constant domestic abuse become so mentally destroyed and helpless that they "sink into a state of psychological paralysis"[44] and are thus held in captivity of both their abusers and their own states of mind. Women become so terrified by their abuser's possible reactions to their defiance that they "become trapped by their own fear."[45] Most battered women share common personality traits such as "low-selfesteem," traditional notions about gender roles in society, "guilt that their marriage is failing, and the tendency to accept responsibility for the batterer's actions."[46]In addition, social and economic factors influence women's' decisions to leave their batterers. For example, battered women often want to escape but find that there "may be no place to go" due to "lack of material and social resources" separate from those of their abusive spouses.[47]For this reason, "[a]s many as 50 percent of homeless women and children are fleeing domestic violence."[48] Many women remain immobile due to lack of any better alternatives or resources. Therefore, despite the advances of the civil and legal systems, the individual circumstances of battered women often obstruct their path to freedom.

VI. The Dangerous Gap Between the Ideals of the Legal System and the Realities of Battered Women

Despite the psychological, economic, and social restraints on battered women, the legal system often operates under the notion that women are free to leave their abusive situations. Furthermore, law enforcement officials assume that women subject to domestic abuse should automatically turn to the legal system for help and penalize women who refuse to do so by viewing their allegations of psychological abuse with skepticism and disdain. In many instances, the law threatens battered women's safety rather than protecting it. For example, abused women "are often threatened by their abusers and can be punished more severely if they go to the legal system."[49]The District

---

[42] *Id.*
[43] Kay, p. 1115.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Kay, p. 1111.
[49] Leigh Goodmark, *The Legal Response to Domestic Violence*.

Court of Connecticut case Thurman v. City of Torrington (1984) is an extreme example of the consequences of attempting to find refuge in the law. In *Thurman*, the plaintiffs claimed that the "nonperformance or malperformance of official duties by the defendant police officers"[50] violated their rights under the fifth, ninth, and fourteenth amendments of the Constitution and under the statute 42 U.S.C. §§ 1983, 1985, 1986, and 1988. In 1982, plaintiff Tracey Thurman began continuously reporting the abuse of her estranged husband Charles Thurman to the defendant police officers of the city of Torrington. After multiple instances of violence and the arrest and release of Charles Thurman, the plaintiff obtained an *ex parte* restraining order "forbidding Charles Thurman from assaulting, threatening, and harassing Tracy Thurman."[51] In addition, Tracy Thurman continuously went to the police department to obtain a warrant for her husband's arrest. However, the police officers never arrested him and Charles Thurman ended up finding Tracy and stabbing her "repeatedly in the chest, neck and throat."[52] After the Torrington Police Department arrived, they did nothing while the abuser ran into the residence, got his child, and dropped "the child on his wounded mother."[53] In addition, Charles Thurman continued kicking the plaintiff in the head in the presence of the police officers and was not arrested until she was on a stretcher. The District Court of Connecticut held that the defendant police department and City of Torrington violated the plaintiff's right to equal protection of the laws by knowingly refraining from "interference in such violence" and automatically declining to "make an arrest simply because the assaulter and his victim are married to each other."[54] Thus, the court denied the City's motion to dismiss the plaintiff's allegations.

Although *Thurman* is an extreme case the legal system's failure to protect those affected by domestic violence, it exemplifies the peril of the law enforcement's miscomprehension and indifference to the dangers that threaten battered women who look to the law for safety. Therefore, for some women, the legal system becomes just another domain of domestic abuse rather than a safe haven.

Furthermore, the law "only reprimands physical violence" and tends to ignore allegations of solely psychological violence regardless of the fact that "psychological abuse can be as harmful to the health of a victim of violence as physical abuse."[55] The legal system often fails to truly comprehend the extent of psychological damage inflicted on women affected with battered women's syndrome and thus is less effective for battered women as a whole. As a result, battered women are often viewed with skepticism and law enforcement officials frequently doubt "their claims, their parenting ability, their

[50] Kay, p. 1099.
[51] Kay, p. 1100.
[52] Kay, p. 1101.
[53] *Id.*
[54] Kay, p. 1103.
[55] Leigh Goodmark, *The Legal Response to Domestic Violence*.

judgment, and sometimes, their sanity."[56] This nonchalance and skepticism often infringes on the legal system's ability to truly protect women and comprehend all of the obstacles they have to face.

Domestic abuse situations that involve children often compromise the victim's capacity to escape without devastating consequences as well. For example, many women who do not obtain civil or legal protection from their abuser due to the harmful ramifications that would follow are usually accused of negligence and of "failing to protect"[57] their children. A battered woman's "inability to fulfill her duty to protect her children from exposure to domestic violence or from violence being done to the children"[58] often has ominous consequences in regard to both child protective services and custody arrangements. For instance, in the matter of *Eryck N. Heather N. v. Tompkins County Dept. of Social Services (2005),* the Family Court of Tompkins County removed five children from their mother's care due to "findings of neglect premised upon the children's exposure to domestic violence" even though she was attempting to act in their best interests to "facilitate visitation between her husband and the children."[59]Thus, battered women are justifiably skeptical of the child protective system due to the fact that they are usually "viewed as mothers who have failed their children by being abused and are suffering the consequences."[60]Although courts have started taking domestic violence into account when making custody decisions, many women still have to "contend with 'friendly parent' provisions when they bring custody cases."[61] After custody decisions, many women never fully break free from the captivity of their abuser due to his connections with the children. In addition, batterers usually fight for custody and win in order to continue psychologically tormenting their victims. Consequently, many women find that the legal system "becomes the batterer's forum for terrorizing his victim, and judges and others often give him the tools to perpetuate the abuse"[62] and thus have to look for other alternatives to escape their situation.

VII. Alternatives Besides the Legal System

Due to the fact that the legal system is not always the preeminent solution for battered women, it is essential that other alternatives such as community-based programs and shelters are available to help them escape their situation. Community programs that engage in battering intervention plans can provide a different route for eliminating domestic violence in households nationwide. For example, the Family Violence Prevention Fund sponsors programs such as "Coaching Boys Into Men" and the

[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Kay, p. 371-372.
[60] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[61] *Id.*
[62] *Id.*

"Founding Fathers Campaign" that are "designed to provide non-violent role models for boys and engage men in the efforts to end domestic violence."[63] These leadership and development programs are essential in preventing a future generation of batterers because without intervention, "the cycle of violence recreates itself across generations and throughout society."[64] Numerous studies have proven that "boys who witness their fathers' abuse of their mothers are more likely to become batterers"[65] and, likewise, girls who grow up in an abusive environment are more likely to be abused later in life. Therefore, it has been proven that "generally it is the tortured who turn into the torturers."[66] Stopping the cyclical nature of domestic violence is vital in decreasing its occurrence in households nationwide. In addition, professional fields have become included in the fight against domestic violence. For instance, the University of Minnesota's Aurora Center for Advocacy and Information and its School of Dentistry have "learned to promote screening for domestic violence in dentists' offices."[67] Therefore, through both leadership programs and the expansion of "the circle of 'professionals' trained to assist battered women,"[68] civil alternatives have increased the options available to women subject to domestic abuse on a non-legal basis.

Furthermore, the Violence Against Women Act of 2000 (VAWA II), which "created a complex system for state and federal funding in all fifty states to provide civil legal assistance to battered women" and implemented state support of protection orders and other solutions, was an "important milestone in the evolution of the domestic violence movement."[69] As a result, the increase in civil funding in order to reduce domestic violence in America has ameliorated battered women's chances for freedom from abuse. Even though the legal system may appear to be the primary refuge for battered women, in many cases other alternatives should be used as well in order to prevent future domestic violence and stop its reoccurrence.

VIII. Eliminating Domestic Violence: How To Improve The Conditions of Battered Women

Although the legal system has multiple flaws in its protection of battered women, it has become the primary escape route for the abused and its reforms have significantly helped women escape their violent environments. On the other hand, civil remedies, especially the civil protective order, have also proven to be vital in reducing the amount of domestic

---

[63] *Id.*
[64] Kay, p. 1110.
[65] *Id.*
[66] "The Last Straw: Support, Motivation, Tips and Warning Signs of Domestic Violence," WordPress.com, accessed November 18, 2011, http://thelaststraw.wordpress.com/quotes/.
[67] Leigh Goodmark, *The Legal Response to Domestic Violence*.
[68] *Id.*
[69] Jane C. Murphy, *Symposium: Engaging With the State.*

violence in America. It is essential that both systems be employed to eliminate instances of battering in households. However, in order to substantially decrease the amount of women affected by domestic abuse, it is just as crucial to prioritize domestic violence as one of the most critical issues plaguing America today. Representative Mark Green's statement, "if the numbers we see in domestic violence were applied to terrorism or gang violence, the entire country would be up in arms,"[70] demonstrates the extent domestic abuse has been brushed to the side in lieu of other matters. The decision by the city council of Topeka, Kansas to "decriminalize domestic violence" due to a "run-of-the-mill budget dispute over services" in 2011 further emphasizes the current lack of urgency in addressing domestic abuse in America.[71] By a vote of seven to three, the Topeka City Council "repealed the local law that made domestic violence a crime" and as a result eighteen people convicted of domestic abuse were released just because public officials were trying to decide who would protect the victims.[72] The officials prioritized issues such as gang violence over domestic abuse and thus didn't want to pay for "prosecuting people accused of misdemeanor cases of domestic violence."[73]Therefore, in order to improve the current situations of battered women in America, it is critical that the legal system and the public place the issue of domestic violence higher on their agenda. In order to do so, it is essential to increase the public's awareness on the consequences and psychological implications of battered women's syndrome. In addition, the legal system should treat psychological abuse with the same seriousness as physical violence in order to encompass the situations of all battered women. Therefore, prioritizing domestic violence on the public agenda and improving the viewpoint of the legal system in regard to battered women would significantly reduce domestic violence in America.

IX. A Personal Outlook on the Fate of Battered Women

Throughout my research regarding battered women, I was shocked by the alarming treatment of domestically abused women that still occurs today. Although the fact that the legal system condoned the "rule of thumb," correctional treatment of women in the past is indeed disturbing, the fact that batterers currently use the legal system as another domain of control and abuse was significantly more disquieting. The legal system is meant to ensure the justice of individuals and protect their constitutional rights as citizens, and the idea that it could be manipulated instead to further restrict battered women from achieving those very rights is very unnerving. However, the law's

---

[70] "The Last Straw: Support, Motivation, Tips and Warning Signs of Domestic Violence," WordPress.com, accessed November 18, 2011, http://thelaststraw.wordpress.com/quotes/.
[71] A.G. Sulzberger, "Facing Cuts, a City Repeals Its Domestic Violence Law," The New York Times, October 11, 2011, http://www.nytimes.com/2011/10/12/us/topeka-moves-todecriminalize-domestic-violence.html?_r=1&ref=domesticviolence.
[72] *Id.*
[73] *Id.*

progressive protection against domestic abuse throughout time has allowed me to hope for a more promising future for battered women in America.

Though I have always been interested in the legal treatment of domestically abused women, I had personal reasons for researching this topic as well. One of my close family friends is a victim of domestic abuse and has been currently attempting escape the ramifications of her situation. Although the domestic violence only physically affected her, I witnessed firsthand the psychological effects on her whole family and the trauma her children went through as a result. The cyclical nature of abuse is perhaps its most frightening quality due to the fact that although the battering may stop, the violent tendencies are often passed down through generations. Therefore, I have become significantly more aware of the urgency of addressing domestic violence and have become convinced that public awareness of the reality of domestic abuse is key to amending the circumstances of battered women. In order for domestically abused women to break free of the captivity of their abusive environments and take their "first step to success," it is crucial that the consequences of domestic abuse are given high priority in the legal system and in society as a whole.