

Battered Wives, Religion, & Law: An Interdisciplinary Approach

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[As long as] God is male,
then the male is God.¹

INTRODUCTION

For centuries, Judeo-Christian² teachings have espoused the inferiority

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1. M. DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 19 (1973).

2. For the purposes of this article, the term "Judeo-Christian" refers to traditional Jewish and Christian attitudes about the roles of men and women and the control of women by men. I do not mean to suggest that the Jewish and Christian traditions in their particulars are necessarily similar and can be conflated. Although the two traditions share common origins, they diverge in many important respects. Even within the two broad traditions fall numerous sub-traditions with diverse permutations on the basic Jewish or Christian teachings.

As male-centered forms of religion, Judaism and Christianity share many oppressive attitudes towards women which emanate partially from the concept that God created and sanctioned the patriarchal family. During the time of Abraham, for example, the basic social unit was the extended family, or clan, presided over by a male ruling elder. E. DORFF & A. ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 17-18 (1988). Similarly, Paul analogized the authority of a husband to rule over his wife to the authority of Christ to rule over the church. *Ephesians* 5:22-24. (All Biblical references are to the King James version of the Bible.) See *infra* text accompanying notes 130-35. Another basis for the suppression of women has been the androcentric interpretation by both traditions of the story of Adam and Eve, consistently used by theologians to justify and explain women's "inevitable" subservience to men. See *infra* text accompanying notes 82-108.

Male-created beliefs about women's "proper" roles manifest themselves in the lack of noteworthy women characters in Jewish and Christian sacred writings; instead, these writings contain a plethora of harlots, concubines, and submissive wives of great patriarchal leaders. Although a few women, such as Esther and Deborah in the Old Testament and various minor figures in Jesus' parables, are depicted positively in the Bible, for the most part the Bible is a record by and about men. Even Mary, the mother of Christianity's savior, recedes into the background; we learn virtually nothing about her as an individual or about the spectrum of emotions she must have felt as a single, pregnant woman, as

of women as a means of maintaining patriarchy and male superiority. They also have explicitly and implicitly sanctioned wife abuse.³ Women who have survived abusive marriages rooted in stereotypical religious attitudes confront these same attitudes when turning to the legal system for help. Recognizing the deleterious impact oppressive religious doctrines have on women's lives, feminist theologians are applying the feminist method of reinterpretation, revision, and restructuring based on women's experiences⁴ to religions. Feminist legal scholars who advocate the recognition and valuing of women's experiences likewise must seriously consider the influence of religion on battered wives and deal with it constructively. This article will propose that feminist lawyers and feminist theologians work together to meet more comprehensively the needs of battered wives.

Historically, religions codified explicit rules giving husbands the authority to beat ("chastise") their wives.⁵ Prior to the separation of the Christian Church and the courts, for example, these laws were a major part of the legal system. Even when the courts became distinct entities, the law continued to sanction battering on religious grounds.

Today, no state statutes permit wife abuse, and most churches officially condemn it. However, a twofold problem still exists. First, women's sinfulness, inferiority, and duty to submit to men continue to permeate religious teachings. Second, the patriarchal legal system reflects these

a young mother, and as a witness to the brutal death of her son. Indeed, Biblical writings have excluded women from any kind of decisive voice or role in the most significant moments in both Jewish and Christian histories: the covenanting between God and the Jewish community at Sinai, and the formation of the Christian church during Jesus' life and immediately following his death.

Plaskow notes that Moses' warning in *Exodus* 19:15 excludes women from the community preparing to enter into the covenant with God at Sinai because Moses addresses only the men: "At the central moment of Jewish history, women are invisible. Whether they too stood there trembling in fear and expectation, what they heard when the men heard these words of Moses, we do not know. It was not their experience that interested the chronicler or that informed and shaped the Torah." J. PLASKOW, *STANDING AGAIN AT SINAI* 25 (1990) (footnote omitted). Instead, women became the object to be avoided sexually.

Similarly, women are largely absent from the texts selected to comprise the New Testament. During the formative period of Christianity, the voices and experiences of women are non-existent. Yet as Fiorenza forcefully presents, women played a critical role in establishing and maintaining the "house church" movement which enabled Christianity to survive the tumultuous early years. See E. FIORENZA, *IN MEMORY OF HER* 175-84 (1983).

3. Battering occurs not only between heterosexual, married persons, but between cohabitants and within homosexual relationships as well. This article, however, will focus primarily on marital relationships since I shall be tracing the current legal treatment of battered women back into historical religious doctrines, which recognized only the institution of marriage.

4. See *infra* note 213 and accompanying text.

5. Although I recognize that battering in its most expansive definition encompasses physical, emotional, psychological, spiritual, and sexual abuse, this article will address primarily the physically battered wife.

notions in its lack of an adequate response to the battered wife. As a result, modern jurisprudence directly and indirectly impedes the woman who attempts to leave her batterer, yet condemns the woman who acquiesces to religious teachings and remains in the marriage, tolerating the abuse.

An inherent tension exists between the ideal of gender equality and assumptions that the male being transcends the female. When the latter beliefs are embedded in religion, they cannot be dismissed glibly as unimportant. Religions wield considerable power and influence in modern society; thus, their pronouncements regarding women take on momentous significance, especially when justified as "the word of God." Furthermore, millions of women choose to develop themselves spiritually in organized religion.⁶ Not only does religion affect how a woman perceives an appropriate husband-wife relationship, but it also influences her decision to seek legal assistance should that relationship founder. As long as religions continue to create and maintain a patriarchal system paralleled in the secular society which writes the laws, women will be able to advance only as far as the male creators of this system permit.

Part I of this article will recount the legal system's inadequate response to battered wives. Part II will examine the Judeo-Christian religious teachings that give rise to negative attitudes about women and justify the domination of wives by husbands. Part III will then analyze a variety of judicial opinions in which these teachings are manifested. Finally, Part IV will suggest that as feminist theologians work to change the patriarchal religious doctrines which lead to wife abuse, feminist lawyers can both exert legal pressure on organized religion and sensitively take into account the religious experiences of battered wives when formulating legal strategies to assist these women.

I. THE LEGAL SYSTEM'S RESPONSE (OR LACK THEREOF) TO BATTERED WIVES

Organized societies have long accepted, either overtly or tacitly, violence against women. Today it continues to serve as "material" for comedy routines as well as a basis for male fantasy. On September 30, 1987, KLOS-FM's (Los Angeles) popular morning comedy team, Mark

6. The National Opinion Research Center reports that 93% of persons who have responded to its General Social Survey since 1972 identify themselves with some organized religion. Hadaway, *Identifying American Apostates: A Cluster Analysis*, 28 J. SCI. STUDY RELIGION 201 (1989).

Thompson and Brian Phelps, sponsored a "beating a woman" contest. Female callers were invited to phone in during the Mark and Brian Show, and whoever could most realistically emulate the screams and cries of a woman being beaten would win a prize. In response to complaints by some women callers, the disc jockeys attempted to even up the contest by sponsoring a "beating a man" segment during the next hour.⁷ KLOS attributes the station's number one rating among its 18-34 year old male audience to these disc jockeys.⁸

Such tolerance of violence against women produces the following statistics. Battering is the single major cause of injury to women, exceeding rapes, muggings, and auto accidents.⁹ The U.S. Attorney General's Office estimates that approximately 50% of married women in California will be assaulted by their husbands.¹⁰ In Los Angeles alone, 20,203 domestic violence incidents were reported in 1986; of those incidents, 13,918 involved weapons.¹¹ Finally, 30% of female homicide victims are killed by their husbands or boyfriends.¹² These desperate figures are by no means an exhaustive survey of the extent of violence against women, but they do illustrate the scope and urgency of the situation.

Historically, laws codified the authority of husbands to beat their wives. Men were given broad latitude when "correcting" women as long as they avoided extremes—a highly subjective restriction. As early as 753 B.C., Romulus proclaimed the first marriage law, admonishing wives "to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions."¹³

7. I sent a letter to Bill Sommers, President and General Manager of KLOS, complaining about the "beating a woman" contest. In response, Mr. Sommers explained that these disc jockeys "were brought in from Birmingham, Alabama and as you can well expect, it was a culture shock for them living and working in our community." Letter from Bill Sommers to author (Oct. 7, 1987). This weak justification seems to imply that what is shocking in Los Angeles—violence against women—is not shocking in Birmingham.

A further example of the acceptability of violence against women was illustrated by a recent psychological study of male Canadian university students completed by UCLA researchers. The researchers reported that 26% of the 18 to 25 year old men surveyed "said they would be at least somewhat likely to commit rape if they could escape punishment." L.A. Times, Feb. 13, 1989, Metro Section, at 3, col. 5.

8. L.A. Times, July 22, 1988, Part II (Metro), at 3, col. 5.

9. Domestic Violence Fact Sheet (Oct. 1987) (prepared by County of Los Angeles Domestic Violence Council).

10. *Id.*

11. *Id.*

12. *Id.*

13. Dobash & Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427 (1977-78).

Because wives were property, husbands could, and did, exercise absolute control over them. A husband had the right to punish his wife for behavior such as adultery or drinking.¹⁴ Of course, comparable punishments for similar conduct by men did not exist.

The Middle Ages were an especially violent era for women. Numerous offenses warranted wife beating, in particular adultery or lying to her "lord."¹⁵ One account approvingly described the beating endured by a wife who had imprudently scolded her husband in public; after knocking her to the ground, the man kicked her in the face, intentionally breaking her nose so that her disfigured "visage" would serve as a future reminder to her of the consequences of her "evil and great language."¹⁶ A Medieval commentator observed that the laws actually protected wives by restricting the husband to only reasonable beatings.¹⁷

Lest this time period be dismissed as exceptionally barbaric and outdated, a person need only examine the writings of one of the most influential scholars of jurisprudence to note the continuation and acceptance of wife abuse. In the mid-seventeenth century, Blackstone described the legal right of a husband to "chastise" his wife:

The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife . . . otherwise than lawfully and reasonabl[y] belongs to the husband for the due government and correction of his wife. The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors . . . to beat his wife severely with scourges and sticks; for others, only . . . to use moderate chastisement.¹⁸

14. *Id.* at 428.

15. G. COULTON, *MEDIEVAL PANORAMA* 617 (1938).

16. *Id.*

17. *Id.* (citing Leon Gautier).

18. 1 W. BLACKSTONE, *COMMENTARIES* *444-45 (T. Cooley ed. 1899) (footnotes omitted).

Clearly, the extent of the physical means used by a husband to rule over his wife depended on how he defined "violence" and "reasonableness." In a self-congratulatory tone, Blackstone explained how in his own enlightened era, "this power of correction began to be doubted . . . and a wife may now have security of the peace against her husband. . . ." ¹⁹ However, as one editor of the *Commentaries* noted, times had not changed significantly:

Husband and wife, in the language of the law, are styled "baron" and "feme": the word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime ²⁰

American law assimilated Blackstone's interpretation of English common law attitudes toward marriage in general and wife abuse in particular. Not until the late nineteenth century did American jurisdictions explicitly repudiate wife abuse. ²¹

As even a cursory glance at the modern legal response to the plight of battered wives illustrates, it would be better to be an assaulted horse than wife, ²² an assaulted stranger than wife, ²³ or if you are an assaulted wife,

19. *Id.* at *445 (footnotes omitted). Blackstone went on to characterize women as esteemed creatures for whom "even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England." *Id.* The editor took umbrage with this rosy depiction of the law's treatment of women; he could not "repress at this point an expression of impatience at this unwarrantable praise of the law of England," and proceeded to discuss the many legal disabilities under which women strained, leaving to the reader "to determine on which side is the balance, and how far this compliment is supported by truth." *Id.* at *445 n.2.

20. *Id.* at *445 n.2. Furthermore, Blackstone inaccurately reported that wife abuse occurred only in the bottom rung of society: "Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour." *Id.* at *445. Blackstone distorted the reality of wife abuse in two ways. First, he stated that abuse occurs only among the lower class of society. This perception was as much a myth then as it is today; wife abuse cuts across all socioeconomic levels and races. See D. MARTIN, BATTERED WIVES 19 (1976); R.E. DOBASH & R. DOBASH, VIOLENCE AGAINST WIVES 19-20 (1979). Second, he designated the category of abusers as "people," when in fact, the abusers were, and are, overwhelmingly men. See National Coalition Against Domestic Violence Statistics (May 1988) (men commit 95% of all assaults on spouses or ex-spouses).

21. See *infra* text accompanying note 150; but see *infra* text accompanying notes 151-54 for cases which accepted "trivial" forms of abuse.

22. D. MARTIN, *supra* note 20, at 118. In 1975, KCBS news radio reported that a California man

it is better to be one living in a wealthy, caucasian neighborhood than in a poor, minority inner-city area.²⁴ Explicit legal prohibitions against wife abuse have not decreased its incidence, but have forced a retreat behind the sacrosanct doors of the family home. Just as the eradication of overtly racist laws and policies has not suppressed covert racism, so has the abolition of laws permitting wife abuse failed to stop the violence.

One barrier to effective protection of wives is this society's reverence for the privacy of the home. In accordance with the phrase "a man's home is his castle," officials within the legal system (until recently, almost exclusively men), such as police, prosecutors, and judges, are reluctant to invade the sanctity of another man's abode.²⁵ Behavior which would be severely condemned if it transpired between strangers is minimized or ignored when it occurs between a husband and wife. Somehow, a black eye from one's spouse is not as offensive as one from a mugger. One wonders if members of the legal hierarchy choose to ignore wife abuse because they subconsciously hope that it will not happen in their own lives; perhaps they choose to ignore it precisely because it *is* happening in their lives. Whatever the reason, this unresponsiveness grants the batterer a privileged status among criminals.²⁶

Paralleling the law's unwillingness to invade the home is the notion that spouses should not sue each other. Notwithstanding the fact that by the time a wife files criminal charges against her husband or attempts to obtain a civil restraining order, the marriage is already in serious trouble, legal

who wanted to get even with his wife shot and injured her horse with a bow and arrow. The court summarily fined the man \$100 for veterinary costs and sentenced him to 90 days in jail. Had the husband assaulted his wife, such judicial swiftness would have been unlikely.

23. See *infra* note 33 for implied evidence of the disparate response given by law enforcement agencies to battered women in contrast to victims of non-domestic violence; *infra* note 159 for administrative classifications which effectively deny battered wives protection.

In general, bystander studies indicate that an observer of violence is much more likely to intervene if the observer thinks the attacker and victim are strangers. In simulated physical assaults by a man on a woman, if the woman yelled, "Get away from me, I don't know you," bystanders intervened on her behalf 65% of the time. However, if she yelled, "Get away from me, I don't know why I ever married you," bystanders helped only 19% of the time. Shotland, *When Bystanders Just Stand By*, PSYCHOLOGY TODAY, June 1985, at 50, 52. In an incident where a 20 year old woman was raped in full view of 25 employees of a nearby roofing company who watched intently but did nothing to help, these witnesses later explained their inaction by stating that they thought the couple were boyfriend and girlfriend, despite the woman's screams. *Id.*

24. As a volunteer at Sojourn Services for Battered Women and their Children, a shelter in Los Angeles, I learned that police respond less quickly to inner city wife abuse calls because spousal violence is viewed as "natural" among the cultures which reside there.

25. D. MARTIN, *supra* note 20, at 87.

26. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657 (1981).

officials continue to believe that lawsuits between a husband and wife cause more harm than good because litigation weakens marital cohesiveness and disrupts the family unit.²⁷ The legal system promotes marital harmony at all costs, even if such harmony is merely illusory.

An abused wife's initial encounter with the legal system is generally with the police. Police departments, however, have been notoriously unresponsive to these women by failing to show up at the scene of the incident, by unreasonably delaying their arrival, or by dissuading women from taking any further legal action if they do arrive. Many courts sanction this behavior by holding for the police in civil suits instigated by battered women who were denied protection.²⁸ Traditionally, domestic violence disturbance calls have been relegated to the lowest priority of all calls to the police.²⁹ Thus, a battered wife may have to wait for hours before law enforcement help arrives.³⁰

While the police are usually the first step in the wife's attempt to gain legal protection or redress, they are also often the first to dissuade the woman from doing just that. Police policy manuals have explicitly encouraged officers to avoid arrest if at all possible unless extremely egregious injuries have been inflicted on the wife, or unless the husband is still acting in a hostile manner in the presence of the police.³¹ It is not unusual for the responding officers either to encourage the woman to reconcile with her spouse, or to discourage her from pursuing additional legal avenues by intimating that she provoked the abuse, that the husband was acting appropriately, or that the legal processes available are so complex that the woman should forget about them.³² As a result of feminist efforts on behalf of battered women, many of these explicit policies are changing; however, in the absence of statutes and guidelines

27. *Id.* at 1669-70. See also D. MARTIN, *supra* note 20, at 103, 115; *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1529 (1984).

28. See *infra* text accompanying notes 162-70.

29. R.E. DOBASH & R. DOBASH, *supra* note 20, at 211.

30. Some battered women shelters keep track of police inaction by asking hotline callers how the police responded to requests for help. For example, as a volunteer on the 24-hour hotline at Sojourn Services for Battered Women and their Children, I was trained to elicit this information. When problems were evident, shelter staff would contact precinct chiefs to discuss unreasonable delays or other inappropriate actions.

31. D. MARTIN, *supra* note 20, at 93.

32. Eisenberg & Micklow, *The Assaulted Wife: "Catch-22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 157 n.222 (1977). In Wayne County, Michigan, a wife called the police because her husband was breaking their furniture. One officer told her that "it's his house, his furniture, it's his community property. He can do whatever he wants to it. If he wants to, he can burn it; it's his just as well as yours."

requiring specific, affirmative police action, changes in actual behavior occur very slowly, if at all.³³

Should an abused wife decide to pursue criminal charges against her husband, she faces formidable obstacles. In addition to the customary rigorous and time-consuming nature of any criminal prosecution, the woman may encounter a prosecutor who is less than enthusiastic about handling her case. Attorneys find that domestic violence cases are unpleasant to litigate, lack prestige, and are professionally unrewarding.³⁴ Reluctant attorneys want some assurance that battered women will not drop the charges midway through the case,³⁵ often requiring that the wife file a divorce action as proof of her seriousness.³⁶ Many prosecutors, like police, believe that domestic violence is a social problem for agencies other than the criminal court system. As a result, prosecutors may attempt to dissuade the battered wife from pursuing her criminal case.³⁷

If the abused wife pursues the civil remedy of a temporary restraining order (TRO), she must grapple with forms which are confusing to fill out

33. CAL. PENAL CODE § 273.5 (West 1989) criminalizes domestic violence, but does not specify any particular police action. The Lula Mae Thomas Consent Decree requires Los Angeles law enforcement officers to arrest a man who commits a felony in violation of § 273.5 regardless of whether or not the woman requests an arrest. If a misdemeanor has occurred in the officer's presence, the officer must arrest the man in accordance with the criteria which determine whether an arrest would be appropriate in a similar non-domestic violence situation. Los Angeles Police Department, Memorandum No. 1, Standards and Procedures Regarding Domestic Violence, at B6, B8 (Feb. 14, 1986).

The details of this decree are notable because by implication they illustrate the extent of past police failure to assist battered women. For example, officers are now required to treat domestic violence incidents as criminal conduct. *Id.* at B1. Officers must handle requests for assistance by "family or household members" the same way they would handle similar requests made by non-family or household members. *Id.* at B3. Decisions to dispatch a unit to the scene of a reported domestic violence incident are to be made in accordance with standards used to dispatch a unit to the scene of similar non-domestic violence incidents. *Id.* at B4.

CAL. PENAL CODE § 13701 (West 1990) compels all state law enforcement agencies to promulgate explicit and detailed procedures governing officers' response to domestic violence calls by January 1, 1986. The introductory paragraph to this section seems to state the self-evident by proclaiming that the "policies shall reflect that domestic violence is alleged criminal conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred." The policies are to include, in part, standards for furnishing victims information about shelters, TROs, criminal prosecutions, and child custody and support.

34. Eisenberg & Micklow, *supra* note 32, at 158.

35. Even in jurisdictions such as California where the victim theoretically has no authority over dropping the charges because charging is strictly a prosecutorial decision, if the woman refuses to cooperate, the prosecutor may be left without a case. Remarks by Mia Baker, Program Director for the Victim/Witness Assistance Program of the Los Angeles District Attorney's Office, made at the Los Angeles Free Clinic Seminar (Oct. 1, 1988).

36. Eisenberg & Micklow, *supra* note 32, at 158.

37. *Id.* See also D. MARTIN, *supra* note 20, at 109-14.

and costly to file. In Los Angeles, if a TRO involves child custody, the spouses must submit to mandatory mediation. The inherent problem with mediation is that it is premised on some equality of bargaining power between the parties, equality obviously lacking in a violent home. Typically, when a battered wife encounters her spouse in a mediation setting she is silent and will rarely divulge a complete and accurate account of the battering.³⁸ At the Order to Show Cause (OSC) hearing, she will encounter her batterer in court, which can be dangerous.³⁹ Even if the woman succeeds in obtaining a TRO, the police often refuse to enforce it. This failure causes the woman to realize, sometimes by enduring yet another beating, that a TRO is, after all, only a piece of paper which the batterer may or may not respect.⁴⁰

When a battered woman appears before a judge either in a criminal or civil proceeding, she often encounters further examples of indifference towards or ignorance of her situation. Many judges refuse to listen to wife abuse complaints because these cases are perceived solely as "women's problems."⁴¹ Furthermore, sexist and sexually-oriented jokes are not unknown in modern courtrooms.⁴² Judges will not lightly impose criminal penalties if they think the couple may reconcile, an outcome they often

38. California does allow the mediator to meet with the husband and wife separately. Even this allowance is little comfort to women who believe that husbands who beat their wives are unfit fathers *per se* and should not be given the opportunity to contest custody. In one study, 71% of men who ultimately were killed by the women they tortured had physically and/or sexually abused their children; 51% of men who were not ultimately killed had done so. A. BROWNE, *WHEN BATTERED WOMEN KILL* 70 (1987). Even if the batterers did not abuse the children, the very example of a father committing acts of violence against the mother is extremely detrimental to children, who thus should not be permitted to reside with their fathers unless and until the men change.

39. Battered women shelters provide advocates to accompany the victims to their OSC hearings. If the advocate deems the situation exceptionally dangerous, she will request a police escort to and from the courtroom.

40. Battered women hotline workers will caution a caller about the theoretical versus realistic effectiveness of TROs and then encourage the woman, based on her knowledge of her husband's respect for law enforcement, to decide if it would be worthwhile to obtain one. This knowledge is again based on my experience at Sojourn Services for Battered Women and their Children.

41. Durham, *Women and the Helping Professions: A Judicial View*, A. MORMON COUNS. & PSYCHOTHERAPISTS J. 38, 43 (Mar. 1985). Judge Durham asserts that the fact that courts have only recently begun to deal seriously with wife abuse further illustrates their sexist tendencies. *See also Recent Developments—Judging Domestic Violence*, 10 HARV. WOMEN'S L.J. 275 (1987), in which the author states that judges have learned the same myths about domestic violence as lay persons, including the assumption that the woman must have perversely enjoyed the abuse because she did not leave her abuser. These beliefs are manifest in an overall courtroom tolerance of the batterer when the judge gives credence to the man's claim that the woman caused/provoked/deserved the violence or focuses on reconciliation of the spouses as the ideal solution.

42. Durham, *supra* note 41, at 43. Judge Durham recounts that when the first domestic violence statute was passed in Utah, she "consistently met with jokes which attributed the responsibility for the abuse to the victim."

encourage by "sentencing" husbands to diversion therapy programs.⁴³ Whether the judge views wife abuse as a domestic or a criminal problem will affect the sentencing; if the violence is perceived as a domestic problem, the husband may escape criminal liability altogether.⁴⁴ Courts within the same county or in adjacent counties vary widely in the manner in which they handle wife abuse. The networks of battered women's shelters are fully aware of which courts are the most tolerant of and responsive to survivors⁴⁵ of abuse, and encourage the women to travel to them if at all possible.⁴⁶

When the violence escalates to an intolerable level, some wives actually kill their husbands in self-defense. After failing to protect these women, the legal system then characterizes them as perpetrators of cold-blooded violence. The manner in which the defendants are treated shows that they are "presumed guilty until proven innocent."⁴⁷ Some of these women lack the strength to endure a lengthy criminal trial even if their attorneys believe they have a strong self-defense case; other women are more concerned with the effect that such a trial might have on their

43. Eisenberg & Micklow, *supra* note 32, at 159. Diversion represents a judge's desire to see the couple reconcile. Whether one agrees or disagrees with this purpose, diversion has typically been an abysmal failure. Diversion programs vary markedly in their structure, quality, and attendance requirements. The Los Angeles County Domestic Violence Council has recognized this problem and is currently attempting to rectify it. A recent publication is designed to assist judges and other court officials in determining which diversion programs are the most effective. However, these guidelines are just that—suggestions, not requirements. See COUNTY OF LOS ANGELES DOMESTIC VIOLENCE COUNCIL, *BATTERER'S TREATMENT PROGRAM GUIDELINES* (1988).

44. Eisenberg & Micklow, *supra* note 32, at 159. Note also the outcome in the celebrated Charlotte Fedders divorce action against a husband who physically abused her for nineteen years. A domestic master in Maryland awarded John, among other items, 25% of the profits from the book Charlotte wrote chronicling her experience with his abuse. L.A. Times, Nov. 19, 1987, View Section, at 6, col. 1.

45. I appreciate Alan Rosenfeld's sensitive use of terminology to describe persons molested as children. Rather than describe them as "victims," an adjective with numerous negative connotations, Rosenfeld prefers "survivors" to indicate individuals who have endured unspeakable horrors with strength and courage. For similar reasons, I, too, choose to use the term "survivor" (unless, of course, the woman is murdered by her abuser) to describe women who endure abusive behavior from those who purport to love them. See Rosenfeld, *The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy*, 12 HARV. WOMEN'S L.J. 206 n.1 (1989).

46. California has acknowledged the inadequate court treatment of abused women. The Supreme Court appointed a Judicial Council Advisory Committee on Gender Bias which in turn created a subcommittee on domestic violence to study this very problem. Confidential hearings were held in 1988, with public hearings beginning in 1989. JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, DOMESTIC VIOLENCE COALITION MEETINGS ON GENDER BIAS IN THE COURTS at 1 (Fall 1988) (pamphlet).

47. A. BROWNE, *supra* note 38, at 160. It is not unusual for women charged with the homicide of their husbands to lose custody of their children, at least temporarily, especially if the prosecutor plans to use the children as witnesses against their mother.

children and would rather pull the family back together as quickly as possible than spend protracted time in court. As a result, a wife may plead guilty to lesser charges by plea bargaining.⁴⁸

Should the woman try to convince a jury that she acted in self-defense, she will have to portray herself as a weak, manipulable automaton living in a fear-induced state of paralysis which prevented her from leaving her husband. Much of the discussion in judicial opinions centers on this "learned helplessness" syndrome espoused by expert witness Lenore Walker.⁴⁹ The courts ignore the probability that the wife did attempt to leave the abusive environment,⁵⁰ or, based on a careful weighing of the pros and cons, made a rational choice to stay.⁵¹

II. JUDEO-CHRISTIAN IDEOLOGIES UNDERLYING THE LEGAL SYSTEM'S TREATMENT OF BATTERED WIVES

The inadequate response of the legal system to battered wives results from the interplay of numerous factors. One of the most significant is the role of religion in promulgating doctrines that subordinate women to men.⁵² The importance of religious pronouncements cannot be overemphasized; religious devoutness is the most important variable in consistently predicting attitudes about familial roles, extra-familial roles, male/female

48. *Id.* at 163.

49. L. WALKER, *THE BATTERED WOMAN* (1979). See *infra* note 188 for a description of Walker's learned helplessness theory. See also Walker, *Battered Women and Learned Helplessness*, 2 *VICTIMOLOGY* 525 (1977-78).

50. One woman sought help from her clergyman (who recommended she be more understanding and forgiving of her spouse), her doctor (who wrote out a prescription for tranquilizers), her friend (whose husband consequently forbade her to see the battered wife), a family guidance agency (who exhorted her to find a way to control the violence), and the police (who did not come out to the house but called several hours later to inquire if things had calmed down). D. MARTIN, *supra* note 20, at 2-3.

In one study of battered women, 53% of those interviewed had left the relationship. Among the group of women who ultimately killed their batterers, many had left or attempted to leave; some had been separated or divorced for up to two years preceding the homicide. A. BROWNE, *supra* note 38, at 109.

51. See Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 45-46.

52. Horton, Wilkins & Wright, *Women Who Ended Abuse: What Religious Leaders and Religion Did for These Victims*, in *ABUSE AND RELIGION: WHEN PRAYING ISN'T ENOUGH* 235 (A. Horton & J. Williamson eds. 1988). Women must recognize the role religion plays in wife abuse:

The religious battered woman must come to see reality—that religion has been part of her problem and that true mental and emotional health can come about only when she can reject her religious dependency sufficiently to recognize a fact: that the degradation of women is a cornerstone of most religions.

Id. (quoting Cameron, *The Battered Woman: Why Does She Stay?*, 10 *FEMINIST CONNECTION* 12 (1980)).

stereotypes, social change, and gender role preference.⁵³ The far-reaching effect of these teachings has been, and continues to be, profound. Ruether describes how religious dogma about women and societal systems governing women intersect:

The male bias of Jewish and Christian theology not only affects the teaching about woman's person, nature, and role, but also generates a symbolic universe based on the patriarchal hierarchy of male over female. The subordination of woman to man is replicated in the symbolic universe in the imagery of divine-human relations. God is imaged as a great patriarch over or against the earth or creation, imaged in female terms. Likewise, Christ is related to the Church as bridegroom to bride. Divine-human relations in the macrocosm are also reflected in the microcosm of the human being. Mind over body, and reason over the passions are also seen as images of the hierarchy of the 'masculine' over the 'feminine.' Thus, everywhere the Christian and Jew are surrounded by religious symbols that ratify male domination and female subordination as the normative way of understanding the world and God. This ratification of male domination runs through every period of the tradition, from Old to New Testament, through the Talmud, Church Fathers and Canon Law, Reformation Enlightenment, and modern theology. It is not a marginal, but an integral part of what has been received as mainstream, normative traditions.⁵⁴

Most families can trace back within two to three generations progenitors

53. Morgan, *The Impact of Religion on Gender-Role Attitudes*, 11 *PSYCHOLOGY OF WOMEN Q.* 301, 305-07 (1987). A questionnaire was sent to senior women at two eastern universities to measure the correlation between religious commitment and gender-role attitudes. Religious devoutness was measured by the quality and extent of participation in religious activities and the woman's feelings about her religion. Women majoring in traditional and nontraditional courses of study were involved.

Morgan's study indicates that as the level of religious devoutness increases, gender role attitudes become more traditional. Of the variables religious devoutness, self-esteem, assertiveness, mother's education and mother's employment, religious devoutness was the most important in consistently predicting gender role attitudes. Variables which most exerted a counter-influence on intrafamilial roles were self-esteem and mother's employment: "as self-esteem and the likelihood of the mother working outside the home for pay increased, attitudes toward roles within the family became more nontraditional." *Id.*

54. Ruether, *Sexism, Religion, and the Social and Spiritual Liberation of Women Today*, in *BEYOND DOMINATION* 110 (C. Gould, ed., 1983).

who were deeply immersed in a male-oriented religion.⁵⁵ Thus, the very structure of present-day marital life contains customs and beliefs about women which members of both sexes consider correct and accurate simply because "people have 'always' accepted them as right."⁵⁶ Furthermore, lawmakers have embedded these customs and beliefs, grounded in Biblical traditions, in statutes and judicial opinions pertaining to domestic violence.⁵⁷

Although at one time religious treatises explicitly condoned wife beating,⁵⁸ today "the seeds of wife abuse lie in the subordination of females and in their subjugation to male authority and control."⁵⁹ This hierarchy of male over female manifests itself in the patriarchal family. Religion is the "superstructure"⁶⁰ within which a patriarchal society can create patriarchal families.

Patriarchy is comprised of two elements: structure and ideology.⁶¹ The structure is a highly-stratified hierarchy that dictates who has access to which positions; by definition, certain groups are superior, while other groups are subservient.⁶² Ideology is the means by which the dominant

55. M. STONE, *WHEN GOD WAS A WOMAN* 239 (1976).

56. *Id.* Stone provides a lengthy list of attitudes influenced by religious teachings:

Attitudes toward double-standard premarital virginity, double-standard marital fidelity, the sexual autonomy of women, illegitimacy, abortion, contraception, rape, childbirth, the importance of marriage and children to women, the responsibilities and role of women in marriage, women as sex objects, the sexual identification of passivity and aggressiveness, the roles of women and men in work or social situations, women who express their ideas, female leadership, the intellectual activities of women, the economic activities and needs of women and the automatic assumption of the male as breadwinner and protector have all become so deeply ingrained that feelings and values concerning these subjects are often regarded, by both women and men, as natural tendencies or even human instinct.

Id.

57. *Id.* at 237 (quoting Simone de Beauvoir):

Man enjoys the great advantage of having a god endorse the code he writes; and since man exercises a sovereign authority over women it is especially fortunate that this authority has been vested in him by the Supreme Being. For the Jews, Mohammedans and Christians among others, man is master by divine right, the fear of God will therefore repress any impulse towards revolt in the downtrodden female.

58. A Medieval theological encyclopedia declared that "[a] man may chastise his wife and beat her for her correction; for she is of his household, and therefore the lord may chastise his own, as it is written in Gratian's *Decretum* under the gloss *judicari*." G. COULTON, *supra* note 15, at 615. The *Decretum* further stated that "if the wives of any clergy have sinned, [the husbands may] keep them bound in their house, compelling them to salutary fasting, yet not unto death." *Id.* A third passage states that "[t]he husband is bound to chastise his wife moderately, unless he be a cleric, in which case he may chastise her the harder." *Id.*

59. R.E. DOBASH & R. DOBASH, *supra* note 20, at 33.

60. M. DALY, *THE CHURCH AND THE SECOND SEX* 69 (1985).

61. R.E. DOBASH & R. DOBASH, *supra* note 20, at 43.

62. *Id.* As the authors explain, "[a]ccess to positions is rarely based upon individual ability but is

group utilizes internal controls to force acceptance of the structure and to prevent the subordinate group from rebelling.⁶³ Religion and the state reinforce one another: religious teachings provide structural and ideological supports for the domination of women by men, and the state codifies this relationship.⁶⁴ Religious leaders require women to submit to their spouses because God has given men the authority to rule over the "inferior" sex. Men have been using patriarchal Judeo-Christian doctrines and stereotypical attitudes about women to justify the subordination of women for thousands of years, influencing modern laws and policies affecting battered wives.⁶⁵

In stark contrast to the centuries-old Goddess worshipping societies of the Near East, whose origins are traceable to 25,000 B.C.,⁶⁶ the Hebrews worshipped a male God who did not share his power with any female deity; Jehovah was a "jealous God."⁶⁷ The transformation from a partnership society, characterized by women and men working together toward a common good, to a dominator society, characterized by male violence and domination,⁶⁸ paralleled the emergence of the Israelite nation through a number of invasions of the lands occupied by Goddess-worshippers. Indo-European invaders from the Asiatic and European north⁶⁹ introduced male gods of war who were worshipped by powerful

institutionalized to such an extent that those who occupy positions of power and privilege do so either because of some form of ascribed status or because of institutionalized forms of advantage that give them the opportunity to achieve status." *Id.*

See also Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980): Patriarchy is a "group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive."

63. R.E. DOBASH & R. DOBASH, *supra* note 20, at 43-44. "When the ideology legitimizes the order and makes it right, natural, and sacred, the potential conflict inherent in all hierarchies is more likely to produce conflict within the individual and less likely to emerge as overt resistance." *Id.* at 44.

64. *Id.* at 44.

65. Unfortunately, some women have also accepted this justification for their own subordination, which, in fact, they do not recognize as subordination. See *infra* text accompanying note 202 for reference to false consciousness.

66. M. STONE, *supra* note 55, at 10. See also *infra* note 215.

67. Exodus 34:14.

68. R. EISLER, *THE CHALICE AND THE BLADE* xix (1987). Goddess worshipping societies illustrate a "partnership model" characterized by an absence of sexual inequality. *Id.* at 20. The emerging warrior Hebrew nation illustrates the "dominator model" characterized by a system "in which both men and women are taught to equate true masculinity with violence and dominance and to see men who do not conform to this ideal as 'too soft' or 'effeminate'." *Id.* at xviii.

69. These invasions occurred in three primary waves: 4300-4200 B.C., 3400-3200 B.C., and 3000-2800 B.C. *Id.* at 44. Although historians have generally considered the Hebrews as totally separate and distinct from the Indo-Europeans, today scholars differ as to whether or not the two

priests and warriors.⁷⁰ The Hebrew tribes of Israel,⁷¹ who came from the southern deserts, arrived in the Goddess-worshipping land of Canaan through the direction of their male God, Jehovah,⁷² and brought with them patriarchal society and explicit laws concerning the roles of men and women. These roles represented a stark change from the autonomous lifestyles enjoyed by women in Canaan. By establishing male domination, the Hebrews laid the foundation for future Christian tenets requiring wives to submit to abusive husbands, later reflected in judicial opinions and other legal writings.⁷³

The Hebrews fought constantly with the Ammonites, one of the native groups of Canaan.⁷⁴ Ammonite women held positions of prominence and leadership, and generally enjoyed elevated economic, legal, and social status.⁷⁵ Israelite women, however, lived under the pervasive Mosaic law system⁷⁶ which explicitly subordinated women to men. Thus, "[t]he social and legal position of an Israelite wife was inferior to the position a wife occupied in the great countries round about."⁷⁷ The position of Canaanite women changed drastically from importance⁷⁸ to subservience as the Israelites rose in power, gradually imposing their beliefs on the Canaanites.⁷⁹ After hundreds of years of war, the Hebrews ultimately conquered the Canaanites. The most significant method by which the Israelites imposed their teachings about women on the surrounding culture was by

groups were, in fact, related. See M. Stone, *supra* note 55, at 104-126; R. EISLER, *supra* note 68, at 45. Most certainly many of the Hebrew customs paralleled those of the Indo-Europeans: "*The one thing they all had in common was a dominator model of social organization: a social system in which male dominance, male violence, and a generally hierarchic and authoritarian social structure was the norm.*" *Id.* at 45 (emphasis in original).

70. *Id.* at 44.

71. Israel here is used not to denote the modern-day country, but that group of Semitic people described in the Old Testament as descendants of Abraham, Isaac, and Jacob. Jehovah divided the descendants of Jacob, renamed "Israel," into twelve tribes, each tribe representing one of the twelve sons of Jacob. See *Genesis* 35:21-26; *Genesis* 49:28.

72. M. STONE, *supra* note 55, at 167.

73. See *infra* text accompanying notes 143 and 170.

74. R. EISLER, *supra* note 68, at 44, 58 and 94.

75. M. STONE, *supra* note 55, at 54-55.

76. Moses codified a set of laws in c. 1300-1250 B.C., many of which can be found in the Old Testament.

77. M. STONE, *supra* note 55, at 55, quoting Roland de Vaux.

78. "The social status of women, and particularly the mother of the family, thus appears to have been a high one in Ugarit." M. STONE, *supra* note 55, at 54, quoting Claude Schaeffer. Ugarit was a city in northern Canaan.

79. *Id.* at 167-72. See also R. EISLER, *supra* note 68, at 44, 58. The conquest of Canaan was completed by 1250 B.C. G. LERNER, *THE CREATION OF PATRIARCHY* 164 (1986).

introducing a male-oriented account of the creation and downfall of human life.⁸⁰ This account enabled subsequent patriarchal interpreters⁸¹ to place woman as secondary to man and as the ultimate scapegoat for all the world's ills.

To this day, the account of Adam and Eve's creation serves as one of the strongest religious justifications of the subordination of women⁸² and of the submission of wives to their husbands. The Book of Genesis contains two descriptions of the creation; clerics emphasize the earlier one (the J story), whereas the later, more egalitarian one (the P story) is virtually ignored.⁸³ Disparaging theories about women have arisen directly from the J account. This depiction of the creation shows God forming Eve as an afterthought to man for the sole purpose of serving as man's helper.⁸⁴ After God created Eve from a portion of the male

80. In yet another parallel between the Indo-European invaders and the Hebrew conquerors, *see supra* note 69, both groups brought with them accounts of the creation of the world and of humankind which were characterized by violence and/or the rise in power of men over women. Stone posits the following:

The arrival of the Indo-Aryan tribes, the presentation of their male deities as superior to the female deities of the indigenous populations of the lands they invaded and the subsequent intricate interlacing of the two theological concepts are recorded mythologically in each culture. It is in these myths that we witness the attitudes that led to the suppression of Goddess worship.

...

The prevalence of myths that explain the creation of the universe by the male deity or the institution of kingship, when none had existed previously, strongly hints at the possibility that many of these myths were written by priests of the invading tribes to justify the supremacy of the new male deities and to justify the installation of a king as the result of the relationship of that king to the male deity.

M. STONE, *supra* note 55, at 66-67.

81. Whether or not one believes that the account of Adam and Eve actually occurred is not important to the ensuing analysis. The point to be emphasized is that as written and interpreted by men who had a vested interest in legitimizing patriarchy, any real or symbolic accuracy the account may initially have contained has been obscured for centuries. *See infra* text accompanying notes 218-21 for possible reconstructions of the story of Adam and Eve.

82. G. LERNER, *supra* note 79, at 182.

83. Eisler explains that Biblical scholars identify the various groups of Hebrew priests who wrote the Old Testament by initials designating the particular school which the priests represented. The J creation account was written by priests from the Jahweh school of the southern Kingdom of Judaea. The P account was written by priests from the Priestly school. R. EISLER, *supra* note 68, at 85-86.

The earlier J account is found in *Genesis* 2:18-25. The P account is found in *Genesis* 1:26-28.

84. M. DALY, *supra* note 60, at 77-78; *see also Genesis* 2:18. This version of the creation of male and female beings contrasts with Sumerian and Babylonian legends describing a goddess who created women and men simultaneously, in pairs. M. STONE, *supra* note 55, at 218.

Lerner explains that the concept of a male God solely responsible for the creation of humankind was unique:

The creation story in Genesis departs significantly from the creation stories of other peoples in the region. It is Yahweh [Jehovah] who is the sole creator of the universe and all that exists in it. Unlike the chief gods of neighboring peoples, Yahweh is not allied with any female goddess nor does He have familial ties. There is no longer any maternal source for

anatomy, Adam named her,⁸⁵ and the couple dwelled together in Eden in a state of blissful innocence.⁸⁶ This characterization of woman gives rise to religious teachings that women, created after and from men, are less important than men, that the purpose of a woman's existence is to marry a man and serve him as his wife, and that, just as Adam exerted linguistic control by naming Eve,⁸⁷ husbands have the God-given authority to control their wives. This reasoning underlies judicial opinions that insist husbands have the right to control their wives with force.⁸⁸

As significant to the subsequent oppression of women as the J creation story is the account of Adam and Eve's ultimate transgression, which resulted in their banishment from Eden.⁸⁹ Some scholars believe that ancient Hebrew priests wrote this account in order to discourage the Children of Israel from adopting the idolatrous ways of the surrounding communities, where women played prominent roles.⁹⁰ One can understand, for example, why Hebrew leaders would have felt threatened by the Goddess-worshippers of Canaan, who had deified Ashtoreth and her consort, Baal, for thousands of years;⁹¹ idolatry and its accompanying ritualistic sexual practices were abominations to the Israelites.⁹² Furthermore, the Hebrews wanted to obliterate any belief system that incorporated female deity worship. As a result, the Biblical account of Adam and Eve's demise contains symbols intended to speak directly to both the heathen idolaters and the Hebrews tempted to join their ranks.

the creation of the universe and for life on earth, nor is there any indication that creativity and procreativity are linked. Quite to the contrary, God's act of creation is entirely unlike anything humans can experience.

G. LERNER, *supra* note 79, at 180 (footnote omitted).

85. *Genesis* 2:22-23.

86. *Genesis* 2:24-25.

87. G. LERNER, *supra* note 79, at 181-82. The significance of human naming, which gives meaning and creates order, is great. "Name-giving is a powerful activity, a symbol of sovereignty." *Id.* at 182. Other Biblical stories indicate that "the male shares in the divine power of naming and re-naming." *Id.*

Dale Spender asserts that "those who have the power to name the world are in a position to influence reality." D. SPENDER, *MAN MADE LANGUAGE* 165 (1980). The act of naming the female creation, Eve, follows a tradition of male naming in order to maintain the patriarchal structure: men named God "the Father," who created, or gave birth to, Adam, who in turn gave birth to Eve, according to the J story. *Id.* at 167. Since any quality or activity deemed worthwhile is characterized as male, while evil and all other negative traits are female, "male activities were named as *religion* while comparable female activities were named as *cult*." *Id.* at 169 (emphasis in original).

88. *See infra* text accompanying notes 142-43.

89. *Genesis* 3.

90. M. STONE, *supra* note 55, at 198. *See also* R. EISLER, *supra* note 68, at 87-88.

91. M. STONE, *supra* note 55, at 9.

92. E. PAGELS, *ADAM, EVE, AND THE SERPENT* 10 (1988).

One sacred symbol of the Goddess worshippers was the serpent; it represented the positive qualities of prophesy and wisdom.⁹³ Thus, Eisler asserts that "[t]he fact that the serpent, an ancient prophetic or oracular symbol of the Goddess, advises Eve, the prototypical woman, to disobey a male god's commands is surely not just an accident."⁹⁴ The Hebrew listener of this story would learn that the first part of Eve's sin consisted of following the tenets of the Goddess rather than of Jehovah. Of equal symbolic relevance in the Genesis story is the tree of knowledge of good and evil.⁹⁵ In Goddess shrines, a particular kind of tree was planted alongside the altar, and worshippers may have eaten the tree's fruit as a symbol of the flesh and blood of the Goddess.⁹⁶ By disobeying Jehovah's command not to eat of the tree, Eve was again following the pagan ritual so harshly condemned by the Hebrews.

Women, especially married women, have severely felt the impact of men's depiction and interpretation of Eve's actions ever since the story was first told. The immediate ramifications were explicit: "Unto the woman he [God] said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee."⁹⁷ Paul adopted this gender hierarchy in later-developed Christian theology.⁹⁸ Adam also was punished, but "[b]ecause thou hast hearkened unto the voice of thy wife"⁹⁹

Later writers have theorized that Adam and Eve's recognition of their nakedness after eating the forbidden fruit¹⁰⁰ suggests their sexual awakening; by experiencing sexual intercourse, the couple indulged in illicit pleasures of the flesh.¹⁰¹ One of the results of this new-found sexual knowledge has been male antipathy towards the female body:

93. R. EISLER, *supra* note 68, at 88-89. For a detailed historical account of the significance of the serpent to goddess worshippers, see M. STONE, *supra* note 55, at 199-214.

94. R. EISLER, *supra* note 68, at 88.

95. *Genesis* 2:17.

96. M. STONE, *supra* note 55, at 214, 216. The tree was variously called a sycamore, a fig, and a mulberry.

97. *Genesis* 3:16.

98. *See infra* text accompanying notes 130-35.

99. *Genesis* 3:17.

100. *Genesis* 3:7, 10.

101. M. STONE, *supra* note 55, at 221. *See also* Rockwood, *The Redemption of Eve*, in *SISTERS IN SPIRIT 6* (M. Beecher & L. Anderson eds. 1987). "The 'Apocalypsis Mosis' and 'Vita Adae et Evae' in 'The Books of Adam and Eve' and 2 Enoch all suggest that in Eden Eve transgressed sexually with the serpent then seduced Adam, the innocent victim of Eve's deception." *Id.*

Their bodily sexual presence is regarded as a dangerous threat to male purity and, at the same time, as a justification for constant verbal and physical abuse. They experience their bodies as constantly vulnerable to assault and are told, at the same time, that they deserve such assault because they 'cause' it by their sexual presence.¹⁰²

Once again locating the point of blame and responsibility for their own passions in women, men continue to justify their abusive behavior by identifying themselves as innocent victims of womanly temptation. One of the major obstacles for women who seek assistance from the legal system has been that many legal officials believe that battered wives have done something to provoke the abuse. In one way or another, so this reasoning goes, women tempt men to lose control of their reason and bodily urges, and thus deserve what they get.¹⁰³

It is significant that Eve was the first to disobey God, and that Adam merely followed her lead. By succumbing to the serpent's temptation, Eve eschewed God's explicit commandment not to eat the fruit from the tree of knowledge of good and evil. This transgression drastically changed the relationship between women and the male deity. Whereas in pre-fall Eden both Adam and Eve had conversed with and received direction from God directly,¹⁰⁴ Eve's disobedience resulted in men assuming the role of intermediary between women and God.¹⁰⁵ Furthermore, because a woman had "extinguished the light of man's soul" by leading him to sin,¹⁰⁶ men would forever consider women inherently evil temptresses.¹⁰⁷ For these reasons, Hebrew males taught their sons that one day they would rightfully

102. Ruether, *Feminist Interpretation: A Method of Correlation*, in *FEMINIST INTERPRETATION OF THE BIBLE* 114 (L. Russell ed. 1985).

103. See *infra* notes 142, 145 & 170.

104. See, e.g. *Genesis* 1:28: "And God blessed *them*, and God said unto *them*, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." (emphasis added).

105. *Genesis* 3:16. Eve was told that "thy desire shall be to thy husband, and he shall rule over thee."

106. Rockwood, *supra* note 101, at 4 (quoting 1 L. GINZBERG, *THE LEGENDS OF THE JEWS* 67 (12th ed. 1937)).

107. Ruether describes the impact of depicting Eve as responsible for Adam's demise: Male mythology not only makes woman responsible for the advent of evil in the world, but it also translates female evil into an ontological principle. The female comes to represent the qualities of materiality, irrationality, carnality, and finitude, which debase the 'manly' spirit and drag it down into sin and death.

R. RUETHER, *SEXISM AND GOD-TALK* 168-69 (1983).

rule over their wives. Ruether describes why force is a necessary corollary to this mandate:

Stories like the myth of Eve also enforce the continued repression and subjugation of woman, as 'punishment' for her primordial 'sin' in causing the fall of 'man' and the loss of paradise. Because women are in fact not inferior, but full human persons of equivalent capacities upon whom all males, as children, were once dependent, the task of suppressing women into dependence on males is a never-ending struggle. It is not a 'coup' accomplished once upon a time in some mysterious victory of patriarchy at the dawn of history. It must be reiterated generation after generation, by repeating the myths of woman's original sin to the young, both male and female, and by reinforcing laws and structures that marginalize women from power roles in society. Even then the task is not accomplished. Wives show an alarming lack of submission, an irrepressible tendency to assert shreds of autonomy and resistance. The whole range of coercive techniques, from brute force to contempt and ridicule to artful blandishments, is necessary to keep her in her 'place.' Religion is relied upon as both the foundation and the daily aid in this project.¹⁰⁸

As Daly states, "[t]he Bible contains much to jolt the modern woman, who is accustomed to think of herself as an autonomous person. In the writings of the Old Testament women emerge as subjugated and inferior beings."¹⁰⁹ A few examples will suffice to illustrate this point.

Hebrew men enjoyed sexual freedom both within and outside of marriage, but these same men expected unmarried women to be virgins.¹¹⁰ A woman who was not a virgin at marriage could be, at the instigation of her spouse, stoned at her father's doorstep by the men of the city.¹¹¹ Although adultery was punishable by death for both the man and the woman, the same penalty was imposed for different reasons. The wife who committed adultery "violated her primary responsibility to her husband, giving away what belonged only to him," while "[t]he man who

108. *Id.* at 169-70.

109. M. DALY, *supra* note 60, at 75.

110. G. LERNER, *supra* note 79, at 170.

111. *Deuteronomy* 22:13-21.

had sex with another man's wife stole from her husband his rights and his honor. . . ."¹¹² These penalties underscore the fact that the laws classified a wife as her husband's possession, along with his slaves, ox, and ass.¹¹³ Wives referred to their husbands as "ba'al" or "master," and descent was patrilineal.¹¹⁴

Although respect for a woman increased if she bore her husband sons,¹¹⁵ the overwhelming percentage of Old Testament stories with women characters evidence the appalling manner in which men treated women.¹¹⁶ Accounts featuring women in leadership roles are anomalous or depict "women and their activities primarily as they aid or hinder the plans of men, or, in rare cases, as they perform roles usually reserved for men."¹¹⁷ Perhaps most damaging of all to the status of women is that the Old Testament God covenanted only with men, signifying that even the deity considered women unimportant and further solidifying patriarchal rule.¹¹⁸

The effects of a belief system legitimized by a God who subordinates women took on added dimensions in the writings of the New Testament, which contains a plethora of guidelines and admonitions governing interspousal relationships. An examination of the New Testament is

112. J. PLASKOW, *supra* note 2, at 173.

113. The Mosaic Law commands Hebrew men not to covet their neighbors' property; a wife is listed among those possessions: "Thou shalt not covet thy neighbour's house; thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's." *Exodus* 20:17.

114. G. LERNER, *supra* note 79, at 168, 169. One of the major shifts from the goddess worshipping societies to the Hebrew society was one from matriliney to patriliney. See R. EISLER, *supra* note 68, at 78-84.

115. M. DALY, *supra* note 60, at 76. Male children were more highly valued than female children. "A man could, indeed, sell his daughter as well as his slaves. If a couple did not have children, it was assumed to be the fault of the wife." *Id.*

116. See, e.g., *Genesis* 12:10-20 (Abram deceives Egyptians into believing Sarai was his sister, thereby protecting himself from murder but compromising his wife's virtue); *Genesis* 19:1-8 (Lot offers his two virgin daughters to mob who threatened visitors in Lot's home); *Genesis* 26:1-11 (Isaac deceives Abimelech into believing Rebecca is his sister); *Judges* 19:1-30 (Levite offers his concubine to appease angry mob, who raped and abused her all night).

For the proposition that the writer of Deuteronomy softened some of the laws regarding women not primarily because he found them demeaning to females, but because these rules threatened nationalistic and political concerns, see CARMICHAEL, WOMEN, LAW, AND THE GENESIS TRADITIONS (1979).

117. J. PLASKOW, *supra* note 2, at 32; see also G. LERNER, *supra* note 79, at 176. For an interesting discussion of how the accounts of Miriam, Deborah, and Huldah simultaneously illustrate the power of some Biblical women while also undercutting the importance of these women's lives, see J. PLASKOW, *supra* note 2, at 38-40.

118. G. LERNER, *supra* note 79, at 188-93. Lerner observes that the symbol of Yahweh's covenant with Abraham is circumcision, a ritual performed on all Hebrew infant sons which unmistakably defines the covenant community as male. *Id.* at 190. See also J. PLASKOW, *supra* note 2.

interesting for two interrelated reasons: one, the books which comprise it were selectively included in the canon, while others depicting a positive view of women were excluded; two, Christians have selectively drawn upon New Testament scriptures that focus upon a wife's duty to her husband in order to justify the subordination and abuse of women.¹¹⁹

Following the death of Jesus Christ, the struggling Christian sect was not a monolithic entity which espoused one set of divine teachings; the Gnostic Gospels¹²⁰ prove that what today passes for New Testament Christianity was but one of many interpretations of Christ's teachings.¹²¹ Gnostic writings are remarkable for their very different conceptualization of the creation of the world, Adam and Eve, and women's roles, casting women in a favorable light.¹²² These alternative views translated into an egalitarian Gnostic community where women and men participated fully and equally. Christian feminist theologians excited about the possibility of an alternative scripture have questioned why this body of writings was excluded from the New Testament canon.¹²³

The process of sorting and choosing books and epistles for inclusion in the New Testament was completed by 200 A.D.¹²⁴ Orthodox Christians branded all of the Gnostic texts as heretical and omitted them.¹²⁵ Although the Gnostics themselves offered a variety of mythical explanations for this rejection,¹²⁶ more persuasive are social reasons which illustrate men's fears of women as coequals. To the dismay of orthodox Christian leaders,¹²⁷ Gnostic groups attracted women because of the

119. *But see infra* notes 222, 223 and accompanying text (discussing scriptures which prescribe appropriate behavior for husbands and point toward the abolition of all human hierarchies).

120. *See* E. PAGELS, *THE GNOSTIC GOSPELS* xiii-xxii (1979). In 1945, an Arab peasant discovered thirteen papyrus books contained in earthenware jars and buried in caves located in the mountains near the town of Nag Hammadi in Upper Egypt. Scholars date these manuscripts about 350 to 400 A.D. and date the originals on which these Coptic translations were based anywhere from 50 to 150 A.D.

These manuscripts consisted of fifty-two texts written by Gnostics, a group of Christians who sought *gnosis*, or knowledge, and insight through observation and experience. Gnostics believed that through this acquisition of knowledge, a person could know him or herself at the deepest level and simultaneously come to know God.

121. *Id.* at xxii-xxiii.

122. *Id.* at 48-69.

123. *See infra* notes 225-27 and accompanying text.

124. E. PAGELS, *supra* note 120, at 57.

125. *Id.*

126. *Id.* at 57-59. For example, some Gnostics surmised that the male God was merely a derivative of the Mother Goddess who created him and gave him the means to administer the world. Caught up in his grandiosity, the male God deluded himself into thinking that he acted alone and proclaimed to his followers, "I am God; there is none beside me." *Id.* at 57.

127. *Id.* at 59-60.

many opportunities for women in both pastoral affairs and in the Gnostic community at large.¹²⁸ Women's activities obviously challenged the orthodox leaders, who rejected any doctrine which would upset the traditional Hebrew construct of the patriarchal family and society. Not surprisingly, the New Testament writings which survived the selection process contain many ideas which denigrate aspiring women.

Some scholars argue that not until the Pauline epistles did the creation and transgression stories of Adam and Eve take on momentous significance in terms of the treatment of women.¹²⁹ A Jewish convert, Paul wrote at length about the proper roles of men and women in a manner combining Christian principles and Jewish customs,¹³⁰ and his theology raised "the problem of sin to a dimension unknown in Judaism."¹³¹ Paul attributed this sin to Eve, warranting the domination of the daughters of Eve by the sons of Adam for generations to come. Perhaps the most notable scripture used to justify male domination is that which exhorts women to submit to their husbands:

Wives, submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church; and he is the savior of the body. Therefore, as the church is subject unto Christ, so let the wives be to their own husbands in everything.¹³²

128. Pagels, *What Became of God the Mother? Conflicting Images of God in Early Christianity*, 2 SIGNS 293, 301 (1976). The Gnostic texts suggest that

women were considered equal to men, they were revered as prophets, and they acted as teachers, traveling evangelists, healers, priests, and even bishops. In some of these groups they played leading roles and were *excluded* from them in the orthodox churches, at least by A.D. 150-200.

Id. (emphasis in original).

129. See, e.g., *I Corinthians* 11:7-9; *I Timothy* 2:11-14. Although early Jewish writings dating from 400 B.C. to the latter part of the first century A.D. interpreted the Genesis stories as the basis for the roles of men and women, the stories themselves were not actually referred to again within the Old Testament after Genesis 5. Rockwood, *supra* note 101, at 3-4. By contrast, New Testament writings about husbands and wives are notable for their allusions to the creation and transgression stories which form the continued basis of patriarchy. *Id.* at 7-8.

130. *Id.*

131. R. RUETHER, *supra* note 107, at 167.

132. *Ephesians* 5:22-24. There is considerable debate as to whether Paul himself actually wrote *Ephesians*. Some of his followers composed letters in Paul's name in order to prevent any misinterpretations of his teachings and supposedly to mitigate the harshness of his messages. See E. PAGELS, *supra* note 92, at 23.

Scriptures written by Paul and his contemporaries¹³³ have not only been utilized by Christian ministers up to the present day to locate the fault of battering in the wife,¹³⁴ but have also explicitly and implicitly influenced judicial opinions in battering cases.¹³⁵

III. THE BATTERED WIFE'S EXPERIENCE IN COURT

Early nineteenth-century American case law illustrates the "Rule of Thumb" doctrine which originated in England: a husband was permitted to beat his wife as long as he did so with a switch no larger than the circumference of his thumb.¹³⁶ Judges justified this rule by the presumed natural superiority of the husband over the wife; the husband enjoyed sole control and discretion over familial activities and was assumed to be correct in his administration of internal order. Therefore, judges did not characterize violence as "abusive" behavior, but rather as an understandable reaction to the wife's provocation or lack of submissiveness. Accordingly, courts adopted a general posture of non-interference in marital interactions.

The Mississippi Supreme Court in 1824 was the first American court to articulate the right of a husband to beat his wife:

[L]et the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and to use salutary restraints in every case of misbehaviour, without subjecting himself to vexatious prosecutions, resulting in the discredit and shame of all parties concerned.¹³⁷

The court's "what will the neighbors think" emphasis on the public exposure of the husband's abusive behavior becomes a recurring theme in subsequent cases. That judges should care about injuring the reputations of those who injure their wives illustrates whose interests receive priority in

133. See, e.g., *1 Peter* 3:1; *1 Corinthians* 11:3; *1 Corinthians* 14:34; *1 Timothy* 3:12.

134. The literature abounds with women recounting how their ministers told them to be better wives, submit, forgive, or change their own behavior in order to stop the abuse. See, e.g., Horton, Wilkins & Wright, *supra* note 52, at 242-44; R.E. DOBASH & R. DOBASH, *supra* note 20, at 199-206; M. FORTUNE, KEEPING THE FAITH: QUESTIONS AND ANSWERS FOR THE ABUSED WOMAN (1987) (pamphlet).

135. See *infra* notes 138-43, 171-75 and accompanying text.

136. See Eisenberg & Micklow, *supra* note 32, at 138.

137. *Bradley v. State*, 1 Miss. (Walker) 156, 158 (1824).

the guise of maintaining appearances.

Generally-held Judeo-Christian beliefs that a wife's duty includes submission to her husband¹³⁸ and that beaten wives provoke and/or deserve their abuse were never so forthrightly and emphatically expressed as in an 1836 New Hampshire case involving a woman who sued for divorce on the grounds of extreme cruelty.¹³⁹ A careful reading of the state supreme court's opinion reveals that Mrs. Poor exemplified what contemporary feminists consider principles of self-empowerment, qualities which antagonized Chief Judge Richardson. In the first paragraph of the opinion, the judge described Mrs. Poor in the following terms:

The wife is shown to be a very active and efficient manager of her household affairs, and of a high, bold, masculine spirit; somewhat impatient of control; in a high degree jealous of the liberty that belongs to her as a wife, and not always ready to submit, even to the legitimate authority of her husband.¹⁴⁰

The judge disapprovingly emphasized the wife's independent and self-willed temperament as ample reason to excuse the husband. Furthermore, the court cast its analysis in terms of Mr. Poor merely reacting to Mrs. Poor's unseemly conduct, stating that she should have been grateful that her injuries were not more serious.¹⁴¹

One of Mrs. Poor's allegations was that Mr. Poor refused to let her take their horse and chaise to go to church because he did not like the minister. Because Mrs. Poor defiantly attempted to take them anyway, Mr. Poor struck her. Although Judge Richardson believed that the husband instigated this particular quarrel, he again laid the ultimate responsibility on Mrs. Poor:

But it was the Sabbath—and, under the circumstances, what course of conduct did duty prescribe to a christian [sic] wife and to a member of the church? The very essence of the religion she

138. Although many women have accepted, and continue to accept, their role as the dutiful and submissive wife, the androcentric origins of these beliefs must not be overlooked.

139. *Poor v. Poor*, 8 N.H. 307 (1836).

140. *Id.* at 308.

141. *Id.* at 311. "But considering the irritable temper of the husband, it seems to us that she escaped with quite as little injury as she could have had any right to expect, in such an attempt to take his castle by storm." *Id.*

professes is, that charity that suffereth long and is kind, which vaunteth not itself, doth not behave unseemly, is not easily provoked, and not only believeth and hopeth, but *beareth and endureth all things*. What course of conduct, then, did duty prescribe to one who professed to have adopted that religion as the guide of her life? If when ye do well and suffer for it, ye take it patiently, this is acceptable with God, says the bible [sic]. What course of conduct did duty then prescribe to one who professes to believe the bible [sic] to be the word of God? In my judgment, there cannot be any diversity of opinion on these questions. It was due to the day, it was due to the religion she professes, it was due to the relation in which she stood to her oppressor, that, if she could not obtain his consent by kindness and condescension, she should have submitted in silence to the wrong he was doing her.¹⁴²

Alluding to Biblical teachings, the judge imposed patriarchal rule on the marriage and expected the parties to conduct themselves accordingly. Thus, regardless of how unfair the husband's decisions were, the wife was obliged to comply or suffer his violence without recourse.

Mrs. Poor further alleged that her husband had beaten her with a horse whip on various occasions throughout the marriage. In order to determine whether she was entitled to the divorce she sought, the court analyzed the elements of "extreme cruelty" first by reviewing the "proper" relationship of a husband and wife.

In scripture the wife is represented as standing, in some respect, in the same relation to the husband as the husband stands to the Redeemer, and the Redeemer to God. The words are: The head of every man is Christ, and the head of the woman is the man, and the head of Christ is God.¹⁴³

142. *Id.* at 312 (emphasis in original). The court went on to explain Mrs. Poor's error: "[S]etting her husband completely at defiance, she at once undertook to accomplish her purpose by force and violence; and in this course she persisted, until, provoked by her perverse obstinacy, the husband was left so far to forget himself as to strike her." *Id.* at 313.

143. *Id.* at 314. This spiritual hierarchy gives rise to the earthly hierarchy:

And in our law the wife is considered as being, in some respects, subordinate to the husband, who is the head of the house. The husband and wife are, in the contemplation of the law, one. Her legal existence and authority are suspended during the continuance of the matrimonial union. All her personal property vests in him, and he is bound to support and maintain her in a manner suitable to her situation and his condition. He is made answerable

To bring an action on the grounds of extreme cruelty, the wife would have to show "wilful misconduct of the husband, which endangers the life or the health of the wife; which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe" ¹⁴⁴ But the dispositive issue was whether such abuse was sustained innocently; if there was any evidence of behavior on the wife's part which conceivably could have provoked the husband, she could not maintain her action. ¹⁴⁵

It comes as no surprise that this judge, given his predisposition against independent women, unabashedly concluded that Mrs. Poor had brought on the abuse by her own actions. Furthermore, the judge deemed her injuries minor, especially considering her own supposed misbehavior. Had Mrs. Poor behaved in a submissive and docile manner, the judge would not have taken such an extraordinary dislike to her, nor would he have found it necessary to advise her that "she should have submitted in silence to the wrong he [Mr. Poor] was doing her." ¹⁴⁶ Judge Richardson denied her petition for divorce and concluded that "[h]er remedy is to be sought, then, not in this court, but in a reformation of her own manners." ¹⁴⁷ By sweetly and patiently submitting to her husband, a woman could make her path of duty "a path of peace and safety." ¹⁴⁸

In later cases, judges attempted to define the contours of a husband's right to abuse his wife. Courts found themselves in the peculiar position of condoning violent behavior perpetrated against those very members of society deemed most in need of legal protection in other areas. ¹⁴⁹ Most

for her debts contracted before the marriage. And during the continuance of the union he alone is responsible for crimes committed by her in his presence—the law not considering her, in such a case, as acting by her own will, but by his compulsion. He is answerable for all torts and frauds committed by her; and if committed in his company, he alone is answerable. And she is wisely made subject in many things to his authority, as he is subject to the laws under which he lives.

Id. at 314-15.

144. *Id.* at 316.

145. *Id.* Judge Richardson further explained:

[I]t is a well settled rule, that a wife is not entitled to be divorced on the ground of ill treatment received from her husband, if that ill treatment has been drawn upon her by her own misconduct. The cruelty which lays a just and legal foundation for a divorce, must be unmerited and unprovoked.

Id.

146. *Id.* at 312.

147. *Id.* at 319.

148. *Id.* at 320.

149. *See, e.g.,* *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). To support the majority's denial of a license to practice law to Myra Bradwell, Justice Bradley explained:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of

courts would not tolerate extreme violence; in 1894, the Mississippi Supreme Court overruled its holding in *Bradley* and repudiated the Rule of Thumb doctrine.¹⁵⁰ But as in the Middle Ages and in Blackstone's day, there was no precise agreement on exactly what constituted extreme forms of abuse. Consequently, judicial opinions reached a perverse compromise between a husband's right to preside in the home and a wife's right to be free from excessive harm.

Although the Rule of Thumb was abolished, "trifling" instances of violence were explicitly ignored due to the emergence of the Curtain Rule. In an opinion which at once condemns all violence and exempts "minor" incidents from censure, the Supreme Court of North Carolina explained in 1874 that while the Rule of Thumb was no longer recognized in that state, the court would ignore lesser offenses:

Indeed, the Courts have advanced from that barbarism until they have reached the position, that the husband has no right to chastise his wife, under any circumstances. But from motives of public policy—and in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to *draw the curtain*, shut out the public gaze, and leave the parties to forget and forgive. No general rule can be applied, but each case must depend upon the circumstances surrounding it.¹⁵¹

civil life. The constitution of the family organization, which is founded in the *divine ordinance*, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141 (emphasis added).

Justice Bradley later asserted that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

See also *Muller v. Oregon*, 208 U.S. 412 (1908). Upholding "protective legislation" which prohibited women from working more than ten hours per day in a mechanical establishment, factory, or laundry, the court said:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

150. *Harris v. State*, 71 Miss. 462 (1894).

151. *State v. Oliver*, 70 N.C. 60, 61-62 (1874) (emphasis added).

By judging interspousal violence on a case-by-case basis, courts explicitly allowed a certain amount of abuse to occur before they would offer protection. Not only should the tolerance of any amount of violence be objectionable, but this piecemeal approach erroneously assumes that the level of violence remains constant, denying the harm of continuous "minor" abuse.¹⁵²

Other jurisdictions similarly utilized the curtain rule analysis.¹⁵³ In *State v. Mabrey*, the court soundly condemned "savage and dangerous" abuse as "not to be tolerated in a country of laws and Christianity," but then exempted from condemnation "trifling cases of violence in family government,"¹⁵⁴ thus implying that laws and Christianity condone drawing the curtain across all but the most egregious incidents.

An example of a wife denied an alternative legal remedy occurred in *Adams v. Adams*.¹⁵⁵ For religious reasons, Mrs. Adams would not request a divorce from her abusive husband, so she filed a writ of supplication in equity on the grounds that her husband had treated her severely and had failed to support her and their child. The writ would have restrained the husband from further abusing her and compelled him to support his family. Counsel for the wife argued that the remedy would enable her to work on the marriage and achieve a possible reconciliation; to deny the writ would effectively mean "that a strong religious feeling of the sanctity of marriage may prevent a wife from obtaining the rights which marriage was to bring."¹⁵⁶

Notwithstanding these arguments, the court held that use of this writ

152. See A. BROWNE, *supra* note 38, at 68-69. Both the frequency and severity of abuse increases over time with a decrease in concern by the abusers for the harm they are inflicting. Because abuse typically does not begin until after a couple is married, *id.* at 47, women tend to view initial instances of abuse as isolated events which are easily explained away by the man's job pressures, drunkenness, etc. As a result, women do not realize that a gradual escalation of violence has occurred until it becomes extreme.

153. The court in *State v. Edens*, 95 N.C. 567 (1886), would allow a wife to maintain a battery action against her husband "only where the battery is so great and excessive as to put life and limb in peril, or where permanent injury to the person is inflicted, or where it is prompted by a malicious and wrongful spirit, and not within reasonable bounds" *Id.* at 569. Otherwise, the court "drops the curtain upon scenes of domestic life, preferring not to take cognizance of what transpires within that circle, to the exposure of them in a public prosecution." *Id.* See also *State v. Fulton*, 149 N.C. 485, 63 S.E. 145 (1908). Dissenting Justice Clark argued against the curtain rule doctrine in this case involving a husband's slander of his wife's virtue. To draw the curtain would leave Mrs. Fulton with no one to protect her reputation, the value of which was "above rubies," *id.* at 495, a clear allusion to Proverbs 31:10, "Who can find a virtuous woman? For her price is far above rubies."

154. 64 N.C. 503, 504 (1870).

155. 100 Mass. 365 (1868).

156. *Id.* at 369.

was obsolete and was never meant to provide separate maintenance while the still-married couple was living apart. Where the legal remedy of divorce was available, the court refused to allow equity to be "an instrument by which a woman, who has ground for a divorce . . . because of ill treatment, may obtain a permanent separate maintenance, and still preserve the marriage relation."¹⁵⁷ Just as religious leaders throughout time have selectively drawn upon particular scriptures subordinating wives to husbands,¹⁵⁸ so have the courts selectively invoked religious doctrines to implement the domination of men over women. The *Adams* court decided in this instance that Mrs. Adams' particular religious scruples lacked merit.

In modern times, prudent jurists usually refrain from explicitly stating religion-based stereotypical assumptions in the courtroom, even if jurists privately subscribe to them. But evidence of these notions continues to manifest itself in subtle ways. Although today's laws theoretically protect battered wives, survivors of domestic violence are effectively denied the protection offered to survivors of violence perpetrated by strangers.¹⁵⁹ Where express statements of women's inferiority to men are lacking, one can still observe that the legal system perpetuates the belief that marriage is off-limits, that battered wives provoke or enjoy the abuse, and that the courts need not intervene in "trivial" matters.

In one of the earliest class actions against police for failure to respond to calls by battered wives and to arrest husbands solely because of the marital relationship, the trial court judge in *Bruno v. Codd* declared that

[f]or too long, Anglo-American law treated a man's physical abuse of his wife as different from any other assault, and, indeed, as an acceptable practice. If the allegations of the instant complaint—buttressed by hundreds of pages of affidavits—are true, only the written law has changed; in reality, wife-beating is still condoned, if not approved, by some of those charged with protecting its victims.¹⁶⁰

157. *Id.* at 372.

158. *See supra* text accompanying notes 82-118, & 130-35.

159. *See supra* text accompanying note 23. Furthermore, in *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526 (D. Conn. 1984), the plaintiffs alleged that although no law facially discriminated against victims of domestic violence, there was an administrative classification used by the police to implement the law discriminatorily.

160. *Bruno v. Codd*, 90 Misc. 2d 1047, 1048 (N.Y. Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 64 A.D.2d 582 (1978), *aff'd*, 47 N.Y.2d 582 (1979) (citations omitted). The resulting consent decree required that officers make arrests whenever they have reasonable cause to

Litigation against law enforcement agencies has yet to be decided in a full-blown trial. Either the cases have resulted in consent decrees,¹⁶¹ or they have been disposed of without trial in the preliminary stages. The uneven disposition of recent cases alleging violations of 42 U.S.C. § 1983 makes prediction of a full trial's outcome impossible.¹⁶²

In *Turner v. City of North Charleston*, the court granted the individual police defendants' motion for summary judgment, finding that they were entitled to qualified immunity due to the absence of a special relationship with the plaintiff.¹⁶³ To determine whether such an affirmative duty existed, the court listed factors which may give rise to a "special relationship": whether either the plaintiff or the perpetrator was in legal custody during or prior to the incident, whether the state had expressly stated its desire to provide affirmative protection to this class of individuals, or whether the state knew of the plaintiff's plight.¹⁶⁴ The court held that the state's domestic violence statute did not create an "express duty of protection, or intervention, in domestic abuse cases, but rather provide[d] only that law enforcement officers take certain protective measures when responding to a domestic abuse incident."¹⁶⁵ Furthermore, although the plaintiff's numerous phone calls to the police department might have put the city on notice of her dangerous situation, they did not necessarily put the individually-named officers on notice. Thus, the court found that under these circumstances, no special relationship existed; even if it had, it "was not so clearly established that the defendants could, or should have,

believe that the man has committed a felony or violated a protective order; that the officers remain at the scene of the incident temporarily in order to prevent another attack; and that if the assailant has left the house and the woman requests an arrest, the same procedures be followed in locating the man as those used in any nonfamilial assault case. 47 N.Y. 2d at 590.

161. See *Scott v. Hart*, No. C76-2395 (N.D. Cal., filed Oct. 28, 1976), cited in Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, at 14-15. Plaintiffs sued the police chief, the watch commander, the supervisor of the radio room, the officer in charge of handling complaints, and the Oakland City Council. In an out-of-court settlement, the police agreed to treat domestic assaults as any other crime, to develop new training materials, and to issue new implementing orders.

162. See, e.g., *Balistreri v. Pacifica Police Dept*, 855 F.2d 1421 (9th Cir. 1988) (court affirmed dismissal of plaintiff's search, seizure, and use of force claims, but reversed dismissal with prejudice of plaintiff's due process and equal protection claims; strong dissent argued lack of special relationship); *Turner v. City of North Charleston*, 675 F. Supp. 314 (D.S.C. 1987) (court granted defendants' motion for summary judgment; see *infra* text accompanying notes 163-69); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.Conn. 1984) (court denied defendants' motion to dismiss for failure to allege violation of constitutional rights); *Bruno v. Codd*, 90 Misc. 2d 1047 (consent decree entered into before trial on merits conducted).

163. 675 F. Supp. 314, 320 (D.S.C. 1987).

164. *Id.* at 318.

165. *Id.* at 319.

foreseen its existence.”¹⁶⁶

Considering the chilling facts of this case, one wonders what Janice Turner would have had to do to qualify for a “special relationship” with the police. The history of abuse by the husband included assaults with a butcher knife, gun, and fists; death threats; abduction at gunpoint; and finally, shooting his wife in the head.¹⁶⁷ Past police involvement included charges of assault and battery (later dismissed), charges of abduction and rape, intervention when the husband was assaulting the wife with a gun butt, two prison terms, and receipt of numerous telephone requests by the wife for enforcement of the TRO.¹⁶⁸ Did this court engage in the case-by-case analysis of old in order to determine if this battered wife should have received protection? Where the rights of police discretion conflicted with the rights of the battered wife, the judge’s rationale effectively sanctioned police inaction:

Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to pervade our constabularies. However, in holding our law enforcement personnel to an objective standard of behavior, our judgment must be tempered with reason. If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher’s knowledge of metes and bounds or a legal scholar’s expertise in constitutional law.¹⁶⁹

Given that police often do not respond to battered wives due to their belief in the age-old stereotypes rooted in religious doctrines,¹⁷⁰ judicial

166. *Id.* See also *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1428 (9th Cir. 1988), where the dissenting justice complained of the utter lack of precedent for the majority’s finding that the combination of a TRO and police awareness of the victim’s situation via her telephone calls created a special relationship deserving protection.

167. *Turner*, 675 F. Supp. at 317.

168. *Id.*

169. *Id.* at 320, citing *Tarantino v. Baker*, 825 F.2d 772, 774 (4th Cir. 1987), quoting *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982).

170. See, e.g., *Balistreri*, 855 F.2d 1421. One of the police officers told Mrs. Balistreri that she deserved the beating, and that her husband was not responsible for his actions. *Id.* at 1423.

language such as that quoted above, while purporting to analyze the legal question of affirmative duty in terms of a "reasonable person" standard, in effect defines that reasonable person from the perspective of a "reasonable *man*" who believes in the traditional hierarchical marital relationship.

If a battered wife chooses to file criminal charges against her husband, she may still encounter indifference to her claims due to assumptions legitimating male rule in the home. In *Bruno*, a New York probation officer allegedly refused court access to a wife whose husband had beaten her and later threatened her with a knife in front of her four children. The officer said, "A man's home is his castle. He had every right to do whatever he wanted in his apartment."¹⁷¹ This statement contains echoes of the Pauline teachings that the husband is the head of the wife.¹⁷² Prosecutorial inaction has also at times given rise to litigation.¹⁷³

Once the woman appears before a judge, she still may not gain assistance. Judicial disapprobation of domestic violence cases has occasionally been overt. In Ohio, a battered wife received a lecture from the judge before whom she filed formal charges against her husband. Rather than condemn the husband, the judge told the wife to study the Bible, attend the local fundamentalist church, and learn to be a good wife.¹⁷⁴ In a 1986 case involving application of a misdemeanor civil compromise statute to domestic violence, the judge explained the statute's purpose: "[t]he legislature recognizes that the court system and the police, and the prosecutor should not be some type of a buffer zone and have their time taken up with boy-girl relations. . . ."¹⁷⁵ This judge's attitude resonates back to the days when courts would not bother themselves with "trivial complaints" of violence. In *Nelles*, the woman had been struck in the mouth by her fiance, necessitating four stitches. Once again, it is difficult to determine what criteria judges use to decide which violence is trivial and which is serious; once again, domestic relations occupy a low,

171. Marcus, *supra* note 26, at 1660 (affidavit of Virginia Rivera-Sanchez, social worker).

172. See *supra* text accompanying note 132.

173. Raguz v. Chandler, No. C74-1064 (N.D. Ohio, filed Feb. 4, 1974), cited in Woods, *supra* note 161, at 13. The resulting consent decree required prosecutors to advise police that spousal abuse would be prosecuted, and allowed victims to request review of any prosecutorial determination not to prosecute.

174. Jensen, *Battered Women and the Law*, 2 VICTIMOLOGY 585, 589 (1977-1978). The judge warned, "I do not want to see you in here again," and dismissed the charges against the husband.

175. State v. Nelles, 713 P.2d 806, 807 (Alaska App. 1986). The judge noted that in California, the civil compromise statute had been amended in 1979 to except injuries arising from a "second willful and knowing violation of a restraining order imposed to prevent domestic violence. Cal. Penal Code 1377 (West 1982)." *Id.* at 810 n.4.

if not nonexistent, priority in a judge's courtroom.

Temporary restraining order (TRO) litigation in Minnesota clearly illustrates the nineteenth century requirement of substantial injury before courts will extend protection. In *Kass v. Kass*,¹⁷⁶ the wife applied for a restraining order after seeing her ex-husband follow her in a car in the town where she had relocated. Mrs. Kass had divorced her husband in 1981 due to his physical abuse. One year earlier, at the suggestion of the local sheriff who had learned of the husband's threats, Mrs. Kass had moved to another town 124 miles away. The appellate court reversed the lower court's granting of the TRO because Mrs. Kass had not been physically harmed by her husband's following her.¹⁷⁷ To receive a TRO under the state's domestic violence statute, the wife had to show some "overt action to indicate that [the husband] *intended* to put [the wife] in fear of imminent physical harm."¹⁷⁸ Because the prior acts of physical abuse had occurred four years before, the court stated that there was no showing of present intent to do harm or to inflict fear of harm.¹⁷⁹

In 1987, an evenly-divided Minnesota court of appeals sitting en banc upheld a restraining order in another case, but not without the howls of the dissenting justices who would have required a showing of more severe abuse before granting protection.¹⁸⁰ In 1981, Mrs. Hall received a protective order after alleging that her husband had held a gun to her head, threatened to kill her, and pushed, shoved, and kicked her on numerous occasions. He had also asked her if she would rather be "dead or beat up."¹⁸¹ Mrs. Hall's 1984 petition to dissolve the marriage was finalized in 1986. Prior to the final judgment, she petitioned for the TRO at issue because Mr. Hall was disputing custody of the children and had threatened to "hunt her down," saying, "I'm going to be the son-of-a-bitch that buries your ass," and "if you don't stop f___ing with me you'll end up in a box."¹⁸²

One of the dissenting justices noted that no physical abuse had recently occurred; incredibly, the justice further stated that Mr. Hall's threats were

176. 355 N.W.2d 335 (Minn. App. 1984).

177. *Id.* at 337.

178. *Id.*

179. *See also* Bjergum v. Bjergum, 392 N.W.2d 604 (Minn. App. 1986) (even where husband admitted prior acts of abuse occurring two years previously, those events failed to show intent to do present harm, and thus were too remote to support a TRO).

180. Hall v. Hall, 408 N.W.2d 626 (Minn. App. 1987).

181. *Id.* at 627.

182. *Id.* at 628.

not overtly intended to cause Mrs. Hall to fear for her imminent safety.¹⁸³ Another judge argued that the domestic violence statute was intended to protect "nearly helpless victims, including spouses and children who are severely hurt."¹⁸⁴ He balanced the wife's interests to be free from harm with the husband's interests to receive due process of the law and found the scales tipped in favor of the husband:

When mistakes are made, and when fair play is not demonstrated to everyone involved in the proceedings, immense damage is often done. It is because of the great powers of the courts in these cases that due process is vital. No matter how good is the will of those who try to resolve personal and family problems, and no matter how tragic are the consequences of failing to act, we should abandon the delusion that there are not equally painful consequences in mistaken, or careless or arbitrary legal dealings on personal and family welfare issues.¹⁸⁵

Although the legal arguments have become more sophisticated since the nineteenth century, the results are often the same: for one reason or another, the battered wife is not protected because the battering husband's interests prevail.

The pervasiveness of patriarchal assumptions within the legal system has influenced even the litigation strategies of feminist lawyers assisting women who have killed their husbands in self-defense.¹⁸⁶ Male-constructed norms and attitudes about appropriate wifely behavior are most evident in this context. As has been shown, courts expect wives to be submissive, compliant, and docile even under egregious conditions. A woman who faces homicide charges has only two possible defenses: temporary

183. *Id.* at 630 (Popovich, C.J., dissenting).

184. *Id.* at 631 (Crippen, J., dissenting).

185. *Id.*

186. Extending self-defense doctrine into battered woman litigation has represented an important advance for assisting these defendants, but it also illustrates the tension between the need for feminists to infiltrate a system in order to change it, and the danger of feminists adopting some of the values and conditions supporting that system in order to gain control. See Moulton and Rainone, *Women's Work and Sex Roles*, in *BEYOND DOMINATION* 189, 202-03 (C. Gould ed. 1983). Self-defense doctrine does not go far enough. We must move beyond the contours defined by masculine jurisprudence and fashion tools (I object to the term "defenses," which implies an acceptance of and reaction to male-biased legal accusations, thus once again making men the point of departure) based on the values, attitudes, and experiences of women.

insanity,¹⁸⁷ or learned helplessness that causes the battered woman syndrome.¹⁸⁸ The battered woman syndrome satisfies a court's expectation of the subservient wife who will not leave her husband.

To successfully employ the battered woman syndrome defense, homicide defendants must exhibit the typical personality traits of battered women: "low self-esteem, traditional beliefs about the home, the family, and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's actions."¹⁸⁹ Many of these characteristics are identical to those enumerated in *Poor*; many are rooted in Judeo-Christian teachings. If they were demeaning and repugnant to women in 1836, why should they be required today to exonerate a wife who did not once and for all leave her husband?

In *State v. Kelly*, the prosecutor made much of the fact that Mrs. Kelly did not leave her husband by repeatedly asking her, "You wanted him back, didn't you,"¹⁹⁰ thus criticizing her for the very behaviors that the

187. For an article which seriously advocates the use of temporary insanity despite the possibility that the woman may eventually be involuntarily committed, see Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427 (1987).

188. See L. WALKER, *supra* note 49. Walker applies the social learning theory of "learned helplessness" to domestic violence as a psychological explanation for the victimization of battered women. She describes dog experiments conducted by experimental psychologist Martin Seligman wherein caged dogs were administered electric shocks randomly and at varied intervals. The dogs learned that no matter how they responded, they could not prevent, mitigate, or otherwise control the shocks. As a result, the dogs became "compliant, passive, and submissive." *Id.* at 46. Furthermore, even when the cage doors were left open and the dogs were shown the way out, the animals refused to leave their cages. Walker argues that

in applying the learned helplessness concept to battered women, the process of how the battered woman becomes victimized grows clearer. Repeated batterings, like electrical shocks, diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favorable outcome, whether or not it might. Next, having generalized her helplessness, the battered woman does not believe anything she does will alter any outcome, not just the specific situation that has occurred. She says, 'No matter what I do, I have no influence.' She cannot think of alternatives. She says, 'I am incapable and too stupid to learn how to change things.' Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety.

Id. at 49-50.

Learned helplessness is exacerbated by the "cycle of violence" that lulls the victim into believing that she is to blame and/or that the battering will cease. Battering does not occur constantly, but within a cycle of three distinct stages: the tension-building stage, the actual battering incident, and the "honeymoon" stage. This last period is characterized by the batterer's repentant gestures and assurances that he will reform. Promises of changed behavior and pleadings for forgiveness hook the woman back into the cycle, which then begins again. *Id.* at 55-70.

Courts are increasingly accepting the battered woman syndrome defense. Not all courts, however, have admitted it. See, e.g., *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981); *People v. Powell*, 102 Misc. 2d 775, 424 N.Y.S.2d 626 (1980).

189. *State v. Kelly*, 97 N.J. 178, 195, 478 A.2d 364 (1984) quoting L. WALKER, *supra* note 49.

190. *Id.* at 206. Furthermore, during closing arguments, the prosecutor minimized the gravity of

legal system has always required. Battered wives who have complied with legally-sanctioned religious doctrines compelling submission, "turning the other cheek,"¹⁹¹ and forgiving their seemingly repentant husbands¹⁹² nevertheless are severely condemned by the legal system for not leaving their marriages. Given the inconsistent manner in which courts determine which instances of violence warrant legal intervention and which do not, a wife may reasonably believe that on a particular occasion, it is best that she submit, forgive, and forget so that she and her husband can work out their differences privately. On the other hand, when the wife is a homicide defendant and must explain why she endured the abuse for so long, the courts require her to portray herself as the most helpless and pathetic of human beings, and hold her accountable for her husband's behavior. Indeed, in describing the effects of the battered woman syndrome, courts find the source of the battered wife's predicament in *her* deviant mental condition:

[T]here is no easy answer to why battered women stay with their abusive husbands. Quite likely emotional and financial dependency and fear are the primary reasons for remaining in the household. They feel incapable of reaching out for help and justifiably fear reprisals from their angry husbands if they leave or call the police. The abuse is so severe, for so long a time, and the threat of great bodily harm so constant, it creates a standard mental attitude in its victims. Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence. They become disturbed persons from the torture.¹⁹³

the abusive incidents:

I'm not going to say they happened or they didn't happen, but life isn't pretty. Life is not a bowl of cherries. We each and every person who takes a breath has problems. Defense counsel says bruised and battered. Is there any one of us who hasn't been battered by life in some manner or means?

Id.

191. *Luke* 6:27-30.

192. See L. WALKER, *supra* notes 49, 188. Women forgive their husbands during the "honeymoon" stage of the three-part cycle of violence.

193. *State v. Hodges*, 239 Kan. 63, 68, 716 P.2d 563 (1986) (quoting *State v. Hundley*, 236 Kan. 461, 467, 693 P.2d 475 (1985)).

By making the wife responsible, the legal system exonerates only those women who submit to their husbands completely. Women are thus required to operate within the traditional constructs developed by men even while men denounce women for doing so.

IV. FEMINIST JURISPRUDENCE AND FEMINIST THEOLOGY: AN INTERDISCIPLINARY APPROACH TO AN APPROPRIATE LEGAL RESPONSE TO BATTERED WIVES

The experiences of women form the point of departure for any feminist examination and restructuring of today's legal system. The use of "women's experiences" is potentially liberating, but precisely defining the scope of those experiences—whose experiences should or should not be considered legitimate—presents a formidable challenge. Nevertheless, formulating a feminism malleable enough to represent all women yet concrete enough to effect overall change is indispensable. Insightful feminists recognize that they must transcend their own personal biases and interests to account for and respond to the needs of all women.¹⁹⁴ Not until feminism delineates realistic and workable contours of experience can it eradicate the androcentric bias central to jurisprudence and comprehensively redefine legal rights and protections.¹⁹⁵

It is all too easy to exclude religion from any serious discussion of women's experiences. As illustrated previously, the selective utilization of negative Judeo-Christian doctrines has played an invidious role in the social and legal suppression of women in general, and of battered wives in particular. Some religious leaders and followers, including women, have further antagonized feminists by marching in the forefront of attacks

194. See Littleton, *supra* note 51, at 24 ("[T]hose very, very few of us with authority and license to speak on behalf of women have a responsibility to speak on behalf of *all* women, not merely those who seem most like us." (emphasis in original)).

195. Elizabeth Schussler Fiorenza argues that until the most oppressed woman is liberated, no woman is liberated:

In a patriarchal society or religion, all women are bound into a system of male privilege and domination, but impoverished Third World women constitute the bottom of the oppressive patriarchal pyramid. Patriarchy cannot be toppled except when the women who form the bottom of the patriarchal pyramid, triply oppressed women, become liberated. All women's oppression and liberation is bound up with that of the colonized and economically most exploited women. This was already recognized by one of the earliest statements of the radical women's liberation movement: 'Until every woman is free, no woman is free.' 'Equality from below' must become the liberative goal of women-church.

Fiorenza, *The Will to Choose or to Reject: Continuing Our Critical Work*, in FEMINIST INTERPRETATION OF THE BIBLE 125, 127 (L. Russell ed. 1985).

against feminist causes.¹⁹⁶ Most significantly, many feminists may denigrate the religious experiences of battered wives because feminists perceive no way to change ecclesiastical institutions. Nevertheless, excluding religious influences from the concept of women's experience trivializes and alienates women who actively participate in a denomination or who otherwise value certain religious precepts.¹⁹⁷ This exclusion has a deleterious effect on any feminist effort to overhaul the legal system, for simply ignoring religion will not make it and its repercussions go away. Furthermore, the loss of religion as one available tool to restructure law and society is the loss of a potentially potent strategy for reform.¹⁹⁸

Religion seems to pervade the lives of women in one of three primary ways: through a woman's direct and active practice in a particular sect, through childhood inculcation of religious values even if active practice is subsequently abandoned in adulthood, or through the influence of religion on attitudes and mores that imperceptibly shape the structure of husband/wife interactions. Although followers of Judeo-Christian traditions do not have a monopoly on "traditional" beliefs and customs that affect a battered wife's choices and behaviors, these beliefs and customs take on increased significance because they are grounded in "God's will." Wives influenced by men's selective and skewed interpretation of Judeo-Christian scriptures typically believe in the correctness of submitting to their husbands and forgiving their offenses "seventy times seven."¹⁹⁹ These women are committed to their families, which occupy a high, if not the highest, priority in their lives. Judeo-Christian teachings can lead women to consider divorce an anathema. The women themselves may feel stigmatized by the specter of a "failed marriage"; moreover, their churches may either expressly condemn divorce or make the process for obtaining an ecclesiastical marital dissolution long and difficult.

The importance of religious doctrines to so many battered wives requires serious and constructive treatment of religious experiences. When

196. For example, one need only examine current newspaper headlines for the recent attacks by the fundamentalist-based Operation Rescue on women's right to abortion.

197. Audre Lorde proclaims that "[i]t is a particular academic arrogance to assume any discussion of feminist theory without examining our many differences" A. LORDE, *SISTER OUTSIDER* 110 (1984).

198. Martha Minow explains that "theorists in many fields have attempted to identify suppressed cultures and voices that represent potential and actual points of resistance to dominant cultural forms." Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 69 (1987).

199. *Matthew* 18:21-22: "Then came Peter to him, and said, Lord, how oft shall my brother sin against me, and I forgive him? Till seven times? Jesus saith unto him, I say not unto thee, Until seven times: but, Until seventy times seven."

forced to choose between religious beliefs or assistance in escaping from abusive relationships, these battered wives are likely to select the former.²⁰⁰ Conditional offers of help constrict rather than expand these women's alternatives. Therefore, a responsible feminist legal approach to the plight of women who have been influenced by Judeo-Christian principles will take these particular experiences into account.

While dismissing experiences stemming from Judeo-Christian traditions as irrelevant or as "false-consciousness"²⁰¹ fails to meet the needs of women operating within those traditions, uncritically accepting these values is likewise harmful to battered wives.²⁰² Grounding change in a multiplicity of feminisms²⁰³ may initially serve as "a rich source of feminist insight,"²⁰⁴ but it ultimately weakens the ability to tear down oppressive structures because of the extreme deference given to each woman's experiences. One possible solution to this dilemma is to believe the accounts of battered wives as

accurate, reasonable and potentially understandable *given the conditions under which [women] live*. Tensions and contradictions in women's descriptions give us a way to examine and criticize the conditions under which [women] live, rather than a reason to deny status to some descriptions or to consider other descriptions as

200. Thistlethwaite, *Every Two Minutes: Battered Women and Feminist Interpretation*, in *FEMINIST INTERPRETATION OF THE BIBLE* 96, 99-100 (L. Russell ed. 1985). Thistlethwaite describes how insensitivity to and nonacceptance of religious values estranges battered women who adhere to them:

In workshops for persons who work with abused women, I have found that most social workers, therapists, and shelter personnel view religious beliefs as uniformly reinforcing passivity and tend to view religion, both traditional Christianity and Judaism, as an obstacle to a woman's successful handling of abuse. Unfortunately, they also say that many strongly religious women cease attending shelters and groups for abused women when these beliefs are attacked.

Id.

201. For a discussion of false-consciousness, see MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 *SIGNS* 637, n.5 (1983) (false consciousness is a methodological "approach [which] treats some women's views as unconscious conditioned reflections of their oppression, complicitous in it."). See also Littleton, *supra* note 51, at 26 ("Like traditional jurisprudence, which translates women's experience into male terms, the 'false consciousness' explanation translates *some* women's experiences into *other* women's terms." (emphasis added)).

202. Littleton, *supra* note 51, at 26-27. "[U]ncritical pluralism undercuts our ability to criticize existing structures of male domination."

203. See Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 *STAN. L. REV.* 751 (1989) (discussion of "feminisms").

204. Harding, *Introduction: Is There a Feminist Method?*, in *FEMINISM AND METHODOLOGY* 8 (S. Harding ed. 1987).

relevant to some women but not others.²⁰⁵

This model enables feminist lawyers to accept Judeo-Christian ideologies as part of battered women's experiences while at the same time independently attacking the ideologies without attacking their adherents. Rather than criticizing abuse survivors, feminists can instead criticize the conditions which compel the decisions these women make. For the legal community to accept these experiences, however, a mechanism must be identified which will move that acceptance beyond an *uncritical* acceptance to a restructuring of the religious context.

Ultimately, feminists must confront oppressive Judeo-Christian traditions and eradicate the male bias which created them. The first step towards this goal is understanding the nature of religious movements in society. Sociologists and anthropologists studying new social movements have observed that the emergence and continuing existence of any religious entity "challenges the normative order of the host society."²⁰⁶ In order to survive, a religion must assimilate to some degree into the dominant culture. However, in order to claim prophetic or divine vitality, a religion must also distance itself from some prevailing contemporary customs and mores. These conflicting demands cause religions to oscillate between "assimilation and respectability," and "separateness, peculiarity, and militance. . . ."²⁰⁷

Mauss explains that when attempting to gain respectability from the host society, the religion "typically begins to modify its posture and to adopt selected traits from the surrounding culture that will make it more acceptable."²⁰⁸ Thus, religious leaders will abandon patriarchal beliefs and practices to the extent that abandonment will strengthen the religion and contribute to its longevity. Legal pressure may be one mechanism to assist religious leaders in arriving at this perception.

Any legal strategies designed to eradicate religious patriarchy must necessarily contend with First Amendment constraints.²⁰⁹ Government

205. Littleton, *supra* note 51, at 27 (emphasis in original).

206. Mauss, *Assimilation and Ambivalence: The Mormon Reaction to Americanization*, 22 DIALOGUE 30, 31 (Spring 1989).

207. *Id.* at 32.

208. *Id.* Furthermore, "which traits are selected will depend on the movement's ideology and internal political struggles and resources, as well as on sheer expediency." *Id.*

209. The First Amendment to the U.S. Constitution states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

The religion clauses consist of two prongs: establishment and free exercise. The Establishment

coercion to believe or disbelieve any tenet is "strictly forbidden."²¹⁰ The Supreme Court has, however, permitted regulation of religious conduct thought to be antagonistic to the morals and order of society.²¹¹ More recently, the Court has focused on the *effects* on a religion of otherwise secular regulation. Where a law's purpose is the advancement of secular goals, it may be valid even if it indirectly burdens a religious observance.²¹² The First Amendment, therefore, does not automatically foreclose legal pressure on religions to reexamine and do away with the patriarchal assumptions which legitimize and support wife abuse.

However, the constitutional complexity of direct legal interference with organized religion necessitates alternative means of religious reform. While feminist lawyers may be able to exert some pressure on religions, feminist theologians are the most likely candidates to effect doctrinal changes within the religious context itself. Feminist theologians are an obvious choice to lead an overhaul of organized religion not only because their internal approaches do not violate the separation of church and state, but also because their positions as "insiders" give them much more legitimacy and credibility than a feminist lawyer who may have little personal interest in the denomination itself and is therefore perceived as someone who has come to tear down rather than to build up. A feminist theologian's recognition by and familiarity with the religious group also reduces some of the tension experienced by religions navigating the sensitive course between assimilation and separation. If well-respected insiders can devise an egalitarian, non-patriarchal structure which allows the religion to retain its sense of divine uniqueness, change will be much more readily accepted.

A feminist theologian's refutation of the androcentric bias infusing Judeo-Christian ideologies about wives must draw "on women's experience as a basic source of content as well as a criterion of truth."²¹³ The

Clause prevents governmental favoritism of one religion over another; the Free Exercise Clause prevents the government from regulating substantive religious practices not otherwise protected by other sections of the Constitution. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 742 (1986).

210. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

211. *Reynolds v. United States*, 98 U.S. 145 (1879).

212. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

213. R. RUETHER, *supra* note 107, at 12. Ruether explains the importance of women's experience applied to theology:

The uniqueness of feminist theology lies not in its use of the criterion of experience but rather in its use of *women's* experience, which has been almost entirely shut out of theological reflection in the past. The use of women's experience in feminist theology, therefore, explodes as a critical force, exposing classical theology, including its codified

changes that must occur within organized religion will result not merely from the inclusion of women in the existing male construct, but from women's questioning, reinterpreting, and, where necessary, rejecting the hierarchical ecclesiastical assumptions and biases against them.²¹⁴

The initial effort of feminist theology has been exposing the androcentric foundation of Judeo-Christian teachings. Representative examples of these efforts include questioning the assumed maleness of God,²¹⁵

traditions, as based on *male* experience rather than on universal human experience. Feminist theology makes the sociology of theological knowledge visible, no longer hidden behind mystifications of objectified divine and universal authority.

Id. at 13 (emphasis in original).

As a logical result of employing women's experiences as the central tool in re-examining the religious construct, Ruether argues that

[w]hatever denies, diminishes, or distorts the full humanity of women is, therefore, to be appraised as not redemptive. Theologically speaking, this means that whatever diminishes or denies the full humanity of women must be presumed not to reflect the divine or authentic relation to the divine, or to reflect the authentic nature of things, or to be the message or work of an authentic redeemer or a community of redemption.

Ruether, *supra* note 102, at 115.

214. Ruether observes the following:

Feminists who are engaged in recovering alternative histories for women in religion recognize that they are not just supplementing the present male tradition. They are, implicitly, attempting to construct a new norm for the interpretation of the tradition. The male justification of women's subordination in Scripture and tradition is no longer regarded as normative for the Gospel. Rather, it should be judged as a failure to apply the authentic norms of equality in creation and redemption.

...

The equality of women, as one of the touchstones for understanding our faithfulness to the vision, is now set forth as one of the norms for criticizing the tradition and discovering its best expressions. This will create a radical reappraisal of Jewish or Christian traditions, since much that has been regarded as marginal, and even heretical, must now be seen as efforts to hold onto an authentic tradition of women's equality. Much of the tradition heretofore regarded as 'mainstream' must be seen as deficient in this regard. We underestimate the radical intent of women's studies in religion if we do not recognize that it aims at nothing less than this kind of radical reconstruction of the normative tradition.

Ruether, *supra* note 54, at 112.

215. See, e.g., R. RUETHER, *supra* note 107, at 47-71; M. STONE, *supra* note 55; Wilcox, *The Mormon Concept of a Mother in Heaven*, in *SISTERS IN SPIRIT* 64 (M. Beecher & L. Anderson eds. 1987); Umansky, *Creating a Jewish Feminist Theology*, in *WEAVING THE VISIONS* 187 (J. Plaskow & C. Christ eds. 1989); S. CADY, M. RONAN & H. TAUSSIG, *SOPHIA: THE FUTURE OF FEMINIST SPIRITUALITY* (1986).

Going beyond the realm of Biblical texts, many scholars are investigating the existence, practices, and beliefs of Goddess-oriented societies. Prior to the introduction of monotheistic worship, many societies worshipped the Goddess as the supreme being, with the male deity occupying an important, albeit lesser, role as her consort. The Goddess was known by various names depending on the particular culture: Ishtar, Inanna, Astarte, Nut, Nana, Anahita, Ishara, Asherah, Ashtart, Attoret, Attar, Hathor and Ashtoreth, for example. M. STONE, *supra* note 55, at 9. For the fascinating story of Inanna, see S. PERERA, *DESCENT TO THE GODDESS* (1981); D. WOLKSTEIN & S. KRAMER, *INANNA: QUEEN OF HEAVEN AND EARTH* (1983).

Even a cursory study of ancient Goddess worshippers reveals that religion is not *per se* oppressive of women. In some, but not necessarily all polytheistic societies that elevated a female deity, women shared religious and social power with men, sometimes even dominating. See, e.g., Gimbutas, *Women*

recognizing that many religious doctrines are products of a male set of experiences,²¹⁶ and eliminating sexist language.²¹⁷

Other theologians focus on reinterpreting Biblical stories and scriptural passages typically used to support male superiority. The creation and fall stories of Adam and Eve, for example, may more appropriately be viewed as "piece[s] of Hebrew poetry rather than as a literal historical account."²¹⁸ Alternatively, Plaskow suggests that women should counter the repugnance exhibited toward the female body by reconnecting female sexuality with the divine. Rejecting the notion that women's bodies are "snares and temptations," she argues that properly viewed, "[w]omen's sexuality is a source of life, a fitting image for the ultimate source of life who births the world and nourishes its being."²¹⁹ Tribble propounds yet another perspective of the Adam and Eve story by contending that since men and women did not begin to interact hierarchically until the fall, female subjugation and male supremacy represent a sinful condition, not an ideal system: "[s]ubjugation and supremacy are perversions of creation. . . . Whereas in creation man and woman know harmony and equality, in sin they know alienation and discord. Grace makes possible a new beginning."²²⁰ Finally, Lilith, Adam's legendary first wife who, asserting

and Culture in Goddess-Oriented Old Europe, in *WEAVING THE VISIONS*, *supra*, at 63-65. For a fictional work recounting in part the transition from Druidic goddess worship to Christianity in the context of the Arthurian legends, see M. ZIMMER BRADLEY, *THE MISTS OF AVALON* (1982).

216. See, e.g., Saiving, *The Human Situation: A Feminine View*, in *WOMAN SPIRIT RISING* 25 (C. Christ & J. Plaskow eds. 1979). Saiving contends that the theological definition of sin as self-centeredness, self-assertion, and pride arises from men's experience with these characteristics. A woman's typical experience has been of self-sacrifice to others at the expense of her individuality. Therefore, Christianity's exhortation to men and women to develop the opposite traits associated with the male experience—denial of self through service to others—actually *harms* women by requiring them to give blindly to others while perpetually denying their own needs.

217. See, e.g., Falk, *Notes on Composing New Blessings*, in *WEAVING THE VISIONS*, *supra* note 215, at 128; Ruether, *Sexism and God-Language* in *WEAVING THE VISIONS*, *supra* note 215, at 151; Gross, *Female God Language in a Jewish Context*, in *WOMAN SPIRIT RISING*, *supra* note 216, at 167.

218. Rockwood, *supra* note 101, at 13. Rockwood performs a detailed linguistic analysis of the Genesis texts to argue that these accounts have not been accurately translated from the original Hebrew. For example, "adam" refers to "man" in a collective sense, or humankind, which suggests either the simultaneous, thus equal, creation of woman and man, or the creation of an androgynous being subsequently divided by gender. *Id.* at 14-18.

219. J. PLASKOW, *supra* note 2, at 195. For an enlightening and expansive interpretation of the concept of "motherhood" as an overall transformative and regenerative capacity possessed by all women, childless or childbearing, and the interplay of religion, see generally A. RICH, *OF WOMAN BORN* (1976).

220. Tribble, *Eve and Adam: Genesis 2-3 Reread*, in *WOMAN SPIRIT RISING*, *supra* note 216, at 80.

The conceptualization and possibility of the ideal male-female relationship as one between co-equal components of humanity is eloquently described by the German poet Rilke, who envisioned a time when

there will be girls and women whose name will no longer mean the mere opposite of the

her independence, refused to lie beneath him and fled the Garden of Eden to lead a solitary life, provides an entirely different model than the androcentrically-cast Eve, who is "self-nurturing, self-sustaining."²²¹

To counteract the use *ad nauseam* of scriptures that justify the dominance of husbands over wives, many authorities point out scriptures specifying not the rights, but the responsibilities of husbands,²²² and verses that advocate the abolition of all human hierarchies.²²³ Many feminists point to Jesus Christ as an example of a savior who treated women as equals; some argue that this behavior contributed to the antipathy he aroused among his contemporaries and to his ultimate crucifixion.²²⁴

Studies of non-canonized scriptural texts show that alternative views about women and their roles in secular and non-secular society permeated the earliest Christian teachings;²²⁵ by inference, what eventually became

male, but something in itself, something that makes one think not of any complement and limit, but only of life and reality: the female human being.

This advance (at first much against the will of the outdistanced men) will transform the love experience, which is now filled with error, will change it from the ground up, and reshape it into a relationship that is meant to be between one human being and another, no longer one that flows from man to woman. And this more human love (which will fulfill itself with infinite consideration and gentleness, and kindness and clarity in binding and releasing) will resemble what we are now preparing painfully and with struggle: the love that consists in this, that two solitudes protect and border and greet each other.

R. RILKE, *LETTERS TO A YOUNG POET* 77-78 (S. Mitchell trans. 1984).

221. Cantor, *The Lilith Question*, in *ON BEING A JEWISH FEMINIST* 42 (S. Heschel ed. 1983).

222. See, e.g., *Ephesians* 5:25-29:

Husbands, love your wives, even as Christ also loved the church, and gave himself for it, That he might sanctify and cleanse it with the washing of water by the word; That he might present it to himself a glorious church, not having spot, or wrinkle, or any such thing; but that it should be holy and without blemish. *So ought men to love their wives as their own bodies.* He that loveth his wife loveth himself. For no man ever yet hated his own flesh, but *nourisheth and cherisheth* it, even as the Lord the church. (emphasis added).

223. See, e.g., *Galatians* 3:28: "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus."

224. See, e.g., R. EISLER, *supra* note 68, at 120-34; Thistlethwaite, *supra* note 200, at 101-02; M. DALY, *supra* note 60, at 79-80; Sakenfeld, *Feminist Uses of Biblical Materials*, in *FEMINIST INTERPRETATION OF THE BIBLE* 57-58 (L. Russell ed. 1985). See also *John* 4:7-30 (Jesus violates local custom not only by talking openly with a woman, but also by sharing his gospel with her); *Luke* 10:38-42 (Jesus teaches that it is more important for a woman to acquire knowledge than to spend her time cooking and cleaning); *John* 20:11-18 (the resurrected Christ shows himself first to a woman).

225. See E. PAGELS, *supra* note 120; see also Ruether, *supra* note 54, at 110-11, arguing that a modern-day reinterpretation of Biblical scripture must include a plurality of viewpoints:

There is much ambiguity and plurality concerning the views of women in religious traditions and the roles women have actually managed to play at different periods. For example, evidence is growing that women in first-century Judaism were not uniformly excluded from study in the synagogues.

...

Similarly, the teachings of 1 Timothy about women keeping silence now appear to us not

canonized was not necessarily selected through divine inspiration.²²⁶ Additional historical records refute the assumption that the Bible's paucity of female protagonists reflected women's absence from active participation in religious leadership positions.²²⁷

As feminist theologians directly attack and restructure the religious context contributing to the current problems confronting battered wives, feminist lawyers can exert legal pressure on organized religion while accepting the religious influences on women's lives as real and legitimate, rather than dismissing them as false consciousness. By listening and responding to theologians, feminist lawyers can better formulate legal strategies which sensitively deal with the experiences of religiously-influenced women. Furthermore, by working in conjunction with lawyers, feminist theologians can assist in efforts to develop not only legal solutions to battering which will withstand constitutional scrutiny, but also strategies to assist the theologians in their own restructuring efforts.

CONCLUSION

Without question, Judeo-Christian religious teachings about the roles of husbands and wives pervade the legal system, adversely affecting battered wives who seek protection from the law. Unfortunately, these women turn from one patriarchal institution—marriage—to another—law—and discover that the available remedies do not respond to their needs or their experiences. As long as American society is based on a patriarchal structure buttressed by religion, wife beating will continue. Male judges and lawyers do not shed their own biased assumptions and inclinations

as the uniform practice of the New Testament Church, but as a reaction against the widespread participation of women in leadership, teaching, and ministry in first-generation Christianity. This participation of women in the early Church was not an irregular accident, but rather the *expression of an alternative worldview*. Women were seen as equal in the image of God. The equality of women and men in the original creation was understood as restored through Christ.

...
The inclusion of women in early Christianity expressed an *alternative theology* in direct contradiction to the theology of patriarchal subordination of women. The New Testament must be read *not as a consensus* about women's place, but rather as a *conflict over alternative understandings* of male-female relations in the Church. (emphasis added).

226. See *supra* text accompanying notes 124-28. Fiorenza argues that the New Testament canon is not a collection of the complete and total writings in existence at that time, but a record of the "historical winners" of a selection process characterized by struggles of "the patristic church with Marcion, different gnostic groups, and Montanism." E. FIORENZA, *supra* note 2, at 55.

227. *Id.* at 52. See also Fiorenza's account of women's decisively important role in the "house church" movement of early Christianity. *Id.* at 175-84.

merely by entering a courtroom; their values color their perceptions and influence their decisions about battered wives and the men who beat them.

Notwithstanding the pernicious role religions have played in fostering this unconscionable situation, there is much to be said about religion which is positive but beyond the scope of this article. Furthermore, religions have the potential to restructure themselves so that they can eventually become truly egalitarian and humanitarian organizations both in form and substance. As this restructuring takes place, societal systems must also change. Thus, it is not only sensitive but expedient for feminist jurisprudence to accept the experiences of battered wives who adhere to religious values in order to devise responsive legal remedies for these women. Although feminists and theologians have often found themselves representing opposing points of view, feminist lawyers should cooperate with feminist theologians committed to religious change. This union contains the most potential for eliminating patriarchy from both religion and society in order to value all persons equally, regardless of gender.